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In Search of Answers: U.S. Military Investigations and Civilian Harm

Center for Civilians in Conflict (CIVIC)

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IN SEARCH OF ANSWERS:

U.S. Military Investigations and Civilian Harm

ABOUT THE AUTHORS

Center for Civilians in Conflict (CIVIC) is an international organization dedicated to promoting the protection of civilians caught in conflict. CIVIC's mission is to work with armed actors and civilians in conflict to develop and implement solutions to prevent, mitigate, and respond to civilian harm. Our vision is a world where parties to armed conflict recognize the dignity and rights of civilians, prevent civilian harm, protect civilians caught in conflict, and amend harm.

CIVIC was established in 2003 by Marla Ruzicka, a young humanitarian who advocated on behalf of civilian war victims and their families in Iraq and Afghanistan. Building on her extraordinary legacy, CIVIC now operates in conflict zones throughout the Middle East, Africa, Europe, and South Asia to advance a higher standard of protection for civilians.

At CIVIC, we believe that parties to armed conflict have a responsibility to prevent and address civilian harm. We assess the causes of civilian harm in particular conflicts, craft practical solutions to address that harm, and advocate the adoption of new policies and practices that lead to the improved wellbeing of civilians caught in conflict. Recognizing the power of collaboration, we engage with civilians, governments, militaries, and international and regional institutions to identify, institutionalize, and strengthen protections for civilians in conflict.

www.civiliansinconflict.org

The **Columbia Law School Human Rights Institute** advances international human rights through education, advocacy, fact-finding, research, scholarship, and critical reflection. We work in partnership with advocates, communities, and organizations pushing for social change to develop and strengthen the human rights legal framework and mechanisms, promote justice and accountability for human rights violations, and build and amplify collective power.

Founded in 1998 by the late Professor Louis Henkin as the anchor for human rights within Columbia Law School, the Human Rights Institute promotes engagement and knowledge of human rights within the law school, throughout the University, and around the world. Across the many substantive areas of its work, the Institute builds bridges between scholarship and activism, develops capacity within the legal community, engages governments, and models new strategies for progress.

The Human Rights Institute's Project on Counterterrorism, Armed Conflict, and Human Rights strengthens respect for human rights and international law in the context of counterterrorism and armed conflict, including a focus on U.S. practice and policy. The Project includes work on drone strikes and 'targeted killings,' torture and detention, compensation for victims, strengthening armed conflict laws, and war crimes investigations.

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TABLE OF CONTENTS

| | |
|---|------------|
| About the Authors | iii |
| Acknowledgments | iv |
| Executive Summary | 1 |
| Key Findings and Recommendations | 2 |
| Glossary | 7 |
| Methodology | 8 |
| U.S. Military Tracking, Assessment, and Investigation of Civilian Harm: Process, Policy, and Procedure | 12 |
| Discovery and Initial Reporting | 13 |
| Preliminary Inquiries | 17 |
| Assessments | 17 |
| Investigations | 18 |
| U.S. Military Tracking, Assessment, and Investigation of Civilian Harm: Key Issues in Practice | 22 |
| Establishing Commander’s Intent and the “Command Climate” | 22 |
| Internal Records and Reporting | 26 |
| NGOs, Witnesses, and Media Reporting | 31 |
| Initial Assessments | 34 |
| BREAKOUT BOX: “New” (CCARs) vs “Old” (15-6) Processes | 39 |
| Civilian Witness Interviews | 40 |
| Visits to Sites of Civilian Harm | 43 |
| Training and Resourcing | 48 |
| Outcomes and Steps Taken as a Result of Administrative Investigations | 50 |
| Transparency to Families, Communities, and the Public | 52 |
| Military Lessons Learned | 56 |
| Appendix | 60 |



Villagers from the Kapisa province of Afghanistan gathered to meet with a joint investigation team led by U.S. military forces. The investigation team explored allegations of civilian casualties during a counterinsurgency operation in the province, January 27, 2009.

Lt.Cmdr. John Gay/U.S. Forces Afghanistan.

EXECUTIVE SUMMARY

For the families and communities of civilians killed and injured by the U.S. military, it can be very difficult to find out why their relative was harmed, and what – if anything – the military may do to acknowledge, explain, or compensate their loss. The military can never fully remedy the death of a loved one or the destruction of a family’s livelihood. Yet effective military investigations into civilian harm can help answer important questions for affected civilians, provide a basis for appropriate redress, promote accountability, and allow the military to learn valuable lessons for avoiding or mitigating similar harm in the future.

Effective investigations, which may take a variety of forms, are also essential to protecting and promoting human rights and the rule of law. Without accurate, thorough investigations, the military’s conduct may fall below legal standards without detection or correction. A failure to investigate possible violations of law and, where appropriate, hold responsible individuals to account for unlawful conduct, can also constitute a violation under both international human rights law and international humanitarian law.

Since 2001, the U.S. military has been involved in operations around the world, including counterinsurgency in Afghanistan, highly secretive counterterrorism raids and drone strikes in Somalia and Yemen, and large-scale air campaigns in Iraq and Syria. In each of these environments, U.S. forces have killed or injured civilians. Sometimes, the military has conducted in-depth investigations that have involved coordination with local government and community leaders, interviews with civilian witnesses, and visits to the location of harm. At times, these investigations have resulted in the military publicly acknowledging and explaining the reasons behind the civilian harm; providing condolence payments to families; and, in some cases where members of the military have violated the law, they have been held accountable. In other cases, the military has made very few channels available for civilians and civil society to bring forward allegations of civilian harm; the military has also dismissed or not responded to allegations of civilian harm; and it has failed to conduct effective investigations.

The U.S. military has the capability to investigate thoroughly. Military leaders have publicly acknowledged the value of investigating allegations of civilian harm, and official military doctrine clarifies the benefits of investigations. However, over the last eighteen years, examples of good practice in investigating civilian harm have been overshadowed by the inconsistency—and, too often, inadequacy—of the overall record of military investigations. Impacted civilians and civil society organizations, both in the United States and in countries where the U.S. carries out military operations, have repeatedly called for more thorough and transparent investigations.

This report seeks to move the practice forward, by thoroughly analyzing the U.S. military’s standards and procedures for investigations into civilian harm. It aims to identify both the factors that are most important to ensure effective investigations and the obstacles or challenges that may prevent a successful investigation. The report also makes recommendations to improve investigations of civilian harm.

This report uses “investigations” to describe the formal or informal processes of inquiry—to include both military assessments and formal administrative investigations—employed by the military, to evaluate the facts and circumstances of alleged or reported incidents of civilian harm. To better understand U.S. military procedure and practice around investigations, the research team closely examined publicly available records of 228 assessments and investigations into civilian harm from the U.S. Central Command area of operations (primarily Afghanistan and Iraq) conducted between 2004 and 2014; reviewed applicable laws, military regulations, protocols, and standards; conducted interviews with military, government, and civil society experts with relevant experience; and conducted four workshops with military personnel and non-governmental organization (NGO) representatives. The research methodology was informed by experience the Center for Civilians in Conflict (CIVIC) and the Columbia Law School Human Rights Institute (HRI) have obtained over more than a decade of engaging with the U.S. government and military on the use of force and civilian harm.

Effective investigations of civilian harm are essential to upholding fundamental human rights, democratic accountability, and effective military and counterterrorism policy. This report aims to support the efforts of the U.S. military to improve civilian harm investigations for both legal and non-legal reasons. It also aims to equip civilians, civil society, Congress, and other stakeholders with tools to understand and assess military practice, and to press for improvements. While the onus remains on the United States government to account for civilian casualties, this report seeks to support civil society efforts to effectively engage the military to investigate specific incidents of harm and to improve investigation practice and policy.

KEY FINDINGS AND RECOMMENDATIONS:

Overall, the research pointed to significant inconsistencies in when and how U.S. military investigations into civilian harm are conducted. In some cases, the military has carried out detailed and thorough investigations. However, in too many instances, investigations have been concluded based on incomplete or inadequate internal information, or have failed to sufficiently incorporate external evidence such as witness interviews or site visits. The lack of standardized approaches has contributed to a variety of shortcomings—including a failure to investigate incidents when a close look was warranted, denying civilians access to meaningful and dignified channels to report incidents to and to receive feedback on the status of their claims, and missing opportunities to learn from incidents and make future corrections. These findings are summarized below, with corresponding recommendations that, if implemented, will improve the quality, consistency, and credibility of U.S. military investigations.

Establishing Commander's Intent and the "Command Climate"

Key Findings

- **The consistency and thoroughness of investigations is highly dependent on the orientation and preferences of individual military commanders.** U.S. military commanders are empowered with a high degree of discretion over the investigative process, determining which

incidents are investigated and how thoroughly. Those who require or prioritize reporting (including through their critical information requirements), and who pursue reports, are more likely to surface and thoroughly investigate civilian harm. Those who secure adequate resources—including both staffing and expert input—to support the investigative process, are more likely to achieve an effective investigation process. Where commanders do not actively encourage effective investigations, they are far less likely to take place.

- **A commander's dual role in both directing operations and in ordering investigations of harm resulting from those operations creates an inherent tension and a potential conflict of interest.** Commanders are required to balance their ongoing involvement in operations with the responsibility to remain impartial and ensure compliance with law and regulation over the course of an investigation. This dual role introduces a risk of bias that can, and must, be controlled for in the investigative process.

Key Recommendations

- Commanders must fulfil their duty to ensure effective and impartial investigations of civilian harm, including by communicating to personnel within their command that investigations are essential and valuable to advance the U.S. military's goals of accountability, effectiveness, discipline, and learning.
- Commanding officers should make reporting of any and all incidents of civilian casualties mandatory.
- To reduce the risk of bias, commanders should select an investigating officer from outside his/her unit, and separate personnel who conduct civilian casualties tracking from those who are directly involved in operations.

Internal Records and Reporting

Key Findings

- **Internal military records can be incomplete and inconsistently maintained, leading to erroneous dismissal of civilian casualty allegations.**

In particular, flight and strike logs, which are often used to cross-reference external reports of harm, can lead military staff to dismiss as “non-credible” claims that merit further investigation. Accurate internal reporting of civilian harm depends heavily on the consistency, precision, and reliability of the tools and processes used by the military to record and review information about operations such as airstrikes.

- **The military too often relies solely on its internal records and sources—which can be flawed and incomplete—to assess civilian harm.** Military self-reporting has been an important source for recognizing and acknowledging incidents of civilian harm. Internal military records and internal sources of information, such as interviews with U.S. military personnel, remote analysis, overhead imagery, and intercepted communications, are all very important sources in an investigation. But they are often insufficient. Relying only on internal records can lead to inaccurate conclusions.

Key Recommendations

- The U.S. military should ensure that internal records and other military evidence are checked against other sources of evidence, and that they are adequately maintained and verified.
- Department of Defense policies should explicitly recognize that internal records are a necessary but insufficient source for discovering and evaluating claims of civilian harm from outside parties.

NGOs, Witnesses, and Media Reporting

Key findings

- **Non-military sources, such as survivors and witnesses, civil society, and the media, are likely to have information that does not exist otherwise in military records.** These sources are both an important source of initial reporting of civilian harm and an important resource for further investigation. Military officials have acknowledged the importance of such “ground truth” in evaluating claims of civilian harm.

- **Civilians, civil society, and others often face barriers when trying to make complaints of civilian harm to the military.** Although standard operating procedures stipulate that the military assess claims from any source, civil society organizations—including representatives from groups in Afghanistan, Somalia, and Yemen—identified the lack of an easily identifiable, accessible mechanism where they, or affected civilians, could direct such reports as a key obstacle to reporting harm. Civil society groups based in the country where an incident took place may lack adequate information on what information they must provide when submitting an allegation for an incident to be investigated. The military may dismiss civilian claims without providing information on why the allegations were regarded as not credible, and may fail to report back to victims after complaints are made.

Key Recommendation

- The U.S. government should facilitate the receipt of information from civilians, civil society, and witnesses on civilian harm for its own operations and in instances in which it is partnering with local, regional, or multinational forces, including by establishing a reliable and accessible complaints mechanism or reporting channel.

Initial Assessments

Key findings

- **The shift in how the military conducts investigations has reduced the likelihood that claims of civilian harm are ignored, but this shift has also affected the thoroughness of the investigative process.** Since circa 2014, the military assessment process (the Civilian Casualty Assessment Report, or CCAR) has replaced certain functions that were once largely served by administrative investigations, including the initial fact-finding process, determination of facts, and identification of corrective measures.
- **The current procedures employed by the military during the credibility assessment process create the risk of dismissing valid external reports and complaints as “non-credible,” thus preventing further investigation**

of these incidents. The expedited nature of the assessment process, combined with the military's heavy reliance on internal records to corroborate outside reports, may compromise the thoroughness of an inquiry into civilian harm and affect the accuracy of its results.

Key Recommendations

- The U.S. military should either proceed with an administrative investigation for all confirmed casualties or take other measures to compensate for gaps in the current assessment process.
- U.S. military commands should carry out thorough assessments for all plausible claims of civilian harm, using standardized procedures and publicly-available criteria for determining how complaints are determined credible or non-credible, to ensure that no valid claim is dismissed without sufficient scrutiny.

Civilian Witness Interviews and Visits to Sites of Civilian Harm

Key findings

- **While the military regularly interviews military witnesses, it rarely interviews civilian witnesses, thereby severely compromising the effectiveness of investigations.** As recognized by the U.S. military in its doctrine, civilian witness can be a crucial way for investigators to obtain key information on civilian casualty incidents, notably by identifying the individuals harmed and assessing their civilian status. Civilian witness interviews can also demonstrate to communities that the U.S. military makes serious efforts to investigate allegations of civilian harm.
- **The U.S. military rarely conducts investigations at the site of strikes or raids, and this undermines investigation effectiveness.** Site visits are important because they allow investigators to discover evidence that is not visible through aerial footage or remote observation, inspect weapons fragments and damage at the site, collect forensic evidence, and otherwise learn the details of the incident and the resulting harm. Military personnel commonly cite security concerns and resource constraints as the primary factors inhibiting site visits, but there is no guidance identifying the

specific circumstances in which a site visit should be conducted, how site visits might be conducted by other partners (such as police or partner military), and how to mitigate the deficiencies that may result from not conducting a site visit.

Key Recommendations

- The U.S. military should make civilian witness interviews a standard practice in assessments and administrative investigations of civilian harm wherever feasible. In cases where an in-person interview threatens the security of witnesses or investigators, the U.S. military should plan for alternative interviewing methods, such as interviewing by secure telecommunications, relaying questions and answers through third parties, or meeting in locations other than the site of harm.
- The U.S. military should visit sites of civilian harm as standard practice in investigations and assessments wherever feasible. Where the military cannot itself undertake site visits, it should see whether a partner force or local government body is able to conduct a visit to collect information requested by the investigating team instead.
- If it is not possible to conduct civilian witness interviews or site visits, investigators should document why and how any resulting evidentiary gaps were addressed.

Training and Resourcing

Key finding

- **Investigating officers sometimes lack the specific training, skills, or experience necessary to effectively conduct complex investigations of civilian harm allegations.** Administrative investigations, which are used to investigate a broad range of incidents (not only civilian harm), are conducted by investigating officers who are re-assigned from other duties and who may lack specific investigative competencies such as interviewing skills or technical expertise. However, investigating officers in the military may have other critical competencies such as knowledge of military operations and tactics that can be important to analyzing a civilian harm incident or identifying necessary corrections.

Key Recommendations

- The military should provide adequate resources and training for investigations when planning military operations or campaigns.
- Commanders should ensure that investigators have the requisite skills, training, and access to supplementary expertise needed to conduct effective civilian harm investigations.

Outcomes and Steps Taken as a Result of Administrative Investigations

Key finding

- **Commanders' written instructions in the appointment orders were not always followed in the investigations reviewed by the research team, particularly with respect to civilian witness interviews.** This suggests that instructions from commanders, at least in template orders for investigations or assessments, may not be followed systemically, and also suggests that other actions are needed to ensure that these measures are actually taken in practice.

Key Recommendation

- Commanding officers and judge advocates should ensure that the investigating officer has followed all instructions laid out in the appointment order—including interviewing civilian witnesses—prior to approving the results of an investigation.

Transparency to Families, Communities, and the Public

Key finding

- **U.S. investigations into civilian harm are too often opaque, and the U.S. rarely informs impacted families about the existence of an investigation or its conclusions.** Publishing investigation results while protecting the privacy and interests of those harmed, with transparency as a guiding principle, is essential to strengthening external oversight and democratic accountability and to preserving the credibility of investigations. Sharing specific results and outcomes with families, survivors, and affected communities, where appropriate, is also an

essential follow-up to effective investigations in order to provide those affected with answers. Yet families and communities of civilians killed or injured through U.S. operations are rarely informed of the existence of an investigation or its conclusions, even where the U.S. military has boots on the ground.

Key Recommendations

- The military should promptly release thorough and detailed investigative records to general public, except for limited exceptions where there is a compelling national security interest or privacy/security concerns for affected civilians.
- Investigative officers, or those who oversee investigations, should ensure that family members or other survivors are kept informed and apprised of investigations as they progress either directly, or through cooperation with a local government or partner military.

Lessons Learned

Key finding

- **Lessons learned from investigations are not systematically disseminated or implemented across the Department of Defense, resulting in a failure to adapt and avoid similar mistakes in future operations.** When conducting administrative investigations, investigating officers are often asked through appointment orders to identify lessons learned from a specific incident. However, the U.S. military faces several obstacles in learning from civilian harm incidents, relating to the competencies of investigating officers, turnover, prioritization of investigations, and the storing of investigative records. Valuable relationships and competencies cultivated from the experience of assessing, investigating, and tracking harm can also be disrupted by staff turnover.

Key Recommendation

- Ensure that the military fully captures and communicates lessons learned, both across branches and over time, including through the creation of a single database.



Damaged buildings in Raqqa, Syria. Numerous reports of civilian casualties emerged after a U.S.-led coalition and allied ground forces carried out a military offensive to clear ISIS from the city. December 18, 2017.

Tomas Davidov / Shutterstock.com

GLOSSARY

| | | | |
|-----------------|---|----------------|---|
| AFRICOM: | U.S. Africa Command | FOIA: | Freedom of Information Act |
| AR 15-6: | Army Administrative Investigation | HRI: | Human Rights Institute at Columbia Law School |
| ATP: | Army Techniques Publications | ISR: | Intelligence, Surveillance, and Reconnaissance |
| ATTP: | Army Tactics, Techniques, and Procedures | IO: | Investigating Officer |
| BDA: | Battle Damage Assessment | ISAF: | International Security Assistance Force, the NATO-led mission in Afghanistan |
| CCAR: | Civilian Casualty Assessment Report (Operation Inherent Resolve (“OIR”) terminology for a credibility assessment) | SJA: | Staff Judge Advocate |
| CCIR: | Commander’s Critical Information Requirements | JAGMAN: | Manual of the Judge Advocate General, the Navy manual for administrative investigations |
| CCMD: | Combatant Command | MCIO: | Military Criminal Investigation Organization |
| CDE: | Collateral damage estimate | NDAA: | National Defense Authorization Act |
| CENTCOM: | U.S. Central Command | OIR: | Operation Inherent Resolve |
| CFLCC: | Coalition Forces Land Component Command | OPNAV: | Office of the Chief of Naval Operations |
| CIVCAS: | Civilian Casualty | RS: | Resolute Support |
| CIVIC: | The Center for Civilians in Conflict | SIR: | Serious Incident Report |
| CLAMO: | Center for Law and Military Operations | SOP: | Standard Operating Procedure |
| CONOP: | Concept of Operations | | |
| DoD: | Department of Defense | | |
| EOF: | Escalation of Force | | |
| FIR: | First Impression Report | | |

METHODOLOGY

This report examines how the U.S. military tracks, assesses, and investigates reports of civilian harm by its forces, both in theory and in practice. The findings in this report are based on research carried out between 2017 and 2019 by staff and research consultants working for the Center for Civilians in Conflict (CIVIC) and the Human Rights Institute (HRI) at Columbia Law School (“the research team”). The research team analyzed the information collected both in light of what military officials have identified as good practice, and against benchmarks reflected in international human rights law on protecting the right to life when using lethal force, including the need for transparency and access to information, accountability, and the availability of meaningful remedy.

The report contains a detailed analysis of military assessments (the military’s preliminary review of reports and information about civilian harm incidents) and administrative investigations (a more formal inquiry into a report of civilian harm that is ordered by a commanding officer and is conducted in accordance with specific regulations). The report purposely focuses on administrative rather than criminal investigations for several reasons. First, criminal investigations are rarer than assessments and administrative investigations, which are the primary means of preliminary fact-finding and inquiry into reports of civilian harm. Second, the initiation of an administrative investigation typically precedes a criminal investigation. Third, criminal investigations are already highly regulated by law, regulation, and policy, and are often conducted by agencies with the specific mandate of investigating criminal offenses, whereas the standards applied to administrative investigations and assessments are more ambiguous and less commonly understood. Moreover, while some basic principles apply to both kinds of investigations, administrative investigations into matters involving military operations often require competencies and expertise that is substantively different than those required by criminal investigations, and as such, should be evaluated differently (i.e., administrative investigations may require no less skill, but the skills they require may be different).

The research team analyzed U.S. military regulations and doctrine (for example, Army guidance in the form of “Tactical Publications”); interviewed and consulted over 30 current and former military personnel and civilians with a diverse range of relevant experience and expertise; reviewed all U.S. military administrative investigations of civilian harm allegations conducted between 2002-2018 publicly released by the U.S. Central Command (CENTCOM); conducted two scenario-based table-top workshops with AFRICOM and the Modern War Institute at the U.S. Military Academy at West Point; and held two expert workshops with representatives from human rights NGOs and with current and former military officials with experience in assessing and investigating civilian casualties to preview and test our findings. These methods are further described below.

Any independent study into military investigations of civilian harm faces the hurdle of government secrecy and inconsistent record-keeping: many important materials on the subject are classified or not publicly available. To overcome other limitations inherent in the information that is available to the public about the U.S. military’s record on investigations—especially information that reveals contemporary practice that has not yet been subject to release—the research team employed a mix of research methods that helped to compensate for known gaps.

Review of U.S. military laws, protocols, and standards. To understand the legal and policy framework applied by the U.S. military, the research team conducted a comprehensive desk review and survey of all publicly available laws, protocols, and standards relevant to U.S. military tracking, assessment, and investigation of civilian harm. The research team consulted experts familiar with these processes to ensure that our desk review had identified and analyzed all relevant sources. Interviews also ensured that the research team understood the ways in which these different frameworks interacted with each other. For example, in some cases, the team wished to identify which policy or procedure

had precedence over another, or confirm how authoritative or binding a particular source was. The team also sent requests for information about the assessment and investigations process to U.S. AFRICOM, and to Operation Inherent Resolve and Resolute Support, both within CENTCOM's area of operations. The team received a written response from both AFRICOM and Resolute Support, and supplemented gaps in knowledge about the process employed by Operation Inherent Resolve from other sources within and outside of government.

Review of civilian harm assessments and investigations. To understand the actual practice of U.S. military assessment and investigation of civilian harm, the research team reviewed all publicly available records of assessments and investigations into civilian harm released by the military as a result of prior Freedom of Information Act (FOIA) requests (submitted by other parties) and available on the website of U.S. Central Command (CENTCOM), through the CENTCOM FOIA Library. To establish our data set, the research team first compiled all 290 available reports of investigations from the CENTCOM FOIA library and divided them into two broad categories according to whether they addressed an allegation of civilian harm or not.² 50 reports did not relate to civilian harm and were excluded from our analysis. Of the remaining 240 reports, nine reports were either illegible due to the poor quality of photocopy or too incomplete to review (e.g. had substantial portions necessary for analysis missing or incomplete).³ Seven reports were found to be successive investigations into the same allegation; to avoid double-counting, only the single latest investigation was counted in our analysis.⁴ Similarly, two investigations relating to the same allegation were released in two different reports; only the latest investigation was counted in the analysis.⁵ Two investigations were criminal

investigations and hence were not analyzed.⁶ Thus, the final data set consisted of 228 reports of investigations that were opened, closed, and released during a period that spanned 2002-18. 94% of the data set consisted of investigations conducted in accordance with Army Regulation 15-6, which governs the Army's administrative investigations process—a process that is also commonly used by the U.S. Navy, U.S. Marine Corps and the U.S. Air Force when under the command of an Army officer.

To analyze the data set, the research team developed an analytical framework that allowed consistent analysis of the investigation reports on the basis of a range of criteria meant to help the team identify any trends and anomalies. These criteria were derived from the commonly recognized principles of what constitutes an effective investigation: promptness, independence, impartiality, thoroughness, and transparency. Our analysis thus included, inter alia, the date, location, and type of incident; the source of the initial complaint or report; the duration of the investigation (and the time between the incident and the initiation of an investigation); the investigative methods (e.g. site visits) and sources of evidence used (e.g. photographs or witness interviews); a summary of the results (to include any lessons learned or recommendations); and characteristics of specific investigations that stood out to our research team as interesting or unique. We also evaluated each report of investigation for its completeness, in terms of the inclusion of standard forms and exhibits. The research team subsequently read and analyzed each investigation report and recorded information in the analytical framework. The result enabled comparative analysis of homogenous data as well as the identification of irregular cases or situations.

2 We defined investigation reports that addressed "allegations of civilian harm" broadly, to include all investigation reports in which the U.S. military had already identified an allegation of civilian harm as well as all investigation reports into incidents noted as involving a local national.

3 Investigation 157 is unreadable, whereas investigations 182, 208, 218, 224, 581, 501, and 506 contain too little information either because: they contain only an incomplete Form 1574, which did not contain relevant information apart from dates; they only contain an appointment order; or they only contain the letter of the appointing authority regarding the IO's findings. Investigation 223 is not an investigation per se but a series of requests for information as to an investigation into a CIVCAS incident.

4 Investigations 101, 141, 213, 232, 252, 265, and 493.

5 Investigations 67 and 68.

6 Investigation 64 by the Naval Criminal Investigative Service and Investigation 454 by the U.S. Army Criminal Investigation Command.

Because the U.S. military does not automatically release reports of administrative investigations to the public, and because it may have determined that certain investigation reports were not subject to release on the basis of a specific FOIA request, the research team cannot assess the total number of administrative investigations conducted over the period and, hence, the representativeness of the data set of investigations. As a result, this report refrains from making definitive claims based on quantitative and qualitative analysis of the data set. Where the report makes a claim by invoking a statistic derived from the data set, the research team also sought to test the claim through other methods such as interviews, workshops, or requests for information from the military itself. For example, the research team attempted to find information that might contradict or corroborate the finding supported by analysis of the data set that the U.S. military rarely conducts interviews with civilian witnesses through interviews, desk research, and the workshops.

Moreover, because the intention of the report is not merely to evaluate military practice, but to explain it, the report draws on the data set of investigative records to help explain why the military may or may not do certain things, under what circumstances, and why. The team also assessed that the reports of investigation carried research value by identifying specific practices that were applied during one or more investigations, during certain periods of time, or by individual officers, that may never have been recognized or institutionalized. As such, while the limited data set imposes constraints, the records—and the practices they reveal—are helpful for supplementing other research that seeks to better understand military practice.

Expert interviews: A purposive sampling method was first used: experts were chosen based on CIVIC and HRI's long-standing knowledge of the field of independent, military, government, human rights, and civil society experts working on the issue of civilian harm. We then used referral sampling to widen the pool of experts. Experts interviewed included those familiar with U.S. military administrative and criminal law and procedure; those familiar with conducting or overseeing U.S. military assessments and investigations into civilian harm; and human rights researchers and journalists

with experience researching allegations of civilian harm by the U.S. military, including researchers from Afghanistan, Somalia, and Yemen. Interviews were conducted in a semi-structured format using a pre-prepared interview guide balanced with a degree of flexibility to probe the subject's answers. The research team obtained informed consent for the interviews, using best practices outlined in the Lund-London Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations. The team informed interviewees of the purpose of the research and made them aware of the potential future uses of their statements. The team prioritized interviewee control of the use of any information, and interviewees could choose to remain unnamed. In many cases the report cites government officials who are serving but have neither the intent nor the authority to speak officially on behalf of the government as "a government official with knowledge of military investigations processes." Providing a degree of anonymity to interviewees enabled the research team to include the valuable perspectives of those who play a day to day role in the process of assessing and investigating harm. The research team never knowingly requested classified information from government experts, and to our knowledge, none was provided nor included in this report.

Our research focused on U.S. military practice, and thus did not depend on direct testimony from those who have experienced harm as a result of U.S. military operations. Moreover, the research team considered the extent to which re-interviewing victims could re-traumatize them. To reflect the value civilians derive from investigations and the challenges they face in the process, we therefore sought to capture a representative sampling of their experiences by drawing on extensive research that human rights NGOs and others have previously conducted into cases of civilian harm. Civil society members from Afghanistan, Somalia, and Yemen also discussed the importance of effective investigations and transparent reporting to civilian victims and local communities in the researcher team's interviews with them.

Scenario-based workshops: CIVIC and HRI also conducted two scenario-based workshops with serving military personnel: one closed

workshop with active duty U.S. military officers with experience conducting or overseeing investigations into reports of civilian harm by U.S. military forces; and one U.S. Africa Command (AFRICOM) workshop reviewing its civilian casualty assessment process. These workshops served to fill gaps in knowledge of assessment processes, enhance understanding of some of the practical challenges inherent to such processes, and identify best practices as applied to specific scenarios and contexts. Prior to these exercises, a “pilot workshop” with three retired military personnel with specific experience related to investigations of civilian harm was held to receive feedback on the initial design and questions for the scenario exercise.

The first workshop, held at the Modern War Institute at the U.S. Military Academy at West Point in April 2018, explored scenarios in which the investigating commander has either limited or plentiful resources, and where they operate with either restrictive or permissive rules of engagement. Through isolated variations in each scenario, the exercise aimed to assess how each variable impacted the initiation and conduct of investigations into civilian harm. The scenarios were run in a semi-structured format from pre-strike and operation planning to the end of the post-strike administrative process. The moderator running the scenario introduced additional facts

and asked participants to explain how they would respond, what questions they would ask, and what they would do as the situation evolved. Staff from CIVIC and HRI observed and recorded participant reactions and feedback.

The second workshop, held at AFRICOM headquarters in Stuttgart, Germany in September 2018, was organized by AFRICOM and included AFRICOM civilian and military personnel as well as representatives from CIVIC, HRI, and other NGOs. The workshop employed a series of scenario-based vignettes, developed by AFRICOM in consultation with CIVIC and HRI, to which participants responded. CIVIC and HRI used observations from this exercise to inform understanding of the context-specific processes for responding to civilian harm, including the specific factors that shape how the U.S. military responds and investigates in particular circumstances.

Expert workshops: Finally, the research team convened two expert workshops to provide critical feedback on the preliminary findings derived from this research. One expert workshop was comprised of former and serving military personnel. The other was comprised of representatives from NGOs and think tanks carrying out research on these and related issues. Some participants had previously been interviewed for this report.

U.S. MILITARY TRACKING, ASSESSMENT, AND INVESTIGATION OF CIVILIAN HARM: PROCESS, POLICY, AND PROCEDURE

This section explains, in simplified form, each of the four stages of the U.S. military's tracking, assessment, and investigation processes, as well as the sources of informal and formal guidance that govern them. Reference is made to some practical, illustrative examples. However, this section does not aim to assess whether these processes are, in fact, followed in practice, which is covered in detail in subsequent sections.

A U.S. military inquiry into civilian harm broadly comprises four main process stages:

- 1) **The discovery (by the military or as a result of external sources or complaints) and internal reporting of harm** to a person or persons in a position of authority to take further action (such as a military commander or an officer specifically delegated with such responsibility);
- 2) **A preliminary inquiry or assessment** of the known facts to determine if further investigation or action is needed;
- 3) **A more formal investigation**, commonly an administrative investigation and, occasionally, a criminal investigation; and
- 4) **The conclusion and outcome**, including any actions taken based on the findings of the investigation and any recommendations of the investigating officer or the commander overseeing the investigation regarding whether or not to take action, how to remedy harm, and/or how to address lessons learned in the course of an investigation.

Each stage of an investigation is important in laying the foundation for the next stage of the process and for the character and outcome of the process as a whole. However, not every inquiry

will cover each stage. For example, not all inquiries will include a more formal investigation and may instead proceed from the preliminary assessment directly to the outcome.

U.S. military investigations and inquiries are conducted within an organizational culture that emphasizes decentralized authority and empowers commanders with flexibility to operate within a defined set of legal and regulatory boundaries.⁷ Commanders' influence operates at two levels. First, individual commanders play specific roles within an investigation, including initiating the investigation and reviewing, approving, amending, or rejecting its findings. Second, commanders contribute to the establishment of an environment that is conducive to inquiry and enables the investigative process to serve its intended purposes throughout the process. This is referred to as the "command climate" or "command environment," which is often expressed through formal and informal signals of "commander's intent."⁸ As one retired military interviewee summarized, "the command environment is going to shape what the commander deems worthy of inquiry."⁹

While military regulations establish some basic requirements and guidelines for investigations, they are largely conducted according to unit-specific Standard Operating Procedures (SOPs) or a commander's specific orders. Some elements of investigations are mandatory, while others may derive from discretionary sources of guidance, such as military doctrine which is used as a source of suggested, but not mandated, practice. Such guidance can be made non-discretionary when codified into orders or directives, which carry the authority of regulation. The U.S. military preference for decentralized decision-making and command discretion, along with other variables, helps to explain the procedural complexity of investigations and the wide degree of variation observed in U.S. military practice over time, across different

7 Army Doctrine Reference Publication 6-0, "Mission Command," https://fas.org/irp/doddir/army/adrp6_0.pdf (In doctrine, the concept of decentralized decision-making is sometimes referred to as "Mission Command," described in Army Doctrine Reference Publication 6-0, which notes, "Mission command emphasizes centralized intent and dispersed execution through disciplined initiative;" Mission command is further described in the article "Understanding mission command": James D. Sharpe Jr. and Thomas E. Creviston, "Understanding mission command," U.S. Army, July 10, 2013, https://www.army.mil/article/106872/understanding_mission_command).

8 Center interviews with Jay Morse, Christopher Kolenda, Josh Berry, Jonathan Horowitz, and two former military officials with knowledge of military investigations (names withheld).

9 Center interview with Christopher Kolenda, Washington, D.C., December 7, 2017.

operations, and across commands. It also accounts for the difficulty of analyzing investigative practice as a rigid or consistent phenomenon. Although the U.S. military places the primary responsibility for both accomplishing the mission and complying with U.S. and international law upon commanders, it also endows commanders with great discretion in how the mission and compliance are achieved.

Discovery and Initial Reporting

Processes and procedures that aid in the discovery of civilian harm are essential to a) determining whether a fuller investigation into the incident is warranted; b) tracking trends in civilian harm; c) aiding in future prevention and mitigation of civilian harm; and d) identifying the appropriate response. As such, the reliability of mechanisms to document harm observed by military personnel and to facilitate the receipt of external reports will impact how and whether a more formal investigation is triggered, as well as the overall record of investigative practice by any one command or by the military as a whole.

Internal Reporting

In some operations—such as raids or patrols, detention operations, convoys, or checkpoints—the military personnel involved in the operation may observe civilian harm due to their proximity to, or direct involvement in, the incident. In other operations that occur from a distance, such as air or artillery strikes, direct observation of civilian harm by military personnel may be less likely and

depends on a number of variables, including the availability of assets such as full-motion video, imagery from a “targeting pod” (a tool used by attack aircraft to designate targets),¹⁰ and the deployment of personnel on site to inspect the aftermath of an air strike.

Depending on the circumstances, personnel can be required to report any civilian harm they observe, cause, or discover. While a commander has great discretion in establishing many of the reporting requirements within their area of operations, some requirements are established at higher levels of authority and are therefore not discretionary. Department of Defense (DoD) Directive 2311.01E requires U.S. military personnel to report anything that is a “possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”¹¹ A commander can also issue command-specific guidance requiring subordinates to report a broader range of incidents whether or not they have reason to suspect a violation of international humanitarian law (the law of war), including any observed or reported civilian casualty incident. Available military records provide examples where ground force or task force commanders explicitly specified a requirement to report all civilian casualties, or incidents that could lead to civilian casualties such as escalation-of-force incidents, among Commander’s Critical Information Requirements (CCIR).¹²

10 Email from Marc Garlasco, former military intelligence analyst, currently senior military advisor for the United Nations Human Rights Council, May 22, 2019.

11 DoD Directive 2311.01E §1.1, May 9 2006, <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf>; The Army and the Air Force also provide additional guidance on violations of the laws of war as “reportable incidents:” AR 190-45 categorizes war crimes, such as “mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons, or civilian internees” together with “violations of the Geneva Conventions” and “atrocities” as “Category 1 reportable serious incidents” which “must be reported to law enforcement channels, with copies of the reports forwarded all the way to Headquarters.” The Regulation further suggests that commanders should be over-inclusive in determining whether an incident should be further elevated on the basis of the severity of the incident; the potential for adverse publicity; the potential consequences of the incident; whether or not the incident is reportable under other reporting systems; and the effect of the incident on “readiness;” Air Force Instruction 51-401 (within Air Force Policy Directive 51-4, which establishes policies to ensure compliance with the Law of Armed Conflict when it comes to Air Force personnel) prescribes reporting procedures for alleged LOAC violations. According to the Directive, as a matter of policy, the Air Force will “[i]n coordination with the Combatant Commanders, ensure reportable incidents committed by or against members of the Air Force, or persons accompanying them, are promptly reported and investigated.” Section 5 further requires that Air Force personnel who suspect or have information about a possible LOAC violation “shall promptly report it to their immediate commander,” and where the immediate commander appears to be involved in the violation, the personnel shall report to possible violation to the next higher command authority.

12 For example, Investigation 138 relating to an incident on July 9, 2006 in Ghazni, Afghanistan refers to a “Task Force Eagle Commander’s Critical Information Requirements” mandating that escalation of force (EOF) incidents be reported “where disabling shots have been used in response to a suspected hostile act.”

Among the more prominent channels and sources of self-reporting:

- **Military personnel can self-report** civilian harm observed during operations to their commanding officer or to a person in a position that has been specifically delegated this responsibility (such as an “Action Officer” who reviews civilian casualty reports) through incident reporting mechanisms, such as a Serious Incident Report (SIR), Significant Act Report, or Spot Report.¹³ These reports may convey the basic facts of the incident (e.g., date, time, location, personnel involved, and a description of the incident) but are not necessarily intended to determine the cause or to make judgements or findings. During the U.S.-led Operation Inherent Resolve (OIR) in Iraq and Syria, military personnel involved in air operations self-reported civilian casualties they observed during or after air strikes, often with the aid of full-motion video.¹⁴
- Military personnel may also discover civilian casualties in the course of conducting a Battle Damage Assessment (BDA) – the after-action review process used to assess the effects of an operation – though the purpose of the BDA is not limited to discovering civilian harm.¹⁵

External Reporting

The military may also discover or corroborate civilian harm reports from a range of outside sources, including local partner military forces, local government officials, journalists, representatives of international organizations

such as the United Nations, international human rights and humanitarian organizations, civil society organizations, traditional media (i.e., television, press, or radio), social media, and/or survivors and witnesses themselves. Reports may be received virtually or in person. For example, claimants in some analyzed investigations provided information via e-mail,¹⁶ while others provided information by interacting with other U.S. government or military representatives—in some cases by directly approaching personnel at U.S. military installations.¹⁷

Civilians harmed by U.S. military operations must be able to effectively report claims of harm, and have these reports meaningfully considered, under international human rights law, which protects their right to remedy—in particular for the loss of life.¹⁸ Ghulam Noor, an Afghan man whose 16-year-old daughter Bibi Halima was killed when a U.S. airstrike hit a group of women and girls gathering firewood, expressed deep frustration with his inability to seek recourse. “I have no power to ask the international forces why they did this,” he said.¹⁹

The ability of outside parties to report incidents or provide additional information about civilian harm directly to the military depends on a variety of factors, including the availability of channels through which to provide information, public awareness of such channels, transparency regarding the types of information that should be included when submitting a report, trust in the military, security concerns, access to lawyers or groups to support making complaints, and the

13 Review of investigations obtained by FOIA. Other reporting forms referred to in the investigations include a “significant act report” (Investigations 177 and 155), “internal closure report” (Investigation 152), “EOF reports” (Investigation 494), “Blue-3 Spot Report” (Investigation 502), “89 MP BDE Form” (Investigation 503 and 507), and “SOC-SMG incident report” (Investigation 515).

14 Institute for National Strategic Studies, “Civilian Casualty (CIVCAS) Review: Executive Summary,” National Defense University, April 17, 2018, p. 11, <https://www.justsecurity.org/wp-content/uploads/2019/02/Civ-Cas-Study-Redacted-just-security.pdf>

15 U.S. Joint Chiefs of Staff, “Joint Publication 3-60: Joint Targeting,” January 31, 2013, http://www.cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf (The Battle Damage Assessment provides the “estimate of target damage or effect which is based on physical damage assessment, change assessment, and functional damage assessment, as well as target system assessment, resulting from the application of lethal and nonlethal capabilities.”).

16 Investigation 96, regarding an airstrike on an ISIS checkpoint on March 13, 2015, notes that an email on April 2 to CFLCC-I/JA reported the death of two women and three children and the loss of a vehicle.

17 The report from Investigation 95 states that an individual, whose identity is not disclosed, reported a CIVCAS incident to a USAID representative on November 6, 2014 and that a report from the Syrian Network for Human Rights dating from November 9 further provided still and videos images purportedly showing damage from the strike and two dead civilians.

18 General Comment 36, para 67, refers to “the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life.” H.R. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018).

19 “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, p.24.

socio-economic status or mental health of potential complainants. In circumstances where the U.S. military has a ground presence, civilians may be able to register complaints about loss of life, injury, or property damage directly with locally-based units. This may also include the ability to seek a condolence response (e.g., solatia, ex gratia payments, or apologies) or other forms of redress for harm caused by the military. At other times, U.S. military units might hear a report of civilian harm through “word of mouth” or while engaging with leaders in the area in which they are operating.²⁰ During air operations, the lack of ground access or direct contact with civilian communities, as well as security concerns (for both civilians and military personnel), may make direct communication with the military more difficult for those directly affected, especially when adequate steps to establish channels of communication or complaints mechanisms have not been taken by the U.S. government.

Despite the importance of external reporting in discovering civilian harm allegations, little uniform guidance exists across U.S. military law, policy, and doctrine on actively facilitating receipt of external reports. The government has not provided standard guidance to outside parties wishing to report complaints, nor has it created accessible channels to receive such information directly from affected populations. *Ad hoc* channels for exchanging information have been developed in certain cases between the military and western organizations like Airwars. Representatives of civil society groups from Afghanistan, Somalia, and Yemen told the research team that they lacked a clear understanding of how they could report harm to the U.S. military. One Afghan civil society researcher described seeing a range of methods, from families or community members bringing the bodies of those killed to Forward Operating

Bases (during a period when the U.S. had a more significant ground presence), to seeing individuals reporting civilian harm to official U.S. military and NATO handles on Twitter.²¹ A Somali human rights activist also described seeing communities resort to social media campaigns when reporting civilian harm, as well as turning to local police stations, where Somali police said that they were not able to communicate the complaint to U.S. forces.²²

In recognition of these shortcomings, the 2019 National Defense Authorization Act (NDAA) provided for the “development of publicly available means, including an Internet-based mechanism, for the submittal to the U.S. government of allegations of civilian casualties resulting from U.S. military operations.”²³ Military doctrine also provides some general guidance regarding the discovery and receipt of external reporting. Most notably, Army Tactical Procedure 3-07.6 on Protection of Civilians recommends that units be “proactive in their situational understanding of civilian casualty incidents and the population’s perceptions,” as that they undertake “regular engagement and effective liaison with local leaders, intergovernmental and international organizations, and nongovernmental organizations, as well as monitoring the local media, enemy propaganda, and local rumors.”²⁴ Various Combatant Commands (CCMD) and operations have developed their own policies and practices to implement such guidance, discussed in detail below.

Once a component of the military becomes aware of an incident of civilian harm from internal or external sources, it may choose to document and report the incident for further action. In some cases, further follow-up is mandatory; for example, in cases of possible, suspected, or alleged violations of the law of war, or where the commander has introduced specific reporting requirements.

20 Center interview with Christopher Kolenda, Washington, D.C., December 7, 2017.

21 Human Rights Institute phone interview with an Afghan civil society organization researcher, November 12, 2019.

22 Human Rights Institute phone interview with a Somali human rights activist, November 25, 2019.

23 NDAA (FY 2019), Section 936 (b)(3). Note: The DoD is reportedly working on implementing this requirement, although no known changes are known to have been made at the time of writing.

24 ATP 3-07.6, para. 5.57.

PROCESS MAP: INVESTIGATIONS

Discovery and Reporting of Harm

- Civilian casualties are discovered when:
- U.S. military officers report harm through appropriate command channels;
 - Partner forces or local government officials report harm to the military;
 - NGOs, journalists, or civilians report harm directly to military;
 - Local or international media, or NGOs publicly report harm.

In Operation Inherent Resolve (OIR) and AFRICOM, all units within the area of operation are required to report civilian harm to the Office of Primary Responsibility for further review (OPR) If an allegation corresponds with the military's information

Preliminary Inquiry or Assessment

If an allegation corresponds with the military's information about its own activities, the Office of Primary Responsibility (OPR) may conduct a more detailed credibility assessment of the claim. At any stage, the OPR may determine that a report is credible or "non-credible". As an alternative, or in addition to, a standardized assessment, commanders may elect to open a "commander's inquiry" or "preliminary inquiry" to learn the magnitude of the problem, identify witnesses, and determine whether further investigation is needed. **If the commanding officer decides the matter does not require further investigation, the inquiry is closed.**

If the commanding officer decides the matter requires further investigation:

The commanding officer can initiate an administrative investigation. An Army's administrative investigation, frequently referred to as "AR 15-6," has been used across several operational theaters.

AND/OR:

If the incident includes a potential violation of law, a criminal investigation may be warranted.

Appointment

The commander appoints an investigating officer (IO) or board of inquiry and sets the investigation's scope through an appointment order.

Investigation

The IO or board of inquiry conducts the investigation. Prior to approval by the commander, the final report is first subject to a legal review from the commander's staff judge advocate (SJA) or legal advisor.

Lessons Learned

Ideally, the military will evaluate the results of investigations and assessments to determine, what, if any corrective measures should be taken to avoid future harm.

Outcome

The investigating officer or board presents findings about the incident and recommendations to the commanding officer. The commanding officer has the discretion to approve, disapprove, modify, or add to the findings and recommendations made by the investigating officer.

Preliminary Inquiries

Prior to the initiation of a formal investigation, reports of civilian harm (from both external and internal sources) may undergo a preliminary review by a commander or their delegate to determine if the information from the report warrants further investigation. The initial process of review has varied by theater, and the choice of procedure is subject to the discretion of the commander under whose command an alleged or observed incident has taken place.

Preliminary Inquiries and Commander Directed Inquiries

While not a required step prior to a formal administrative investigation, any commander or officer in the grade of major or above may elect to conduct a “preliminary inquiry” (also known as a “commander’s inquiry”) in order to “ascertain the magnitude of a problem, to identify and interview witnesses, to summarize or record witnesses’ statements, to determine whether an investigation may be necessary, or to assist in determining the scope of a subsequent investigation.”²⁵

Army and Navy-Marine Corps regulations governing preliminary inquiries contain formal guidelines related to legal review and evidence. For example, Army Regulation 15-6 (AR 15-6) requires the commander to consult with their legal advisor prior to conducting a preliminary inquiry and notes that the findings should be documented in writing and that it is “advisable” to preserve the evidence.²⁶ At the close of a preliminary inquiry under the Army’s procedure, the commander has discretion to choose from among a set of subsequent steps, including not taking any action or further investigation. If the preliminary inquiry contains adverse information regarding a field grade officer (a major, lieutenant colonel,

or colonel), the commander must conduct an administrative investigation.²⁷

The Navy Manual for Administrative Investigations, or JAGMAN, merely encourages commanders to seek guidance from the relevant staff judge advocate or the Command Services Department of the local Region Legal Service Office prior to convening an investigation.²⁸ However, the JAGMAN goes beyond the AR 15-6 procedures in other ways. For example, it stipulates that the evidence gathered during the inquiry shall be preserved in the event that the commander later initiates an investigation.²⁹

The Air Force regulations, unlike those of the Army, Navy, and Marine Corps, do not have a single regulation specific to administrative investigations, nor do they have a service regulation or procedure for preliminary inquiries, and instead emphasize commanders’ discretion in using their “inherent authority” to initiate investigations.³⁰

Assessments

Since around 2014, the military has adopted SOPs for the “assessment” of civilian casualties³¹ for specific operational task forces in at least three areas of operations: OIR operations in Iraq and Syria, Resolute Support in Afghanistan, and operations across AFRICOM as a whole. Such assessments replace certain functions of the preliminary inquiry or even administrative investigations. They are meant to provide an initial appraisal of information and fact-gathering short of a full, formal administrative and/or criminal investigation. The Civilian Casualty Assessment Report (CCAR) was developed to allow the military to process civilian casualty allegations occurring in greater numbers and from a diverse array of external sources. Formally, the CCAR process does not replace the administrative investigation

25 AR 15-6, 1-6(b); See JAGMAN 0203(a) (Similarly, for the Navy and Marines, a preliminary inquiry “serves as an analytical tool to help a commander determine whether an investigation is warranted and, if so, how it should be conducted” and “is not intended to develop extensive findings of fact.”).

26 AR 15-6, 4-3.

27 AR 15-6, 4-3(b).

28 JAGMAN, 0202(a).

29 JAGMAN, 0203(c).

30 “Air Force Instruction 90-301: Special Management,” Department of the Air Force, August 27, 2015, p. 2, <http://www.af.mil/Portals/1/documents/ig/AFI-90-301.pdf?timestamp=1441998269114>.

31 Note: U.S. military procedures refer exclusively to “civilian casualties,” rather than civilian harm, and as such, the term “civilian casualties” is used throughout this section. It does not reflect the institutional position of CIVIC or HRI on the most appropriate scope of concern of civilian harm investigations.

(described in the next section): the CCAR process clearly allows for an AR 15-6 investigation as one possible outcome. For example, in OIR, an investigation may be ordered by the Court Martial Convening Authority if “further information is needed to document the underlying facts or to answer questions not fully addressed by the CCAR.”³²

The current assessment procedure is a multi-stage process. First, the process requires the action officer (of unspecified rank) who becomes aware of the allegation or self-report to conduct an initial First Impression Report (FIR), which provides a cursory assessment of the incident.³³ Next, the details of the FIR—including date, time, and location—are corroborated using the military’s own strike data or operational data.³⁴ According to an internal DoD report, internal reports are screened to eliminate incidents that cannot be corroborated with operational data or that “lack credible information,” the definition for which is not specified.³⁵ Meanwhile, external reports are also subject to a process of initial corroboration that “attempts to isolate the alleged incident to within a 48-hour range and identify a specific location where it may have occurred.”³⁶ For external reports subject to the procedures of OIR, if neither a 48-hour range nor a specific location is provided, then the cell can also attempt to corroborate an incident using a general location and a specific time of day. Absent a time or location, the military may nonetheless consider a report using photo or video evidence “OR two independent high-quality sources OR other specific facts that warrant a search for strikes.”³⁷

If a review of the operational data confirms a correspondence between the reported event and U.S. or coalition military action, the report proceeds to a “credibility assessment,” which assesses whether the reported civilian casualties were “more

likely than not to have occurred as a result” of U.S. operations. This assessment is the CCAR in OIR and Resolute Support, and is called a Memorandum for Record across AFRICOM. In OIR, the CCAR is used to evaluate the likelihood of a civilian casualty based on several sources of information, including details from the original allegation, chat room logs, full-motion video, supporting intelligence, and the original collateral damage estimates from the implicated strike. Neither the OIR nor the AFRICOM assessment procedure requires the action officer to conduct outreach to external sources for additional information. Although the research team was unable to review written procedures for Resolute Support, according to the Civilian Casualty Mitigation team, “the Task Force (TF) normally will channel most questions or statement gathering from the local security pillars (i.e. District Governors, Provincial Governors, Local Police Chiefs, village elders etc.)”³⁸

Like a preliminary inquiry, the CCAR requires review by the command’s staff judge advocate, and ultimately an endorsement or approval from the commander.

Investigations

A commander may choose to initiate an investigation following an initial report, a preliminary inquiry, or a completed assessment. The nature of some incidents may determine the kind of investigation required. For example, an incident involving a potential violation of criminal law or other “reportable incidents” will often trigger a mandatory criminal investigation by the cognizant Military Criminal Investigative Organization. However, U.S. military procedures afford a wide degree of latitude to commanders in determining what types of incidents to investigate and how. Commanders “have inherent authority to investigate any matter under their responsibility, unless otherwise prohibited or limited, if

32 Combined Joint Task Force - OIR, “Policy for Reporting and Responding to Civilian Casualty Incidents,” U.S. Central Command, May 9, 2018.

33 Referred to within Combined Joint Task Force - OIR as an Initial Assessment and known as a Basic Assessment in AFRICOM.

34 “Annual Report on Civilian Casualties in Connection With United States Military Operations,” Department of Defense, April 29, 2019, p. 10, <https://media.defense.gov/2019/May/02/2002126767/-1/-1/1/ANNUAL-REPORT-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-US-MILITARY-OPERATIONS.PDF>.

35 Ibid.

36 Ibid.

37 Ibid.

38 E-mail from CIVCAS Mitigation Team, Resolute Support Headquarters to CIVIC staff, November 23, 2019.

undertaken for the purpose of furthering the good order and discipline of their command.”³⁹

Administrative Investigations: Army Regulation 15-6

Administrative investigations are the primary investigative tool available to U.S. commanders, and commanders have commonly turned to them to look into many different incidents and issues.⁴⁰ Army regulations provide guidelines for the kinds of incidents that may be investigated using the administrative investigation process.⁴¹ Because of its flexibility, the army’s AR 15-6 investigative procedure has been used across operational theaters as the process of choice for investigating a range of incidents and for multiple purposes. Available records and interviews suggest that prior to 2014, U.S. forces under the command of the Army, Navy, or Marines commonly conducted AR 15-6 investigations for reports or allegations of a civilian casualty involving U.S. forces.

An AR 15-6 investigation begins with the commander’s formal appointment of an Investigating Officer (IO) through an “appointment order,” which establishes the scope of the investigation and provides any additional specific instructions for the IO.⁴² While a commander may choose an IO from a pre-established

“As a commander in Afghanistan there was a big emphasis on civilian protection, when I heard of a CIVCAS, I would trigger a command inquiry”

– *Ret. Colonel Christopher Kolenda*

“roster,”⁴³ guidance specifies that they should select an IO based on “their education, training, experience, length of service, and temperament.”⁴⁴ Furthermore, the commander is required to ensure that the IO is more senior than any

39 Commander’s Legal Handbook (Miscellaneous Publication 27-8), The Judge Advocate General’s Legal Center and School, 2019, p. 105

40 There is no DoD-wide joint publication on administrative investigations, except for DoD Instruction 6055.7, which deals with accidents, including friendly fire, air craft accidents, and accidental injuries to DoD personnel. Most branches of the U.S. military have service regulations and procedures governing the administrative investigation. Army Regulation 15-6 (AR 15-6) lays out the Army’s procedures for administrative investigations and boards of officers. Because the vast preponderance of civilian casualty investigations have been conducted by the Army, or within a theater of operations subject to Army regulations, this section focuses on the Army’s process for administrative investigations, and where notable, will identify key differences between Army process and Navy or Air Force process in footnotes. Administrative investigations overseen and conducted by Navy personnel (including the Marines) are conducted pursuant to the Manual of the Judge Advocate General, or “JAGMAN,” often through a “Command Investigation” (<https://www.newriver.marines.mil/Portals/17/Documents/JAGINST%205800.7E.pdf>). The Air Force, unlike the Army and Navy, does not maintain a general regulation or instruction that lays out procedures for administrative investigations. Instead, Air Force Instruction 90-301 states that commanders should use the inherent authority of command to authorize administrative inquiries.

41 Among those incidents subject to investigation under its Regulation 15-6, the Army includes “training accidents; operational accidents; combat operations (e.g. friendly fire, hostile deaths); garrison operations; minor misconduct; serious misconduct; suicides; complaints and inquiries.” Meanwhile, the Navy JAGMAN sets specific procedures to deal with a broad variety of “major incidents,” defined as: “An extraordinary incident occurring during the course of official duties, resulting in multiple deaths, substantial property loss, or substantial harm to the environment, where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard. Substantial property loss or other harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations. These cases are often accompanied by national public and press interest and significant congressional attention. They may also have the potential of undermining public confidence in the Naval service. That the case is a major incident may be apparent when it is first reported or as additional facts become known.”

42 AR 15-6, ch. 5.

43 To include commissioned officers, warrant officers, or DoD civilian employees of a Level 11 or above, *ibid*, 2.

44 AR 15-6, 2-3(a).

personnel subject to the investigation in question or any person against whom adverse findings or recommendations could be made. Where there is a possibility of command culpability, guidance dictates that a commander should consider requesting an investigator from outside of their command or appointing a board of inquiry—although they are not required to do so.⁴⁵

The IO's duty is three-fold: first, the IO must "thoroughly and impartially ascertain and consider the evidence on all sides of each issue" which points to requirements of thoroughness and impartiality in the weighing of the evidence;⁴⁶ second, the IO must comply with the appointing authority's instructions contained in the appointment order; and third, the IO must "make findings that are warranted by the evidence" and, where appropriate, make recommendations consistent with these findings.

Beyond a basic requirement to develop an investigative plan in consultation with the legal advisor,⁴⁷ an IO has considerable autonomy in choosing the methods used to conduct the investigation. The IO in gathering evidence can "use whatever method they deem most efficient and effective for acquiring information."⁴⁸ The regulations specifically indicate that the IO can conduct in-person or telephone interviews, seek information through correspondence, and collect photographs and other written records such as incident reports.⁴⁹

Through the process of the investigation, AR 15-6 guidelines recommend that the IO arrive at a series of findings related to the original scope or mandate of the investigation and draft a report that lays out the facts of the incident and their

recommendations.⁵⁰ Prior to approval by the commander, the final report is first subject to a legal review from the commander's staff judge advocate (SJA) or legal advisor.⁵¹ In their review, the SJA specifically must determine:

1. Whether the proceedings complied with legal requirements;⁵²
2. Whether there were errors and, if so, whether they were substantial or harmless; the effects these errors had on the proceedings; and actions recommended to correct the errors;⁵³ and
3. Whether the findings of the investigation, board, or those substituted by the appointing authority are supported by sufficient evidence.⁵⁴

Following a legal review, the commander conducts a final review of the IO's or board's findings and recommendations.⁵⁵ The commander has the discretion to approve, disapprove, modify, or add to the findings and recommendations, and in so doing may consider "any relevant information," including information that was not considered by the IO or board of officers, in making their decision.⁵⁶

Criminal Investigations

When an alleged incident involves potential violations of U.S. law, it may be appropriate or required to conduct a criminal investigation rather than an administrative review. Upon learning of an alleged criminal offense, the commander should trigger a preliminary inquiry into the suspected offense.⁵⁷ Such investigations are typically conducted by the relevant service military criminal investigative organization (MCIO), which is established by federal statute and operates as a federal law enforcement agency. Each of the

45 AR 15-6, 2-1(f) ("An individual who has an actual or perceived bias for or against a potential subject of the investigation, or an actual or perceived conflict of interest in the outcome of the investigation, should not appoint an inquiry, investigation, or board. Instead, the potential appointing authority shall forward the matter to the next superior commander or appointing authority, who will determine whether to investigate the matter further and, if so, which proceeding (inquiry, investigation, or board) to use.")

46 AR 15-6, 1-8.

47 AR 15-6, 2-6(b).

48 AR 15-6, 5-2.

49 Ibid.

50 AR 15-6, 3-10 and 3-11.

51 AR 15-6, 2-7.

52 AR 15-6, 2-7(b)(1).

53 AR 15-6, 2-7(b)(2).

54 AR 15-6, 2-7(b)(3).

55 AR 15-6, 2-8(b)(1).

56 AR 15-6, 2-8(b)(3)(b).

57 Manual for Courts-Martial, Rule 303.



An explosion after an apparent U.S.-led coalition airstrike on Kobane, Syria

Orlok / Shutterstock.com

three MCIOs—the U.S. Army Criminal Investigation Command,⁵⁸ the Naval Criminal Investigative Service,⁵⁹ and the Air Force Office of Special Investigations⁶⁰—have investigative responsibility over felony-level offenses. A commander can request the opening of an MCIO investigation, or an MCIO might directly initiate its own criminal investigation. Once open, the Secretary of a

Military Department is the only person authorized to direct an MCIO to delay, suspend, or terminate an investigation.⁶¹ Furthermore, the MCIO is required to report any attempt by a commander to impede or block the investigation.⁶² As this report focuses on administrative investigations, it does not explore the criminal investigative process in detail here.

58 10 USC. § 1585a.

59 10 USC. § 7480.

60 10 USC. § 9027.

61 DoD Instructions 5505.3, 6.2.

62 DoD Instruction 5505.3, 6.4.

U.S. MILITARY TRACKING, ASSESSMENT, AND INVESTIGATION OF CIVILIAN HARM: KEY ISSUES IN PRACTICE

This section examines the practice of military investigations in determining whether, and how well, the investigative process has enabled the U.S. military to be responsive and transparent to reports of harm. The section also considers whether investigative practice enables the military to avoid harm based on lessons identified in specific investigations.

Overall, the research team found significant inconsistencies in when and how U.S. military investigations into civilian harm are conducted. In some cases, the U.S. military has carried out detailed and thorough investigations—reflected in investigations where the team found careful assessment of all available evidence, the deployment of resources and personnel, and the use of site visits or witness interviews. Individual military officers have also shown innovation and initiative when confronted with the challenges of conducting investigations in the midst of conflict. However, the lack of standardized approaches has contributed to a variety of shortcomings in other cases—including not investigating incidents when a close look was warranted, denying civilians access to meaningful and dignified channels to report incidents and get feedback on the status of their claims, and missing opportunities to learn from incidents and make future corrections.

This section, which identifies key issues and findings, draws on the full body of multi-method research conducted to: 1) identify and characterize the factors that affect various stages of an investigation in practice; 2) determine leading practices, as well as gaps and areas for improvement; and 3) acknowledge obstacles and challenges that may restrict the U.S. military's ability to investigate each civilian harm allegation with the same degree of thoroughness.

The following key issues as they relate to investigations of civilian harm are analyzed in turn: the importance of the commander's intent and the "command climate"; internal records and reporting; external reporting through NGOs, witnesses,

and the media; initial assessments; interviews of civilian witnesses; site visits; training and resources; outcomes and results of investigations; transparency; and lessons learned. Each section is prefaced with a set of "key takeaways," some of which serve to describe factors that are important to how, when, and why investigations are conducted, while others offer analysis of gaps or strengths. Each section also opens with a series of recommendations.

ESTABLISHING COMMANDER'S INTENT AND THE "COMMAND CLIMATE"

Key Takeaways and Findings

- **The commander plays a key role in determining which incidents are investigated, and how thoroughly.**
- **Commanders may be motivated by a variety of factors and may see the value of investigations differently, and these factors may differ significantly from the value of investigations to civilians themselves.**
- **Commanders who require or prioritize reporting through methods including their critical information requirements, and who pursue reports, are more likely to surface and thoroughly investigate civilian harm.**
- **Removing the soldiers' notion that investigations imply guilt or punishment is a common challenge faced by commanders. But over-emphasizing the importance of investigations in potentially exonerating soldiers may bias investigative results toward that end.**
- **A commander's dual role in both directing operations and ordering investigations of harm resulting from those operations creates an inherent tension and a potential conflict of interest. Commanders are required to balance their involvement in operations with the responsibility to remain impartial and ensure compliance with law and regulation over the course of an investigation.**

Recommendations

- **Commanding officers should make reporting of any and all incidents of civilian casualties mandatory through clear guidance, such as tactical directives or commander’s critical information requirements.**
- **Commanders should ensure to communicate to personnel within their command that investigations can, and do, serve many purposes, including accountability for persons harmed, unit discipline and effectiveness, and operational adjustments based on lessons learned.**
- **While investigations may result in the exoneration of military personnel of intentional wrongdoing, commanders should place unambiguous emphasis on the utility of investigations to providing recourse to harmed civilians and to preventing future incidents of harm.**
- **To reduce the risk of bias, commanders should select an investigating officer from outside his/her unit, and separate personnel who conduct civilian casualties tracking from those who are directly involved in operations.**

Establishing a “Command Climate” where Investigations are Valued Affects the Likelihood that an Investigation is Conducted and the Quality of Investigations

“Command climate” (also known as “command environment”), which lacks a formal or consistent definition in military doctrine, has been described as “what behavior and actions will and will not be acceptable to the members of the organization.”⁶³ Understanding the motivations driving a commander in shaping the overall command climate falls largely outside this report’s scope. Yet, a range of factors may influence a commander’s interest in establishing an environment specifically conducive to preventing and investigating

civilian casualties, and to ensuring that reports or complaints are taken seriously and that military personnel are likely to self-report any harm they observe. Commanders may relate the value of preventing and investigating civilian casualties to a variety of command objectives, including: ensuring discipline within their ranks; compliance with the law of war and rules of engagement; mission effectiveness; and pursuing a learning environment in which investigations help to identify errors or gaps in order to prevent them from recurring. Some experts interviewed for this report noted certain political factors or policy requirements that could also have a bearing on the degree of prioritization placed on civilian harm (for example, the Afghan government’s sensitivity to civilian casualties or the military’s focus on containing an insurgency).⁶⁴

The command climate also has considerable impact on what incidents—including civilian casualties—are reported, assessed, and investigated, and which are not.⁶⁵ When the commander emphasizes civilian protection as a priority, civilian casualty incidents are taken more seriously by military personnel and are much more likely to be adequately investigated. Importantly, a commander’s rationale(s) for ordering an investigation may differ substantially from the reasons investigations are important to other stakeholders, which may in turn create conflicting expectations of the investigative process and results. This is most clearly the case in the consistent emphasis placed by the military on the value of investigations to exonerate soldiers of wrongdoing, as distinct from the value of investigations for purposes of accountability and justice for those harmed.

Experts provided examples of the many ways in which commanders can establish an environment in which casualties are taken seriously, and in which reports of casualties would be more scrutinized. Explicit “Tactical Directives”, such as those issued to all military personnel serving within the International Security Assistance Force (ISAF) in Afghanistan in 2009, provide one straightforward

63 Thomas E. Ricks, “We need to understand what we mean when we talk about command climate,” *Foreign Policy*, May 30, 2013, <https://foreignpolicy.com/2013/05/30/we-need-to-understand-what-we-mean-when-we-talk-about-command-climate/>.

64 Center interview with Christopher Kolenda, Washington, D.C., December 7, 2017; Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

65 Center interview with Christopher Kolenda, Washington, D.C., December 7, 2017.

means of clarifying a commander's intent.⁶⁶ When asked what other ways one could "know" a commander prioritized civilian casualties, subjects noted the inclusion of civilian casualties among a Commander's Critical Information Requirements (i.e., the pre-identified set of issues and circumstances of which a Commander explicitly must be made aware), as one of the most important indicators. Other experts noted experience with a commander who required regular informal "standup" meetings on reported civilian harm incidents or commanders who asked detailed questions about reported civilian casualty incidents.⁶⁷

Conversely, the "normalization" of civilian harm within a command environment may stifle internal reporting or the initiation of investigations. Documents related to a civilian casualty incident in Haditha, Iraq in 2005 revealed that the "Marines came to view 20 dead civilians as not 'remarkable,' but as routine."⁶⁸ The investigation that was eventually launched into the incident concluded that the Marine Corps's chain of command engaged in willful negligence in failing to investigate the incident, and that "Marine commanders were far too willing to tolerate civilian casualties."⁶⁹ One workshop participant pointed out that "If [a civilian casualty is] an isolated incident, it becomes more significant. If it is one of many, it sounds cold, the commander will account for it but maintain operational tempo."⁷⁰

Clear Guidance is Required to Ensure Consistency in Investigations

Many experts interviewed by the research team were skeptical that an investigation into any matter—let alone civilian casualties—would proceed without explicit direction from the commander. A former government official stressed that a battle space operator must be "compelled, forced or empowered to investigate something. Operators will not act on media reports of civilian casualties unless there is commander's intent or a Concept of

“Senior Commanders and JAs need to emphasize continually that the primary purpose of investigations is to protect Soldiers from unsubstantiated allegations.”

– *GLAMO Report, Forged in the Fire*, p. 183

Operations (CONOP) mandating them to act on these reports.”⁷¹ These experts described the importance of clarifying the commander's intent by establishing uniform and documented procedures through orders or directives within a unit of how information about civilian casualties should be reported and investigated. For example, in 2006, Lieutenant General Chiarelli, who served as the commanding general of U.S. troops in Iraq, required

66 See, for example, Sahr Muhammedally, "Minimizing civilian harm in populated areas: Lessons from examining ISAF and AMISOM policies," *International Review of the Red Cross* (2016), 98 (1), 225–248.

67 E.g., Center interview with Richard Bew, former military official, Washington, D.C., Aug 23, 2018; Center interview with Jay Morse, former military official, Washington, D.C., Aug 23, 2018.

68 Amy Tan, "The Duty to Investigate Alleged Violations of IHL: Outdated Deference to an Intentional Accountability Problem," *New York University Journal of International Law and Politics* (2016) p. 188-89.

69 Michael S. Schmidt, "Junkyard Gives Up Secret Accounts of Massacre in Iraq," *The New York Times*, December 14, 2011, <https://www.nytimes.com/2011/12/15/world/middleeast/united-states-marines-haditha-interviews-found-in-iraq-junkyard.html>.

70 Center scenario exercise at United States Military Academy at West Point, April 26, 2018.

71 Center interview with Jonathan Horowitz, New York, NY, January 24, 2018.

all commanders to begin investigating every instance of death or serious wounding of an Iraqi civilian, regardless of whether the alleged civilian casualty involved an accusation of misconduct.⁷² More recently, the 2018 instruction for AFRICOM's Memoranda for Record includes a statement of policy that "USAFRICOM, Component Commanders, and subordinate units will ensure all CIVCAS allegations, regardless of source, are treated as serious claims and are reported and assessed in accordance with this instruction."⁷³ Similarly, Resolute Support conducts initial inquiries into all allegations regardless of the source of allegation.⁷⁴

Establishing a Culture of Accountability while Avoiding Perceptions of Investigations as Punishment

U.S. military guidance makes clear the importance of investigations to "furthering the good order and discipline of their command,"⁷⁵ and to ensuring "a high standard of order and discipline within the commander's unit."⁷⁶ But many interview subjects noted the inherent tensions between establishing a culture of reporting and accountability on the one hand, and avoiding circumstances in which soldiers would view investigations as a form of punishment.

The Army Tactical Publication on Protection of Civilians explicitly acknowledges this tension:

"When a civilian casualty incident occurs, leadership should avoid creating an overly punitive environment where the focus is on finding someone to blame for an incident. Sometimes, civilian casualty is simply an unfortunate part of warfare. A purely punitive approach provides incentives for subordinates to suppress information and cover up incidents, keeps valuable

lessons in legal channels, and limits initiative and learning. Instead, leaders should first mentor units and individuals to help them to refine their approaches and overcome challenges with which they may be struggling. Monitoring of civilian casualties at all echelons can aid leaders in deciding when mentoring is needed and what kind of mentoring is appropriate."⁷⁷

Military experts consulted for this report suggested that commanders may manage this tension by demonstrating fairness and equanimity in the process.⁷⁸ Others emphasized the value of investigations to learning. For example, a serving military official remarked that his commanding general "put a real focus on learning...he explicitly said not to get defensive. He wanted to get back to figuring out what happened so we could learn from it."⁷⁹ A publication from the Center for Law and Military Operations (CLAMO) points out that investigations "allow the soldier to tell their side of the story, should questions arise," and that "those few circumstances where soldiers act wrongly provide useful lessons to avoid repeating such mistakes."⁸⁰

At the same time, while characterizing the value of investigations in terms that appeal to those inside the military may increase the likelihood of investigations, overstating the extent to which the explicit purpose of investigations is to exonerate soldiers may create the incentive to steer the results of investigations away from accountability and toward absolution.

Potential for Commander Bias

Although many commanders may see clear value in conducting investigations, they may also have competing incentives to avoid investigating their

72 Colin H. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and US Conduct in Iraq," *Quarterly Journal: International Security*, vol. 31, 2007.

73 U.S. Africa Command Instruction (ACI) 3200.03, "United States Africom Instruction: Reporting and Responding to Civilian Casualties Allegations and Incidents," 112.

74 E-mail from CIVCAS Mitigation Team, Resolute Support Headquarters to CIVIC staff, November 23, 2019.

75 AR 15-6.

76 OPNAV Instruction 5530.14E.

77 ATP 3-07, 5-45.

78 Center interview with Richard Bew, former military official, Washington, D.C., Aug 23, 2018.

79 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

80 Center for Law and Military Operations, "Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008," United States Army, September 2008, p. 183, https://www.loc.gov/rr/frd/Military_Law/pdf/forged-in-the-fire-2008.pdf.

own units. For example, investigations can reveal systemic issues with specific units or incriminate the command leadership, senior commanding officers, or their own troops. In some instances, the same authority who approved a strike that led to a civilian casualty allegation is the same person who conducts or oversees the credibility assessment.⁸¹

Simultaneously fulfilling these at times complimentary, at times competing, responsibilities can introduce challenges to ensuring that investigations are conducted independently and without undue command influence. Some NGOs have gone as far as to say that the significant and decisive role played by the commander in the investigative process constitutes a “structural flaw” in the civilian casualty assessment and investigation process.⁸²

One report of investigation into the death of two children by shrapnel caused by U.S. forces illustrated how bias may enter into a commander’s analysis, as he noted “this is a very typical engagement with the enemy out here. [Redacted name of soldier] is one of my very best and he proved why here” (emphasis in original).⁸³

However, some commanders seem to recognize the risk of bias enough to actively mitigate it. For example, in OIR, steps were taken to reduce the risk of bias by ensuring that personnel involved in air operations are not assigned to staff the CIVCAS cell.⁸⁴

INTERNAL RECORDS AND REPORTING

Key Takeaways and Findings

- **Internal military records can be incomplete and inconsistently maintained, leading to erroneous dismissal of civilian casualty allegations.**
- **The military too often relies solely on its internal records and sources, which can be flawed and incomplete, to assess civilian harm.**

- **Military assessments of harm conducted based on internal records can excessively rely on remote analysis and overhead imagery, which can contribute to errors in subsequent military investigations or even prevent investigations from occurring.**

- **In spite of known limitations, the military has conducted investigations and acknowledged civilian harm as a result of its own internal reporting (“self-reporting”). At times, the military itself is the only source reporting incidents of harm.**

- **The military may assume that internal records are more accurate than reports from outside organizations or individual claimants, which can lead to blind spots and gaps in both investigations and acknowledgement of civilian harm.**

Recommendations

- **Department of Defense policies and military procedures should explicitly recognize that internal records are a necessary, but insufficient, source for discovering civilian harm and for corroborating claims of harm from outside parties.**

- **Records, such as flight logs, flight data recorders, and collateral damage assessments, should be used consistently, checked for accuracy and completeness, and be made accessible to military officials responsible for assessing and investigating harm.**

- **The military, and outside parties, should recognize cases in which the military itself identifies, reports, and acknowledges harm as good practice.**

81 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

82 “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>; This is similarly an issue in international military operations, see e.g. Chris Rogers, “Addressing Civilian Harm in Afghanistan: Policies and Practices of International Forces,” Center for Civilians in Conflict, 2010, https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf.

83 Investigation 270.

84 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

Accurate Internal Records are Important to Effective Investigations

Accurate internal information, recorded and stored by the U.S. military, such as satellite imagery, flight logs, targeting data, and communications transcriptions or “chat logs,” can be crucial sources of evidence in the assessment and investigation of civilian harm. One retired military interviewee recalled reviewing full-motion video from an air strike in which a young girl had been killed in order to determine what the air crew could observe at the time, in order to assess whether they had followed procedures and determine if further investigation was warranted.⁸⁵ Internal information can also be used to either corroborate or dispute external reports of alleged incident by cross-referencing the information provided with what is known about U.S. military action in a certain place and time. Kinetic engagements are at times recorded out of concern that an adversary could fabricate evidence of civilian casualties to discredit the U.S. military. In the words of a serving military general with experience in an array of different theaters, internal records serve “to protect ourselves from false accusations.”⁸⁶

Official procedures acknowledge the value of internal sources in the assessment or investigative phases by explicitly referring to them in SOPs, appointment orders, and investigation checklists. For example, OIR’s procedural guidance includes instructions for the assessing officer to review information related to the military’s own collateral damage estimation, battle damage assessment, full-motion video, chat logs, intelligence records, and other internal sources of information. AR 15-6, though not CIVCAS-specific, directs the IO to begin their investigation by “collecting documentary and physical evidence, such as applicable regulations, existing witness statements (e.g. when soldiers are involved in an incident such

as a shooting and take statements at the scene), accident or police reports, video/audio evidence (for example, UAS/Apache camera), and photographs”—some of which constitute internal information.⁸⁷

In spite of their importance to investigations, units or individual officers may not always routinely document or record information that could later be useful to investigations. A former military intelligence analyst with knowledge of targeting processes noted that the maintenance of flight and strike records is often “not a priority, and sometimes it falls through the cracks,” (for example, pilots neglecting to routinely upload information from data recorders).⁸⁸ Limiting or curtailing the use of instruments that record data before and during kinetic engagements because of competing demands can also limit the information available to investigators later. This is often the case with valuable intelligence, surveillance, and reconnaissance (ISR) assets. As such, an effective investigations process depends on the extent to which military units make the effort to record and store data from operations, and the extent to which those records are accessible from those who may need it to evaluate a claim of civilian harm.

Overhead Images May Not Tell the Whole Story When Used to Assess Civilian Harm

The U.S. military has used videos or photos taken from aircraft and satellite imagery to conduct its assessments of civilian harm that resulted from airstrikes. In OIR (Iraq and Syria), the U.S.-led Coalition reportedly used post-strike video assessment,⁸⁹ and in AFRICOM’s operations in Somalia, the military assesses damage at the target site after a strike using aircraft.⁹⁰ The civilian casualty team for NATO Resolute Support in Afghanistan similarly relied on visual and satellite imagery.⁹¹

85 Center interview with Richard Bew, former military official, Washington, D.C., Aug 23, 2018.

86 Center interview with a former military official with knowledge of military investigations processes (name withheld), U.S. Military Academy West Point, April 26, 2018.

87 OIR CCAR SOP, May 2018, 20-23.

88 Center interview with Marc Garlasco, former military intelligence analyst, currently senior military advisor for the United Nations Human Rights Council, New York, NY, January 25, 2018.

89 Samuel Oakford et al., “Death in the City: High Levels of Civilian Harm in Modern Urban Warfare Resulting from Significant Explosive Weapons Use,” Airwars, 2018, <https://airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf>; Chris Woods et al., “Limited Accountability: A Transparency Audit of the Coalition Air War Against So-Called Islamic State,” Airwars, May 2018, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf.

90 “The Hidden U.S. War in Somalia: Civilian Casualties from Air Strikes in Lower Shabelle,” Amnesty International, April 2019, <https://www.amnesty.org/download/Documents/AFR5299522019ENGLISH.PDF>.

91 “NATO: Bolster Inquiries Into Afghan Civilian Deaths,” Human Rights Watch, July 9, 2018, <https://www.hrw.org/news/2018/07/09/nato-bolster-inquiries-afghan-civilian-deaths>.



A group of civilians, fleeing Mosul during the anti-ISIS military offensive, take rest in an abandoned building on their way to a displacement camp. December 2, 2016.

Redline / Shutterstock.com

Advancements in technology have enabled viewers to see highly magnified images, even from high altitudes. Yet overhead surveillance, while an important resource for identifying harm, is nonetheless subject to significant limitations, including the inability to record from different angles or to record damage below an opaque surface like a collapsed roof. Surveillance that is limited in time may also fail to capture movements of civilians once they move into certain areas or structures. Importantly, overhead imagery by itself is often not sufficient in enabling determinations of identity or combatant status of an individual on the ground who has been killed or injured. Post-strike aerial footage may not capture civilians harmed where they entered a building before it was struck and before aerial surveillance began,⁹² or the bodies of the dead that have been relocated or buried in the aftermath of a strike.⁹³ Consequently, incidents of harm may go unidentified by the military and, hence, are not internally reported. An internal U.S. government study revealed how initial air BDA in Afghanistan failed to identify civilian casualties in 90% (19 out of 21) of cases. Civilian casualties were only subsequently identified through ground force investigations.⁹⁴

Military Self-Reporting of Civilian Harm is a Necessary, but Insufficient, Source

Some critics question whether or not the military is

incentivized at all to self-report civilian casualties,⁹⁵ and there is some polling data to substantiate the concern. According to a survey of U.S. military personnel in Iraq in 2013, only 55% of soldiers and 40% of marines would report a unit member for injuring or killing an innocent non-combatant.⁹⁶ NGOs that track and document reports of civilian casualties caused by the U.S. military have raised concerns that some assessments or investigations into alleged harm may never be opened as a result of a culture of not reporting incidents.⁹⁷ For example, in one incident from 2010 in Afghanistan, two commands did not report suspected civilian casualties from an airstrike despite the existence of full-motion video showing women and children on the site, intelligence reports, and a First Impression Report from the aviation unit which conducted the strike.⁹⁸ The investigation concludes that the commands had “had ample evidence of a possible CIVCAS incident but failed to report it.”⁹⁹ The incident was only reported 12 hours after the strike, when the survivors sought medical treatment and the surgeon reported the casualties in the hospital.¹⁰⁰

Thus, flawed initial recording and reporting, including from ground units, may lead to incidents of civilian harm not being investigated. There are several reasons why the initial reporting may be flawed. As one IO notes in a civilian casualty investigation from Afghanistan in 2010:

92 Center interview with Chris Woods, founder and Director of Airwars, London, U.K., September, 21, 2018; Samuel Oakford et al., “Death in the City: High Levels of Civilian Harm in Modern Urban Warfare Resulting from Significant Explosive Weapons Use,” Airwars, 2018, <https://airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf>.

93 ““Will I Be Next?” U.S. Drone Strikes in Pakistan,” Amnesty International, October 22, 2013, <https://www.amnesty.org/download/Documents/12000/asa330132013en.pdf>.

94 Christopher D. Kolenda et al., “The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts,” Open Society Foundations, June 2016, <https://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf>, citing an unpublished study carried out by Dr. Larry Lewis.

95 This point has been stressed in “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>; Richard Bennett, “No Justice for Afghan Civilians Killed by U.S. or NATO Forces,” Amnesty International, August 13, 2014, <https://www.amnesty.org/en/latest/campaigns/2014/08/no-justice-for-afghan-civilians-killed-by-us-or-nato-forces/>.

96 Defense Legal Policy Review Board, “Report of the Subcommittee on Military Justice in Combat Zones,” Department of Defense, May 30, 2013, <http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf>; survey quoted in “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>.

97 “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf> (Referring to a refer to a survey of military personnel in Iraq which found that only 55% of soldiers and 40% of marines would report a unit member for injuring or killing an innocent combatant).

98 Investigation 74.

99 Ibid.

100 Ibid.

“Initial reporting invariably has a certain level of inaccuracy because either the situation has not completely developed or the person reporting it has not yet completely digested the situation.”¹⁰¹The problem may be compounded in an armed conflict setting where the quick tempo of operations and fluctuating information may prevent crucial details about a given incident from emerging. One investigating officer noted that a civilian casualty incident was improperly reported due to “inattention to detail” and “several events occurring at once,” which resulted in the unit in question not initiating an investigation as required.¹⁰²

That said, the available record of practice suggests that internal reporting is still an important trigger for assessments and investigations into civilian harm. Publicly available records demonstrate that assessments and investigations have been initiated as a result of internal reports, many of which resulted from acknowledged human or intelligence errors.¹⁰³ Of the administrative investigation reports analyzed by the research team (covering the period up to 2014) that included information indicating the source of the allegation, 60.5% came from internal reports. During OIR, from January 2015 to December 2017, internal reports were the source of 88% of the civilian casualty incidents that were deemed credible.¹⁰⁴ Without self-reporting on the part of the pilots, operators, and analysts involved in these incidents, many assessments would likely not occur. Even so, the limitations of these systems make clear the added benefits of externally sourced reports.

Case Study: Military Self-Report Leads to Investigation

In Afghanistan in March 2007, U.S. military personnel in a convoy engaged a civilian vehicle with gunfire next to the site of a recently detonated explosive device. Even after departing the vicinity, soldiers continued to fire upon local buildings, vehicles and civilians for a distance of over six kilometers from the original bomb site. The convoy commander reported the engagement via text message to the Marine Special Operations Company (MSOC) Foxtrot. Although the investigation notes that this is not an approved method of communication in their concept of operation, it constitutes an effective internal report that led to an adverse finding. The Investigating Officer ultimately concluded that the U.S. military personnel involved “acted unreasonably in treating the Prado SUV and other personnel in the immediate vicinity of the [suicide vehicle borne improvised explosive device] blast as hostile ...[and] acted unreasonably in using deadly force against these civilians.”¹⁰⁵

101 Investigation 73.

102 Investigation 479.

103 Chris Woods et al., “Limited Accountability: A Transparency Audit of the Coalition Air War Against So-Called Islamic State,” Airwars, May 2018, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf.

104 Institute for National Strategic Studies, “Civilian Casualty (CIVCAS) Review: Executive Summary,” National Defense University, April 17, 2018, p. 11, <https://www.justsecurity.org/wp-content/uploads/2019/02/Civ-Cas-Study-Redacted-just-security.pdf>

105 Investigation 155.

NGOS, WITNESSES, AND MEDIA REPORTING

Key Takeaways and Findings

- Non-military sources, such as survivors and witnesses, civil society, and the media, can have information that does not exist otherwise in military records. These sources provide an important source of initial reports of civilian casualties as well as an important resource for further investigation.
- As U.S. military operations have shifted from ground operations towards air campaigns, the volume of reports from external sources such as NGOs and the Media has increased in proportion to other reports (such as from local government officials).
- When the military relies on its own records to corroborate outside claims, it may miss civilian harm, given known gaps in overhead imagery and internal records.
- Civilians, civil society, and others often face barriers when trying to make complaints of civilian harm to the military even though standard procedures often stipulate that the military will assess claims from any source.

Recommendations

- The U.S. military should ensure that a reliable and accessible complaints mechanism or reporting channel is available to civilians and civil society for each of its operations, through a method that is accessible, easy to understand, and in the language(s) of those who are most likely to use it. Complaints mechanisms should ensure the safety, privacy, and cultural needs of claimants.
- The U.S. government should ensure that it works with partners and local governments to facilitate receipt of information from claimants, including by creating channels to receive such reports in advance of operations.

- The U.S. government should explicitly recognize the value of external information as a critical resource in the investigations process by emphasizing its importance in policy and by requiring its consideration in procedures.

Reports by Witnesses, NGOs, and the Media are Critical Resources

Given the inherent gaps created by overhead imagery and sources of intelligence that vary in reliability, external reports can greatly supplement what the military can directly observe—or claims to independently know—about the effects of its operations on civilians. External reports may bring new details to light when the U.S. military does not have access to a strike site, or where its own logs do not record a strike at the site of the incident. As a former senior ISAF officer stressed to CIVIC in a previous report, “We needed third-party validation [of civilian casualty data]... Military tracking and non-military tracking are both important.”¹⁰⁶ Moreover, external reporting, particularly when it comes directly from civilians, may contain crucial information about the status of the individual or individuals harmed (e.g. that they were a civilian) or of the site targeted (e.g. that it was a protected civilian object such as a place of worship or a house).

Yet both NGOs and civilians acting in their own capacity who wish to report harm have found the lack of a clear, accessible reporting channel a key barrier to reporting civilian harm. “[This is] one of the major challenges. Nobody has any number, [any way] to approach the U.S. government. No such mechanism exists—[not just] now, but for the last 18 years,” said an Afghan researcher working on civilian casualty issues.¹⁰⁷

106 Jennifer Keene, “Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan,” Center for Civilians in Conflict, May 9, 2014, https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf; Azmat Khan and Anand Gopal, “The Uncounted,” *New York Times Magazine*, Nov. 16, 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>.

107 Human Rights Institute phone interview with Afghan civil society organization researcher, November 12, 2019.

Military Operations Without a Ground Presence May Make it More Difficult for Civilians to Submit Complaints

In most of the investigations reviewed for this report from Afghanistan during the period between 2004 and 2014, the U.S. military had a significant ground presence, making it easier for civilians or local government officials to report incidents by directly approaching bases to lodge a complaint or a compensation claim.¹⁰⁸ A significant 24% of the investigations reviewed from this time concerned complaints coming directly from civilians, including survivors/victims and civilian witnesses. The U.S. military also had relationships with community leaders which also may have encouraged, or at least made it easier, for civilians to come forward to report incidents. In several investigations reviewed for this project, the military became aware of harm from local government officials, police reports, or community leaders.¹⁰⁹ And of the administrative investigations reviewed from this time, in more than half of those that originated from external reporting, the military concluded that the allegation was substantiated.

In current campaigns, often characterized by the use of air strikes and partnered operations (such as Inherent Resolve or operations in Somalia), the known channels for civilians to directly report harm to the U.S. military have been largely closed off. Publicized avenues for direct engagement between civilians and the military are limited in Iraq and Syria (as the coalition headquarters is located in Kuwait and there are few or no local military installations representing the coalition), greatly reduced in Afghanistan, and are effectively non-existent in Yemen and Somalia (where air operations are run from Djibouti and elsewhere and there is no known accessible ground presence).¹¹⁰ A Somali human

rights activist pointed out that “the only thing [victims] can do is file a complaint with the local police station. But there’s nothing the police station can do. [When] we have talked to a police station...they told us that the U.S. forces are very far from here and we don’t even know how to reach out to them.”¹¹¹

Moreover, the nature of multinational coalition operations makes attribution, and therefore making a complaint, for an airstrike to any one nation all the more difficult.¹¹² Meanwhile, relationships between U.S. military and civilian leaders may be difficult to forge in places where the military lacks a significant ground presence. Organizations such as Airwars have taken on a new role as intermediaries by acting as a proxy for civilians in providing the U.S. military with information and evidence of specific incidents of civilian harm. As noted, while the 2019 NDAA provides for the development of accessible reporting channels through which civilians and civil society can lodge complaints about civilian harm, this requirement has not yet been implemented.

Given the number of partner and coalition operations where the U.S. lacks a significant ground presence, military reporting channels that respond to the different contexts in which the military operates will need to be established. Channels could allow for reporting by email, through secure telecommunications, through a process created in coordination with local authorities, and/or by working with the United Nations or a non-governmental organization. The procedures for using such mechanisms should be shared with populations who may be affected by U.S. military actions and local intermediaries such as government officials, civil society organizations, or local leaders, using the most appropriate means of publicity. Complaints and reporting mechanisms should ensure the safety,

108 Chris Rogers, “Addressing Civilian Harm in Afghanistan: Policies and Practices of International Forces,” Center for Civilians in Conflict, 2010, https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf; At the time, however, the lack of clear direction to civilians as to where to direct their complaints had already been noted, see e.g. “From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan,” Afghan Independent Human Rights Commission, December 2008, p. 45, https://www.aihrc.org.af/media/files/Research%20Reports/english/Eng_Pro_G_2.pdf.

109 E.g. investigations 78, 158, 173, 264, 266, and 269.

110 An e-mail address created by the State Department to report claims is not publicized and is very rarely used.

111 Human Rights Institute phone interview with Somali human rights activist, November 25, 2019.

112 Sue Eedle et al., “Civil Deaths in the Anti-ISIS Bombing Campaigns 2014–2015,” Minority Rights Group International, November 2015, p.3-13, <https://minorityrights.org/wp-content/uploads/2015/11/CEASEFIRE-REPORT-Civilian-deaths-in-the-anti-ISIS-bombing-campaigns-2014-15.pdf>; Ole Solvang et al., “All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria,” Human Rights Watch, September 24, 2017, https://www.hrw.org/sites/default/files/report_pdf/syria0917_web_0.pdf. Institute for National Strategic Studies, “Civilian Casualty (CIVCAS) Review: Executive Summary,” National Defense University, April 17, 2018, p. 11, <https://www.justsecurity.org/wp-content/uploads/2019/02/Civ-Cas-Study-Redacted-just-security.pdf>

privacy, and cultural needs of complainants. The military should evaluate its complaints system and continuously work to improve it based on feedback from civil society and civilians.

According to the DoD's 2019 official CIVCAS Study, external allegations were the source of only 23 out of 191 (12%) of incidents that were deemed "credible" by OIR from 2015 through 2017 (even though these incidents accounted for 58% of confirmed civilian casualties).¹¹³ As a result, during the two first years of the campaign, official estimates limited the civilian death toll to 152 civilians, whereas Airwars estimated a minimum of 1,500 civilians casualties—a 90% discrepancy.¹¹⁴ According to some analysts, this stems in part from the absence of public guidelines clarifying the information required by tracking cells in order to deem an external report "credible." The military may also employ an artificially high evidentiary standard for establishing credibility of external reports through the assessment process, which is detailed in the next section.¹¹⁵ Civilian casualty allegations made by NGOs or other non-military sources that are deemed by the military to be "non-credible" do not progress to a later stage of investigation unless additional information comes to light.

NGO-Military Communication: A Positive Example

Airwars monitors sources of civilian harm, tracking public claims made by affected communities; active belligerents; local monitors; and through regional and international media. Since mid-2016, Airwars has engaged first with CENTCOM and then with the Inherent Resolve civilian harm assessment teams on a regular basis, as part of ongoing efforts by all parties to improve understanding of this publicly reported civilian harm. Data is regularly exchanged both ways between the civilian casualty cells and Airwars - for example information on incident locations, and open source analysis. Confidential exchanges of information also take place fairly regularly on specific events - with an understanding that Airwars will nevertheless make public certain provided information, for example near location data for credible casualty events. By 2018, Airwars had become the primary source of OIR civilian casualty assessments - and of determinations for non-combatant harm deemed credible by the U.S. military.

113 Institute for National Strategic Studies, "Civilian Casualty (CIVCAS) Review: Executive Summary," National Defense University, April 17, 2018, <https://www.justsecurity.org/wp-content/uploads/2019/02/Civ-Cas-Study-Redacted-just-security.pdf>.

114 Chris Woods et al., "Limited Accountability: A Transparency Audit of the Coalition Air War Against So-Called Islamic State," Airwars, May 2018, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf.

115 "US Military assessments of civilian harm: Lessons learned from the international fight against ISIS," Airwars, March 2019, p. 4, <https://airwars.org/wp-content/uploads/2019/03/Airwars-2019-Interim-Better-Practice-Recommendations-for-DoD.pdf>.

INITIAL ASSESSMENTS

Key Takeaways and Findings

- The volume of external reports received in recent operations has led to the introduction of an official “assessment” into the investigative process, which occurs between an initial report and a formal investigation.
- Since circa 2014, the assessment process (CCAR) has replaced certain functions that were once largely served by administrative investigations, such as the initial fact-finding process, determination of facts, and the acknowledgement of harm.
- The expedited nature of the assessment process, combined with the military’s heavy reliance on internal records to corroborate outside reports, may compromise the thoroughness of an inquiry into civilian harm and affect the accuracy of its results.
- The assignment of officers from within the command overseeing an operation to conduct assessments may bring the benefit of proximity to the operation and access to military records, but may compromise the impartiality of the assessment process.
- One consequence of this “speed vs. accuracy” tradeoff is an artificially low military estimate of total civilian casualties, which may also affect the assumptions used by the military for planning purposes.
- Cases where an assessment yields a positive determination of civilian casualties, and where the assessment matches the account in a report, may not require the collection of additional evidence through a site visit or witness interviews in order to acknowledge the incident and provide redress to victims. Yet these cases may merit further investigation for other reasons.

Recommendations

- The practice of conducting an automatic assessment of any and all claims of civilian harm should be preserved.
- The procedure for assessing that an external claim of civilian casualties is “credible” should be revised to enable thorough inquiry into all plausible reports of civilian harm, and to prevent premature dismissal of potentially valid reports.
- The CCAR as currently designed is less suited to producing adjustments to military tactics or to lessons learned from operations than the administrative investigation, and therefore the military should either proceed with an investigation for all known casualties or take other measures to compensate for this critical gap, such as conducting regular reviews and studies of civilian harm incidents and of patterns of harm. Credibility assessments should include adequate data to enable broader analysis.
- In operations where the U.S. military receives a high volume of reporting of civilian harm, it should conduct civilian harm tracking and conduct periodic internal reviews to assess the possibility of systemic problems or gaps that could lead to civilian harm.
- The military should establish standard procedures that require serious consideration of any new information or evidence that may change the outcome of an assessment.
- The military should publicly clarify the criteria by which it establishes the credibility of complaints or reports, to include the standard applied to conclude that harm occurred as a result of a U.S. military act.

The initial fact-finding function served by the preliminary inquiry or AR 15-6 investigation has been largely replaced by the CCAR, and, as a result, AR 15-6 investigations have become rare in civilian casualty incidents when compared to the period prior to 2014. Between 2016 and 2019, AFRICOM conducted 37 assessments of civilian casualties in Somalia, but conducted no AR 15-6

investigations.¹¹⁶ According to a senior official at CENTCOM, only 41 AR 15-6 investigations into civilian harm from coalition operations in Iraq and Syria were completed between 2015 and July of 2019, with three still pending,¹¹⁷ though the coalition conducted over 2,800 assessments and confirmed 1,321 civilian fatalities in the same period.¹¹⁸

Advantages and Disadvantages of the CCAR Process

The CCAR process offers some advantages over the AR 15-6. Importantly, both AFRICOM and CENTCOM require a review and assessment for any report of civilian casualties, reducing the likelihood that any claim will be ignored entirely. Practically speaking, conducting an AR 15-6 for every case of reported or alleged civilian harm may also be very difficult during high tempo air operations, when the U.S. military may receive a high volume of reports (as it did during OIR). A CCAR-like process may therefore be the most efficient use of capacity and resources in a high-tempo environment. The use of a less formalized process also gives the U.S. military the ability to acknowledge civilian casualties more quickly.

However, CCARs, as currently designed, cannot replace certain functions of a more formal investigation, such as a detailed description of “what happened” during an incident (i.e. they are by nature less thorough). Additionally, they do not include any after-action recommendations, possibly making short-term corrections or the identification of lessons learned over time less likely, in the absence of any additional form of purposeful analysis. Most problematically, as currently designed, CCARs offer no real opportunity to victims to participate in the investigative process. Victims or family members are also not automatically informed of the results of an investigation, other than possibly having harm acknowledged through the periodic disclosure of

civilian casualty estimates (such as the monthly OIR report or the annual report to Congress). The exception to this is Operation Resolute Support, wherein the Civilian Casualties Mitigation Team will release results upon request.¹¹⁹

Too Many Outside Reports are Dismissed as Non-Credible

Research suggests that the procedures employed by the military during the assessment process create the risk of dismissing valid external reports and complaints as “non-credible,” thus preventing further investigation of these incidents.

First, the criteria employed during the assessment procedure establishes a standard of proof that requires the claimant and the report to be both assessed as a “credible” source by the military (e.g. a reported incident contains details that can be cross referenced with known U.S. military activity) and also requires a level of detail that can be used to confirm that physical harm was experienced by a civilian (such as photographs).¹²⁰ The military then uses its own records—records that may not be complete or accurate—to corroborate claims. For example, an investigative report by *The New York Times* identified multiple instances in which OIR dismissed reports of civilian casualties as “non-credible” because they did not align closely enough with the coordinates of strikes recorded in the logs.¹²¹ However, when a *Times* journalist presented new evidence, the coalition conceded many of the reported incidents as their own. In one case, the coalition explained the inconsistency by noting that “the coalition had conducted multiple strikes on various targets within an hour-long period, only one of which was included in the official log.”¹²² Current procedures do not require outreach to any additional outside sources during the assessment process.

116 E-mail from AFRICOM, September 9, 2019.

117 112 E-mail from NGO source citing Senior OIR Official, July 15, 2019

118 Combined Joint Task Force - Operation Inherent Resolve Monthly Civilian Casualty Report, July 27, 2019, <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1918673/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/>.

119 E-mail from CIVCAS Mitigation Team, Resolute Support Headquarters to CIVIC staff, November 23, 2019.

120 U.S. Africa Command Instruction (ACI) 3200.03, “United States Africom Instruction: Reporting and Responding to Civilian Casualties Allegations and Incidents,” 112.

121 Azmat Khan and Anand Gopal, “The Uncounted,” *New York Times Magazine*, November 16, 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>.

122 Ibid.

“I researched online on what are the ways we can approach the U.S. government.... I did not find any mechanisms.... [There is] not a very clear road from the [U.S.] government for NGOs or any other civilians who want to file complaints, or just provide information.”

—*Representative of Yemeni non-governmental organization*

In some situations, the volume of reporting may create the risk that the military will not spend the time and resources required to adequately consider serious allegations of harm during the assessment phase. In one case, in the period of one month (September 2017), the U.S. military said that it assessed 185 independent reports of civilian harm in Mosul and Raqqa as non-credible.¹²³ While some reports may have been duplicates, or may have been too vague to assess, a researcher from Airwars stated that “There could have been no way for them to make an assessment of value at that tempo.”¹²⁴ Even so, nothing inherent to the CCAR should limit the ability of the military to provide an adequate response in a confirmed civilian casualties incident. Notably, when an allegation receives wide media coverage, the U.S. military may decide to investigate it further regardless of assessed credibility. According to one retired military interviewee, “As soon as you started to see in the newspaper reports that there were 200 killed, it was a major visibility challenge” (i.e. the publicity-created incentive to investigate further).¹²⁵

The Military Rarely, if Ever, Explains its Conclusions

The military’s public reporting on civilian casualty claims provides little, if any, information about the reasons for why certain allegations were dismissed as “non-credible,” or what information—including reports from affected communities and civil society—was utilized in arriving at their final determinations.¹²⁶ In an internal review of civilian casualties, the U.S. military noted that civil society had repeatedly expressed frustration that “USCENTCOM’s public release of assessment and investigation findings offers little detail as to why a CIVCAS allegation is considered ‘not credible.’”¹²⁷ Indeed, OIR’s monthly civilian casualties reporting generally offers only a single line on an incident’s dismissal. In an e-mail to the research team, the Civilian Casualties Assessment Team for Operation Resolute Support noted that it “releases investigation results upon

123 Center phone interview with Chris Woods, founder and Director of Airwars, June 26, 2019.

124 Ibid.

125 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

126 Center phone interview with Chris Woods, founder and Director of Airwars, June 26, 2019.

127 Institute for National Strategic Studies, “Civilian Casualty (CIVCAS) Review: Executive Summary,” National Defense University, April 17, 2018, p. 9, <https://www.justsecurity.org/wp-content/uploads/2019/02/Civ-Cas-Study-Redacted-just-security.pdf>.

request to NGOs, government officials and members of the press” and further, that they “also provide feedback and information to local provincial governors to ensure shared awareness and so they may better communicate with their constituencies regarding our operations.”¹²⁸

Reassessing Reports Deemed Non-Credible

According to the 2018 DoD annual report to Congress, “existing assessments are updated if new information becomes available.”¹²⁹ The U.S.-led Coalition in Iraq and Syria has reopened dismissed cases in response to additional credible information provided by civil society. In 2018, after receiving new evidence from Amnesty International, the Coalition agreed to reassess three cases that had previously been closed as “non-credible,” as well as to evaluate one new case.¹³⁰ Investigations were also re-opened in at least 94 incidents following a joint investigation between Airwars and Amnesty International into civilian casualties in Raqqa, Syria.¹³¹

In December 2017, the head of AFRICOM, Gen. Thomas Waldhauser, asked the Naval Criminal Investigative Service (NCIS) to investigate an August 2017 raid by Somali troops and U.S. special operations forces. AFRICOM’s initial investigation denied that any civilians were killed in the attack, but General Waldhauser reportedly called for the NCIS investigation after media reports came out saying that local villagers were insistent that civilians were killed.¹³² However, in some instances, even after NGOs have brought new information about those allegations, the military has not been willing to reopen cases it has already found to be non-

credible, saying that investigators have already considered all “reasonably available evidence.”¹³³ Even when journalists have offered to connect military officials with eyewitnesses or have provided them with the names or contact information of victims and their family members and other relevant information, officials have often been unwilling to reassess allegations of civilian casualties.¹³⁴

Discrepancies in External and Internal Civilian Casualty Estimates

The U.S. military’s dismissal of many external reports of civilian casualties contributes to the significant discrepancy in estimates of civilian casualties between the U.S. military and external tracking organizations. For instance, DoD’s 2018 Annual Report on Civilian Casualties states that in 2018 approximately 120 civilians were killed and 65 injured as a result of U.S. military operations in Iraq, Syria, Afghanistan, and Somalia. In contrast, external tracking organizations—Airwars, the UN Assistance Mission in Afghanistan, the Bureau of Investigative Journalism, and New America—reported that at least 1,224 civilians had been killed over the same time period. In addition to DoD’s treatment of external reports and its expedited process, this large discrepancy of over 1,000 civilian lives may also be partly explained by the significant backlog of reports that CENTCOM has built up over time.¹³⁵

The DoD’s own study on civilian casualties acknowledged the “considerable gap” between the number of civilian casualties reported by Airwars and those confirmed by the U.S. military. It notes that while Airwars “relies largely on journalist accounts, social media, and local sources,” OIR “supplements

128 E-mail from CIVCAS Mitigation Team, Resolute Support Headquarters to CIVIC staff, November 23, 2019.

129 Annual Report on Civilian Casualties in Connection With United States Military Operations,” Department of Defense, April 29, 2019, p. 10, <https://media.defense.gov/2019/May/02/2002126767-1/-1/1/ANNUAL-REPORT-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-US-MILITARY-OPERATIONS.PDF>.

130 “Syria: Flaws in the US-Led Coalition’s Reporting on Civilian Casualties in Raqqa,” Amnesty International, July 17, 2018, <https://www.amnesty.org/en/documents/mde24/8801/2018/en/>. Center interview with Chris Woods, founder and Director of Airwars, June 26, 2019.

131 Center interview with Chris Woods, founder and Director of Airwars, June 26, 2019.

132 Lolita Baldor, “US commander orders new probe into Somalia raid,” *Associated Press*, December 13, 2017, <https://apnews.com/75f0ee905b4344f48abd0260d25c45ec/US-commander-orders-new-probe-into-Somalia-raid>.

133 Belkis Wille, “US-led Coalition in Iraq’s Lame Boast on Civilian Death Inquiries,” Human Rights Watch, December 19, 2017, <https://www.hrw.org/news/2017/12/19/us-led-coalition-iraqs-lame-boast-civilian-death-inquiries>.

134 Nadim Houry, “A Year On, Fog of War Not Lifting Over Deadly Raqqa Strikes,” *Just Security*, March 9, 2018, <https://www.justsecurity.org/53503/year-on-fog-war-lifting-deadly-raqqa-strikes/>; Andrew McCormick, “The Process is truly flawed’: Reporters set the record straight on US airstrikes,” *Columbia Journalism Review*, May 15, 2019, <https://www.cjr.org/watchdog/airstrikes-drone-civilian-casualties.php>.

135 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

CIVCAS allegations with intelligence reporting, social media, and where available, information from partner forces.”¹³⁶ However, the discrepancy in numbers may also be partly linked to the way in which the military evaluates the status of a person as a “civilian” or “combatant” when estimating civilian casualties, in particular, who the military believes is “directly participating in hostilities” at the time of an operation. The opacity and inconsistency of how the military applies combatant status to individuals has been cited as impeding the initiation of investigations into

potential civilian casualties, as well as preventing accountability for them.¹³⁷

Regardless of the cause, inaccurate estimates of total civilian casualties can skew the U.S. military’s assumptions about civilians and civilian harm during planning processes, with serious implications for the prevention and mitigation of civilian harm during operations.

136 “Annual Report on Civilian Casualties in Connection With United States Military Operations,” Department of Defense, April 29, 2019, p. 11, <https://media.defense.gov/2019/May/02/2002126767/-1/-1/1/ANNUAL-REPORT-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-US-MILITARY-OPERATIONS.PDF>.

137 See Jennifer Keene, “Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan,” Center for Civilians in Conflict, May 9, 2014, p.16, https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf; Christopher D. Kolenda et al., “The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts,” Open Society Foundations, June 2016, <https://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf>.

“NEW” (CCARS) VS “OLD” (15-6) PROCESSES

At some time in 2014, the U.S. military began using an assessment process to serve many of the purposes of an investigation that had been previously served by the administrative investigation. The process, known as the Civilian Casualty Assessment Report, offers some advantages—including timely and consistent review of any and all allegations of harm. But as designed, the process may also create gaps in the investigative process.

Civilian Casualty Assessments vs. AR 15-6 investigations

| CCARs | AR 15-6 |
|--|---|
| Less formalized process with less consistent controls for quality assurance, ¹³⁸ although guided by standard operating procedures. | More formalized as a process, with army regulation governing its conduct and standardized procedures. |
| Quicker process, more adaptable to higher tempo situations, and potentially quicker release of information. | Slower, but more deliberate process. |
| No requirement for formal appointment by commander for investigating officer; often conducted by standing cell or unit. | Appointment order provides additional, standardized guidance to investigator, but not always followed. |
| Focused on factual findings; no specific requirement for after-action recommendations. | Includes not just findings but recommendations for after-action. |
| Less well-suited to lessons learned as currently designed. | Better suited to lessons learned, trend analysis, and future harm mitigation – but only if conducted by suitably knowledgeable authority. |
| Provides date, basic locational data, cause of harm to public (but may release additional information to Airwars or other organizations). | May contain important facts and details that are important to family-members and other survivors; results rarely shared with survivors or released to public. |
| At times carried out by operational staff from within same command that oversaw or were involved with operations, providing proximity and access to records, but potentially creating risk of bias. At other times, conducted by staff “firewalled” from those involved in operations. | Ordered and overseen by commanders who may have had a role in operation under investigation or outsourced, but subject to review by Staff Judge Advocate. |

138 Jennifer Keene, “Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan,” Center for Civilians in Conflict, 2014, https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf; Christopher D. Kolenda et al., “The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts,” Open Society Foundations, June 2016, <https://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf>.

CIVILIAN WITNESS INTERVIEWS

Key Takeaways and Findings

- The U.S. military recognizes that witness interviews are a central component of the investigative process. However, while the military regularly interviews military witnesses, by its own admission, it rarely interviews civilian witnesses, thereby severely compromising the effectiveness of investigations. The military rarely explains why it does not interview civilian witnesses.
 - Civilian witness interviews are a crucial way in which the U.S. military can obtain key information relevant to civilian casualty incidents, in particular by verifying and identifying the individual(s) harmed and assessing their civilian status.
 - Civilian witness interviews can also demonstrate to affected communities that the U.S. military takes investigations of allegations of civilian harm seriously.
 - The military faces security challenges and resource tradeoffs associated with carrying out civilian witness interviews in conflict zones.
 - The military does not have a consistent practice in interviewing civilians, even in situations in which the U.S. military has a presence on the ground.
- The U.S. military should attempt to interview witnesses who are willing and able to speak to them both during the assessment stage of an investigations process and during administrative investigations, and for any allegation that meets a basic threshold of credibility (e.g. when military activity can be correlated with the time and location of the reported harm).
 - When the military chooses not to interview civilian witnesses, it should explain why.
 - To overcome the challenges associated with witness interviews, the U.S. military should plan for workarounds or alternative interviewing methods. This may include interviewing by secure telecommunications, relaying questions and answers through third parties, or offering to meet in discreet locations that civilians can reach.

The Military Itself Recognizes the Value of Witness Interviews

The Investigating Officer's Guide for Army regulation 15-6 states that "In most cases, witness testimony will be required" (though admittedly, it never specifies "civilian" witnesses).¹³⁹ Testimonies from civilian witnesses, obtained through interviews, can help establish the facts and circumstances of incidents of civilian harm during assessments or investigations. Interviews can help identify a victim, or can help establish an individual's status (i.e., whether they were a civilian, a civilian directly participating in hostilities, or a combatant).¹⁴⁰ Families who have lost their loved ones are not only unable to obtain redress if those killed are not identified as civilians, but are also denied the basic recognition of their loss, thus compounding their suffering. When families believe their loved one was mistakenly

Recommendations

- The Department of Defense should set the expectation that the U.S. military will conduct civilian witness interviews as a part of the government's response to reports of civilian harm.

139 AR 15-6, Procedures for Administrative Investigations and Boards of Officers, Appendix C, Section 3(c)1 (2016); ATP 3-07.06 also takes it as a given that civilian witnesses will be interviewed, see para. 5.79 ("Witnesses should be interviewed separately and results checked with other accounts and evidence for consistency.")

140 See Sarah Holewinski et al., "Civilian Impact of Drone: Unexamined Costs, Unanswered Questions," Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012, p. 48, https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf ("Former CIA officer Bruce Riedel notes that drone video does not always offer a clear picture of casualties—as belied by the few al-Qaeda members believed killed in drone attacks who have later turned up alive—and argues that with a limited ability to interview witnesses, 'casualty reports are incredibly dubious.'")

identified as a combatant, they may refrain from carrying out ordinary activities including work, local travel, or family visits, due to fears that they too may be targeted. Broader communities also struggle with ongoing trauma and fear.¹⁴¹

Civilian witness interviews are also a way in which the U.S. military can engage with local communities around incidents where there are serious allegations and resentment toward the U.S. military. By conducting civilian witness interviews, the U.S. military can demonstrate to the local community that it is taking allegations seriously and that it is conducting thorough investigations.¹⁴² Alternatively, not engaging with affected communities can lead to a growing sense of grievance and anger that runs counter to the U.S. military's counterinsurgency and counterterrorism objectives.¹⁴³ For example, the survivor of a January 2013 night raid in Afghanistan's Maidan Wardan province whose husband and two sons were killed by a U.S. airstrike, said "No one from ISAF or the U.S. forces came to us so that we could tell them our side of the story."¹⁴⁴ Liban, a Somali farmer from the lower Shabelle whose fellow villagers were killed in what Amnesty International identified as a U.S. strike, said "We have been waiting for someone to come ask us about this. We lost these boys, and no one is talking about it. It seared into our flesh."¹⁴⁵

Identification of those harmed is crucial to administering amends, including condolence payments. It is also extremely important to families who want acknowledgment, whether public or even private, of the harm caused and that their loved ones were not members of armed groups.

The Military Too Rarely Interviews Civilian Witnesses, even when it has a Presence on the Ground

In specific cases, there is established U.S. military practice of conducting civilian witness interviews. For example, in the al-Jadida incident in Mosul in 2017, investigators were reportedly sent to speak with and interview civilian witnesses, with reports clearly indicating that interviews were a priority in that case.¹⁴⁶ But civilians—whether victims, survivors, family members, or witnesses—were interviewed in only 21.5% of the investigations reviewed by the research team. Even in cases where the commander or judge advocate explicitly required the investigating officer to obtain a sworn statement from civilian witnesses, only 77% of the investigations included interviews.¹⁴⁷ These figures are all the more surprising given that the majority of cases reviewed covered incidents in Iraq and Afghanistan in periods when the U.S. military had a relatively significant ground presence. In theory, such a presence should have made it easier to deploy forces to meet with civilians, or to arrange meetings through intermediaries, than it would be during more remote operations (such as for counterterrorism air strikes in Somalia and Libya). AFRICOM has assessed 37 reports of civilian casualties from U.S. air strikes in Somalia and Libya between 2016 to 2019, yet it has not conducted a single interview with civilian witnesses.¹⁴⁸

According to experts consulted for this report, directly engaging civilian witnesses in conflict zones can pose a challenge for the military. For example, deploying investigators to prepare and carry out interviews can

141 Rahma A. Hussein, Abdifatah Ali Hassan, and Alex Moorehead, "Transparency on Civilian Harm in Somalia Matters—Not Just to Americans," Just Security, April 9, 2019, <https://www.justsecurity.org/63554/transparency-on-civilian-harm-in-somalia-matters-not-just-to-americans/>.

142 ATP 3-07.06, para. 5.79 ("Investigations should involve the community. This gives the population an opportunity to tell their story, air grievances, and strengthens the credibility of the investigation's findings by demonstrating that a serious investigation has taken place.")

143 Abdulrasheed Al-Faqih, "Civilian Casualties and Effectiveness of U.S. Drone Strikes in Yemen," Just Security, April 3, 2018, <https://www.justsecurity.org/54464/civilian-casualties-effectiveness-u-s-drone-strikes-yemen-part/>.

144 "Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan," Amnesty International. August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>.

145 "The Hidden U.S. War in Somalia: Civilian Casualties from Air Strikes in Lower Shabelle," Amnesty International, April 2019, p.30, <https://www.amnesty.org/download/Documents/AFR5299522019ENGLISH.PDF>.

146 Ryan Browne and Barbara Starr, "Investigation of Mosul Civil Casualties Expanded," CNN, March 31, 2017, <https://edition.cnn.com/2017/03/30/politics/mosul-airstrike-formal-investigation/index.html>.

147 Analysis of these cases did not reveal any clearly significant correlation between the prevalence of civilian witness interviews and a specific timeframe or location.

148 Email from AFRICOM, September 9, 2019.

“[Iraqi Counterterrorism Service] visual observers had been in direct observation of the area for over two days and had not observed civilians enter or use the structure.... Neither coalition, nor [Iraqi] forces knew that civilians were sheltered within the structure.”

— Brigadier General Matthew Isler, *Briefing on the Findings of an Investigation into a March 17 Coalition Air Strike in West Mosul*

diminish the resources available to carry out other tasks.¹⁴⁹ It may also be difficult to track down, meet, or communicate in other ways with civilians, both due to a lack of access or connections to the civilian population, and also due to security concerns—particularly when witnesses are located in remote or hostile environments. Importantly, civilian witnesses—

already in grave danger by virtue of living in a conflict zone—may similarly be placed at even greater risk if they are seen speaking with the U.S. military.¹⁵⁰

However, across the publicly available administrative investigations reviewed, IOs very rarely explained why they did not interview civilians: explanations were offered in only 10 investigations. The military similarly has not explained why it does not conduct civilian witness interviews during the assessment process. This is problematic for two reasons. First, it does not allow for a deeper understanding of what, if any, alternatives to in-person interviews have been explored, or why the military does not believe interviews are important in certain cases or operations. Second, it may suggest that in practice, there is little expectation that witnesses be interviewed—in spite of their recognized value to the investigations process.

Challenges to Interviewing Civilian Witnesses are not Insurmountable

In spite of the risks and challenges, witnesses in many conflict areas have expressed the desire to bring information to the U.S. government to consider when assessing and investigating civilian casualty claims. One alternative method may be to speak by phone—a process specifically envisaged in AR 15-6.¹⁵¹ But even the use of phones can be dangerous or difficult in places like parts of Somalia, where Al Shabaab reportedly restricts the use of cellular communications.¹⁵² Many NGOs and experts have been critical of the U.S. military’s failure to seek alternative methods to engage civilian witnesses when in-person, on-site access is deemed infeasible.¹⁵³ They have suggested alternative options for conducting interviews in difficult contexts, including conducting interviews in discrete locations, working with third-party researchers who can more safely reach and speak with witnesses, bringing witnesses to another site, and conducting interviews by video link.¹⁵⁴

149 Center interview with Jay Morse, former military official, Washington, D.C., Aug 23, 2018.

150 ATP 3.07.06, para. 5-84.

151 AR 15-6, 5-2.

152 See, for example: “Harsh War, Harsh Peace”, Human Rights Watch, April 19, 2010, <https://www.hrw.org/report/2010/04/19/harsh-war-harsh-peace/abuses-al-shabaab-transitional-federal-government-and-amisom>,

153 See Ole Solvang et al., “All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria,” Human Rights Watch, September 24, 2017, https://www.hrw.org/sites/default/files/report_pdf/syria0917_web_0.pdf.

154 Knuckey et al., “Pentagon Admits Major Investigation Flaw: They Rarely Talk to Air Strike Witnesses or Victims,” *Just Security*, June 29, 2017, <https://www.justsecurity.org/42675/pentagon-admits-rarely-talks-air-strike-witnesses-victims/>.

VISITS TO SITES OF CIVILIAN HARM

Key Takeaways and Findings

- **Site visits can be valuable sources of information or evidence about civilian casualties that cannot be gleaned from other sources—a fact that the U.S. military itself recognizes in both doctrine and practice.**
- **The U.S. military rarely conducts investigations at the site of strikes or raids, and this undermines investigations’ effectiveness. Site visits may—or may not—carry significant security and resource implications.**
- **The U.S. military often fails to carry out site visits to investigate allegations of civilian harm, potentially risking the thoroughness of military investigations.**
- **In publicly available investigation reports, investigating officers rarely provide explanations for why a site visit was not conducted. As a result, it is difficult to identify and analyze the specific obstacles faced by commanders and investigators in conducting site visits.**

Recommendations

- **The military should establish clear criteria for when site visits are needed for an effective investigation of civilian harm. It should not assume that site visits are not feasible.**
- **Military commanders should anticipate and plan for any additional security and resource requirements needed to conduct effective investigations.**

- **Appointment orders for administrative investigations should include standard guidance to conduct site visits.**
- **Where applicable, investigating officers should include an explanation for the lack of site visits in the investigation report.**

Site Visits are Valuable for Investigating Civilian Harm

As the U.S. military recognizes in its own doctrine, site visits can be a critical tool for gathering information on and evaluating the likelihood of alleged or reported civilian casualties, both in an initial assessment and in an investigation.¹⁵⁵ Site visits during an investigation may be necessary for securing or collecting physical evidence, taking measurements, or taking photographs or videos that may help to determine the facts of an incident, the extent of the harm, whether or not any violation of law or regulation occurred, and any lessons that can be drawn or patterns discovered. Although the collection, preservation, and custodial chain of evidence gathered during a site visit bears significantly in suspected criminal violations, site visits to gather evidence may also be necessary in an administrative investigation.

Site visits can help build a more accurate and complete record of findings and facts about a specific incident. Personnel conducting a site visit may discover casualties, or substantiate or challenge a claim of civilian casualties, where a building has been damaged or destroyed and where there is uncertainty as to who was in the building at the time of the attack.¹⁵⁶ For example, in Mosul in March of 2017, the military officer who investigated a strike noted that “Neither coalition nor [Iraqi counterterror forces] knew that civilians were sheltered in the

155 Activities including evidence preservation, biometric enrollment, and forensic collection. Site exploitation may require specialty teams with capabilities typically not found in Brigade and below conventional force maneuver units (see ATP 3-90.15, “Site Exploitation Operations,” for a more detailed discussion of Site Exploitation).

156 See Sarah Holewinski et al., “Civilian Impact of Drone: Unexamined Costs, Unanswered Questions,” Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012, https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf (“For example, a homebound sick child is unlikely to be noted by surveillance conducted prior to a strike, and may again be overlooked as the drone surveys the damage to a home and those killed poststrike from thousands of feet above.”); Lucy Fisher, “Civilians need protection from British drones,” *The Times*, August 16, 2019, <https://www.thetimes.co.uk/article/civilians-need-protection-from-british-drones-7ltshjfrk> (“Analysis from the air becomes even more difficult when strikes are conducted in densely populated and built-up cities, where it is difficult to assess civilian presence in a building pre-strike or calculate civilian casualties amid the rubble afterwards.”).

bottom floors of the structure.”¹⁵⁷ During the course of a site visit, “Iraqi civil defense excavated the structure and found 101 casualties in the bottom floors of the structure.”¹⁵⁸ The subsequent AR 15-6 investigation, carried out by a team of 12 experts, ultimately concluded that between 105 and 141 civilians had been killed in the strike, even though this had not been observed earlier.¹⁵⁹ An internal DoD study similarly found that in a number of cases, ground force investigations managed to identify civilian casualties after the initial BDA failed to do so.¹⁶⁰

One IO, in Investigation 188 relating to a 2008 incident in Afghanistan, deplores that no ground investigation was done to confirm or deny evidence of enemy or civilian harm transpiring in the overhead imagery. A high number of combatants were reported to have been killed (36) or injured (1). Fifteen civilian casualties were also reported. In their investigation, the IO notes that the “gunship video evidence clearly indicates that a building within the compound was destroyed.” Yet, as “no BDA ground assessments were conducted of the adjacent area,” the IO notes that there is no evidence to support the assessment. The IO concludes that incorporating BDA into all operations would “allow immediate confirmation/denial of any future civilian BDA claim.”

Site visits, whether conducted by U.S. troops or local partners, help show civilian populations that the U.S. military has considered all available evidence, including evidence that may establish the civilian character of those killed in an incident. For example, after soldiers shot two children and an 18-year-old collecting firewood in the Kunar province of Afghanistan, family members attempted to present evidence to the local authorities to prove that those killed were civilians. “The police and ANA soldiers visited the mountain and noticed the blood-stained

firewood collected by the victims. Then they returned back and talked to American soldiers.... After that the U.S. soldiers accepted the reality,” one local resident said.¹⁶¹ Site visits, particularly when they include interviews with survivors, witnesses, and the broader community (discussed in detail in the following section) help show that the U.S. military takes civilian harm seriously.

Just as conducting civilian interviews and site visits can build confidence in how the U.S. military treats cases of civilian harm, local populations can read the failure to carry them out as a lack of interest in accountability or in ensuring the legality of U.S. actions. One Yemeni NGO representative who has worked on claims of civilian harm stemming from U.S. drone strikes said, “if your strike can reach that area, then you should also find a way for your investigation—your follow-up procedures—to reach that area. It is the duty of a government as long as they were able to create drones that can reach that far and kill people...they should also be thinking about creating ways that can reach that far and...investigate.”¹⁶²

Improving the accuracy of civilian casualty counts through site visits can aid in addressing systemic problems over time. Calibrating pre-strike collateral damage estimates (CDE)¹⁶³ with a more accurate estimate of civilian casualties gleaned from site visits can help identify flawed assumptions and lessons that can aid in future harm mitigation, including changes to CDE calculations.

Lastly, site visits can help clarify attribution of a particular strike where there is a dispute as to who was responsible (especially in circumstances involving multinational coalition operations), as experts can analyze the site to ascertain the nature of the impact and any armament remnants.

157 “Department of Defense News Briefing on the Findings of an Investigation into a March 17 Coalition Air Strike in West Mosul,” U.S. Department of Defense, May 25, 2017, <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1194694/departement-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a/>.

158 Ibid.

159 Ryan Browne and Barbara Starr, “Investigation of Mosul Civil Casualties Expanded,” *CNN*, March 31, 2017, <https://edition.cnn.com/2017/03/30/politics/mosul-airstrike-formal-investigation/index.html>.

160 Christopher D. Kolenda et al., “The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts,” Open Society Foundations, June 2016, <https://www.opensocietyfoundations.org/sites/default/files/strategic-costs-civilian-harm-20160622.pdf>, citing an unpublished study carried out by Dr. Larry Lewis.

161 *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan*, Afghan Independent Human Rights Commission (Dec. 2008), p.49.

162 Human Rights Institute phone interview with Yemeni civil society organization legal specialist, October 30, 2019.

163 Collateral damage estimation is a process employed by the military to estimate and mitigate the anticipated collateral damage from an airstrike.

“After weighing the potential benefits of visiting the scene of the incident, such as being able to see the locations of the shooter... speaking with witnesses, etc., against the drawbacks, such as re-awakening emotional and political turmoil, I determined the amount of information that could be useful to this investigation was not worth the cost.”

— *Investigating Officer, Investigation 73*

Site Visits are Rarely Conducted and Investigators may Face Challenges in Conducting Site Visits

In spite of their recognized value, former and currently serving military personnel interviewed for this report consistently noted that site visits can be difficult to carry out in ongoing conflict situations, or when air operations are conducted without a corresponding ground presence. Overall, the

evidence strongly suggests that site visits are very rarely conducted.

The U.S. military conducted site visits in only 16% of the investigations reviewed for this study (37 out of 228 investigations), which spans a period in Iraq and Afghanistan in which the U.S. military had a significant number of troops on the ground. AFRICOM did not conduct a single site visit to investigate claims of civilian casualties in the last three years.¹⁶⁴ Across the investigations reviewed for this report, the majority of investigations that did not undertake site visits did not provide a reason for not doing so, making it difficult to identify trends in U.S. practice regarding when and why site visits are undertaken. Explanations for not carrying out site visits were provided in just seven (5.3%) of the investigations reviewed, which most often cited security threats to U.S. forces and local nationals. Site visits may require the use of aircrafts or the deployment of security personnel and assets to secure an area and to allow investigators access and security to examine the site.¹⁶⁵ In a number of the investigations reviewed for this study, investigating officers cited security issues as the reason they did not conduct a site visit (e.g. a case where the investigator noted that visiting the location where mortar rounds exploded was impossible “due to lack of operational vehicles for a convoy and other security risks”). Another investigator noted that “Due to the enemy’s direct, indirect and Improvised Explosive Device threats on the roads leading to Kunjak and no cleared helicopter landing zones, I was not able to visit the site where the alleged incident occurred.”¹⁶⁶ In highly insecure areas, the military may also have to consider the risk of further civilian harm that could be caused by such a deployment; for example, if U.S. forces came in contact with enemy forces, or if enemy forces later retaliate against civilians for having cooperated with a U.S. military investigation.

164 E-mail from AFRICOM, September 9, 2019

165 “Transcript of Pentagon’s Al Jinah Investigation media briefing,” Airwars, June 27, 2017, <https://airwars.org/news-and-investigations/transcript-of-al-jinah-investigation-briefing/> (General Bontrager stated at a Pentagon media briefing that “it’s a rare thing with strikes like this that we can get on the ground in person, or that we can talk to anybody on the ground is not uncommon at all.”); Larry Lewis, “Drone Strikes in Pakistan: Reasons to Assess Civilian Casualties,” CAN Analysis and Solutions, April 2014, <https://apps.dtic.mil/dtic/tr/fulltext/u2/a599423.pdf> (explaining that site visits are more and more unlikely with the increased use of unmanned aerial vehicles in warfare, where a ground force may not exist and locations of strikes are particularly remote).

166 Investigation 200.

Some investigating officers have taken the initiative to overcome challenges involved with conducting a site visit to collect evidence. In some cases reviewed for this report, the report of investigation includes specific steps taken by the investigator to compensate for the lack of a site visit. In Investigation 200, for example, the investigator noted he “was able to overfly the location and conducted a visual reconnaissance of the site,”¹⁶⁷ while the IO in Investigation 219 enlisted the participation of an elder in the community to take photographs, and the local police to collect evidence.

Relying on Evidence Collected at the Scene can be Valuable, but can also Increase the Risk of Bias

Workshop participants and former and serving military personnel interviewed for this report said that soldiers were resourced to gather information on the spot of an incident with “cameras, physical printers, necessary forms, [and] sterilized evidence bags.”¹⁶⁸ Indeed, many of the investigations we reviewed in which the IO did not visit the site (88 of 228 investigations) include photographs which must have been taken at the scene of the incident, for instance a picture of a medic giving CPR to a victim.¹⁶⁹ While this suggests that IOs may be able to conduct the investigation using some evidence collected at the site immediately after the incident, the fact that site visits are rarely conducted by the person conducting the investigation introduces a risk of bias due to the

excessive reliance on the statements of the soldiers present in the incident. The vast majority (82%) of the investigations reviewed in which there was no site visit included testimonies from soldiers.

This can be problematic in cases in which military witnesses hid or obscured evidence, or denied the occurrence of harm altogether. In Investigation 152, for example, soldiers concealed knowledge of video footage (taken by military personnel at the scene) of an incident involving the death of a local police officer during the administrative investigation.¹⁷⁰ Site visits by the individual conducting the investigation may thus be necessary to resolve conflicting accounts or to more fully ensure the impartiality and thoroughness of the investigation.

Site Visits are not Always Necessary to Acknowledge Harm, but the Absence of a Site Visit can be Used to Dismiss Harm

In the vast majority (78.9%) of reviewed investigations that occurred prior to the development of the CCAR process, the allegation of harm was substantiated and acknowledged in the investigation, even without a site visit during the investigation itself. In these cases, the lack of a site visit did not prevent the U.S. military from finding that there was sufficient evidence to recognize that troops did cause civilian harm. But a lack of a site visit can also be used to dismiss a claim, as shown in the case study following.

167 Ibid.

168 Center scenario exercise at United States Military Academy at West Point, April 26, 2018.

169 Investigation 160.

170 The Investigating Officer in this investigation recommended a referral of the case to the Army's Criminal Investigation Division for potential violations of the Uniform Code of Military Justice.

CASE STUDY

Investigation #287: not conducting site visits can strongly harm the thoroughness and effectiveness of an investigation:

The investigation centers on the alleged death of a woman by a Coalition Forces' illumination rocket after the rocket penetrated the roof of a house in 2011 in Khowst Province, Afghanistan. A man presenting himself as her husband brought remnants of a rocket motor as proof of the incident.

The IO's evidence gathering was limited to interviewing the unit involved, interviewing other U.S. soldiers (including subject matter experts), and submitting the remnants of the rocket for analysis. While the IO travelled to meet with the unit involved, he did not travel to the victim's house, nor did he meet with the husband or arrange for other means to interview him, even though his phone number had been made available. He also did not interview other witnesses.

The IO instead strongly relied on the unit commander's description of his patrol after the incident. The commander testified that all the villagers they spoke to knew of a woman being killed by "a bomb from a helicopter." The commander tried to locate the house where the incident was alleged to have happened. The IO noted that according to the commander, the villagers were not happy to see Coalition Forces, and the unit departed. The patrol came back three days later to visit the house, this time with a Law Enforcement Professional, and took photographs of the damaged roof and retrieved the remaining motor. The unit then informed the husband that an investigation would take place.

The IO concluded that that the preponderance of the evidence was in favor of the claim. The commanding authority after having reviewed the investigation stated the following:

"Concur that the preponderance of evidence favors the claimant, but the evidence is not at all conclusive, especially given the inability to examine the remains, the lack of damage to the rocket motor, and the distance from the gun-target line."

In sum, the evidence strongly corroborated the allegations—not least because the rocket motor was provided by the husband himself and the unit took pictures of the damaged roof. Yet, the commander relied on the fact that the IO had not visited the site, citing the "inability to examine the remains" as a means to cast doubt on the evidence as "not at all conclusive." Noteworthy, the commander did not provide any alternative explanation as to how a rocket motor could have found itself in the hands of this civilian or how else the house's roof might have been damaged.

NGOs are cognizant that site visits may not always be feasible—for example, recognizing the clear security risks present in certain parts of Syria that would make site visits dangerous.¹⁷¹ Even so, concerns have also been raised by NGOs about the lack of site visits even in situations where the U.S. military or its partners have secured the area and are in control of territory—for example, in Raqqa and Mosul following major combat operations during OIR,¹⁷² or in Afghanistan during a period when the military continued to maintain a ground presence, but conceded relatively few overall civilian casualties during the assessment phase.¹⁷³

TRAINING AND RESOURCING

Key Takeaways and Findings

- **Adequate resourcing, training, and expertise are essential to conducting effective assessments and investigations of civilian harm.**
- **Valuable relationships and competencies cultivated from the experience of assessing, investigating, and tracking harm can be disrupted by staff turnover.**
- **Investigating officers can lack the specific training, skills, or experience to conduct complex investigations of civilian harm allegations. Civilian casualty tracking and mitigation cells, and other assessment and investigative bodies, often lack adequate capabilities (such as language skills) or face technological obstacles that impede their ability to adequately assess or investigate allegations of civilian casualties.**
- **However, investigating officers in the military may have other critical competencies such as knowledge of military operations and tactics that can be important to analyzing a civilian harm incident or in identifying necessary corrections.**
- **The critical resourcing question facing commanders is often not necessarily whether the resources to conduct thorough investigations exist, but rather how to prioritize investigations among other competing demands for resources.**

Recommendations

- **Plans for military operations or campaigns should include adequate resources for assessments and investigations of civilian harm.**

171 Sue Eedle et al., “Civil Deaths in the Anti-ISIS Bombing Campaigns 2014–2015,” Minority Rights Group International, November 2015, <https://minorityrights.org/wp-content/uploads/2015/11/CEASEFIRE-REPORT-Civilian-deaths-in-the-anti-ISIS-bombing-campaigns-2014-15.pdf>.

172 “Syria: Flaws in the US-Led Coalition’s Reporting on Civilian Casualties in Raqqa,” Amnesty International, July 17, 2018, <https://www.amnesty.org/download/Documents/MDE2488012018ENGLISH.PDF>.

173 “Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan,” Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>.

- **To the extent possible, military personnel should be provided training and information about assessing, investigating, and tracking harm during pre-deployment preparation and in-service training while on rotation in theater.**
- **Commanding officers and judge advocates should ensure the availability of staff with the requisite skills and training to conduct civilian harm investigations.**
- **Commanding officers should ensure that personnel assigned to duties of civilian harm tracking or investigations have access to adequate language translation capabilities if they do not speak the languages used by those making claims of harm.**

Thorough investigations demand time, resources, and political commitment.¹⁷⁴ In some cases, the circumstances involved in specific investigations may require specialized expertise or additional staffing. Conducting an effective investigation into a specific incident may require putting together a team of individuals of a certain rank and with diverse expertise, e.g. a military lawyer, Subject-Matter Expert (SME), an officer with understanding of fire or air support, a Public Affairs Officer (PAO), someone with language skills, and/or someone with the ability to interact with the local government.¹⁷⁵

While the military has enormous resources at its disposal, it also faces competing resource demands to support missions in challenging environments. According to military experts consulted for this project, the critical resourcing question facing commanders is often not whether the resources

to conduct investigations exist, but rather how to prioritize investigations in resource allocation decisions. Interviewees and workshop participants indicated that one potential obstacle may be the “cap on people deployed in theater,” since any decision to increase the number of individuals dedicated to civilian casualty tracking, assessment, and investigation would mean that “someone has to come off.”¹⁷⁶

The failure to allocate sufficient resources to the investigative process can limit the effectiveness of any assessment or investigation of civilian harm. Understaffing can result in assessments and investigations being rushed and concluded prematurely or inaccurately. In 2017, there were only two full-time staff at CENTCOM responsible for assessing reports of civilian harm caused by U.S. strikes in Yemen, Syria, and Iraq.¹⁷⁷ Yet during that year, Airwars estimated that between 3,929 and 6,102 civilians were killed in Iraq and Syria alone.¹⁷⁸ And although AR 15-6 provides that subject-matter experts may be appointed to fill any skill or expertise shortfall, this mechanism was used in only two of the investigations reviewed.¹⁷⁹ The vast majority of cases were investigated by just one IO. Similarly, AR 15-6 also provides that assistant IOs may be appointed, but this option seems to rarely be used. Assistant IOs were appointed in only 3% (7 out of 228) of the investigations reviewed for this project. In some cases, an interpreter may also be necessary to perform a thorough investigation, particularly in interviewing civilian witnesses. Very few of the investigations (7%) analyzed for this report refer to an interpreter having participated in the investigation.

174 Center interview with Jay Morse, former military official, Washington, D.C., Aug 23, 2018.

175 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018; Investigations 87, 97, 101, 123, 247, 264, and 277.

176 Center workshop with Scott Cooper, Christopher Kolenda, and Jay Morse, former military officials, February 5, 2018.

177 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018; Molly Hennessy-Fiske & W.J. Finnigan, “US reconsiders its responsibility for civilian casualties in Iraq and Syria,” *L.A. Times*, May 1, 2017, <https://www.latimes.com/world/middleeast/la-fg-coalition-airstrikes-2017-story.html>; Greg Jaffe, “How a woman in England tracks civilian deaths in Syria, one bomb at a time,” *The Washington Post*, May 14, 2017, https://www.washingtonpost.com/world/national-security/how-a-woman-in-england-tracks-civilians-killed-in-syria-one-bomb-at-a-time/2017/05/14/f5601d16-29e1-11e7-a616-d7c8a68c1a66_story.html.

178 “Airwars annual assessment 2017: civilians paid a high price for major Coalition gains,” Airwars, January 2018, <https://airwars.org/report/airwars-annual-assessment-2017/>.

179 Investigations 97 and 141.

Gaps in Expertise and Skills

In addition to shortages in available personnel, IOs carrying out AR 15-6 investigations into civilian harm do not always have experience in, or specific skills for, conducting investigations— let alone investigations into civilian harm specifically.¹⁸⁰

Personnel may also lack language skills necessary for conducting interviews. For example, interviewees with experience engaging with CENTCOM told the research team that there are no Arabic speakers in the civilian casualty tracking cell of OIR.¹⁸¹ While commanders may choose IOs knowing that they have specific skills or expertise, on many occasions the appointed IO may simply be the “next man or woman up” in the chain of command.¹⁸²

For this and other reasons, SJAs have a crucial role at the onset in preparing IOs to conduct investigations. A report from CLAMO on lessons learned during military operations stresses “the need for JAs to be proactive in advising investigating officers. If a JA waits for an investigating officer to ask questions, it will often be too late in the process to correct problems without starting the investigation over from the beginning.”¹⁸³

Training

In theory, all service members who perform investigative functions should have undergone some training in international humanitarian law and the AR 15-6 process, both during pre-deployment and deployment.¹⁸⁴ However, former and serving military interviewees emphasized that training could be improved. They indicated that trainings could provide more in-depth instruction on how to conduct investigations, how better utilize scenario exercises, and emphasize how lessons are conveyed to new units.¹⁸⁵ Most importantly, interviewees indicated that trainings are often not specialized to address investigations or assessments of civilian casualty incidents, and rarely employ service members

who have expertise in crucial areas relevant to this type of investigation.¹⁸⁶ A comprehensive review of training curricula, which is beyond the scope of this report, is necessary to identify the full range of strengths, weaknesses, and needed improvements. Establishing a roster of IOs for each unit with experience and specialized training in investigations may improve the overall quality of investigations.

OUTCOMES AND STEPS TAKEN AS A RESULT OF ADMINISTRATIVE INVESTIGATIONS

Key Takeaways and Findings

- **Administrative assessments and investigations can play an important role in identifying the facts and circumstances of an incident, as well as in establishing whether there has been any breach of applicable law or rules. This fact-finding role appears more important than that of apportioning discipline.**
- **The results of some investigations illustrate the challenges that arise from commanders’ dual roles in both directing operations and ordering investigations of those operations, although some practices have been developed to mitigate these risks.**
- **Commanders’ written instructions in the appointment orders were not always followed in the investigations reviewed by the research team, particularly with respect to civilian witness interviews.**
- **The interests in promptly concluding investigations may compromise investigations’ thoroughness.**

180 Center interview with Jay Morse, former military official, Washington, D.C., Aug 23, 2018.

181 Center interview with Chris Woods, founder and Director of Airwars, London, U.K., September, 21, 2018.

182 Center interview with Josh Berry, United States Military Academy at West Point, April 26, 2018.

183 Center for Law and Military Operations, “Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008,” United States Army, September 2008, p. 180, https://www.loc.gov/rr/frd/Military_Law/pdf/forged-in-the-fire-2008.pdf.

184 Center interview with Richard B. Jackson, Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, Washington, D.C., November 29, 2017.

185 Center workshop with Scott Cooper, Christopher Kolenda, and Jay Morse, former military officials, February 5, 2018.

186 Center interview with a former military official with knowledge of military investigations processes (name withheld), Arlington, VA, February 7, 2018.

Recommendations

- **Commanding officers and judge advocates should ensure that the investigating officer has followed all instructions laid out in the appointment order, including to interview civilian witnesses, prior to approving the results of an investigation.**
- **Judge advocates should fully exploit the opportunity to thoroughly review investigation results and assess their adequacy through their legal reviews.**

Administrative investigations serve not only to identify facts and document evidence surrounding a case, but also to make conclusive findings based on the information uncovered.¹⁸⁷ Although administrative investigations are not subject to the same requirements as criminal investigations, they may nevertheless be expected to include some form of assessment of compliance with applicable rules and law. This section summarizes the results and actions taken based on available AR 15-6 investigations from 2003-2015.

Factual and Legal Findings

As noted, the vast majority (79%) of the investigations reviewed for this project concluded that U.S. forces did cause civilian casualties. Meanwhile, 60% of investigation reports made legal findings, such as whether the troops involved in the incident complied with the rules of engagement or international humanitarian law. About a quarter (24%) of the investigations found that U.S. forces were involved in wrongdoing—i.e., that they did not comply with the rules of engagement, the law, or applicable guidance.

Conformity with Procedure

Commanders' written instructions in the appointment orders were not always followed in the investigations reviewed by the research team, particularly with respect to civilian witness interviews. This suggests that instructions from commanders, at least in template orders, may not be followed systematically, and also suggests that other actions are needed to ensure that these measures are actually taken in

practice (for instance, by the SJA when conducting the legal review, or by the commander when reviewing the findings).

Though guidance provides for a legal review of the investigation's findings by a legal advisor, the legal review appears to be primarily perfunctory and does not seem to constitute a thorough review of the investigation. In investigations that included "legal reviews," the majority (83%) concluded that the investigation was already legally sufficient—i.e., that there was sufficient evidence supporting the IO's factual findings. Most legal reviews did not include an additional legal determination of compliance or violation of applicable laws and rules. Additionally, commanders overwhelmingly approved the IO's findings and recommendations (an issue explored in further detail below), which suggests that additional control and monitoring are not provided by commanders.

Recommendations and Disciplinary Actions

IOs typically recommended further action as a result of an investigation (72% of reviewed investigations). The specificity of recommendations can vary greatly from one IO to the next. It can include mandating further training (whether in RoE or specific munitions¹⁸⁸), providing training on alternatives to the use of deadly force, and conducting timely BDA.

Only a very small number of investigation reports recommended some form of discipline or non-judicial punishment against one of the soldiers involved (7.5% of reviewed investigation), including reprimand, adverse or disciplinary action, and referral to a Court-Martial. This highlights that AR 15-6 investigations are typically geared toward identifying what happened, and potentially what went wrong and how it could have been avoided, rather than as a mean of ascribing blame and discipline (this is further elaborated in the section of this report titled "Lessons Learned").

The results of some investigations seem to validate concerns about commander bias. For example, in one investigation, the commander noted:

187 AR 15-6, 1-8.

188 30% of investigations recommend that U.S. forces undergo additional training.

“The Company Commander was trying to do the right thing and protect his soldiers in accordance with my guidance. Although he improperly applied the ROI in one of the two most dangerous areas in my AO, he did so because he simply over-emphasized his recent experience and under-emphasized a relatively fine point of the ROE.”

This case is not necessarily indicative of a pattern. However, if a commander believes, as was expressed in the CLAMO study, that the purpose of investigations is to exonerate soldiers, it may not be surprising to see some results in which the commander comes to that very conclusion.

Reviewing and Approving Findings

For investigations conducted in accordance with AR 15-6, “the commander again has discretion... to approve, disapprove, modify, or add to the findings and recommendations, unless provided by another directive.”¹⁸⁹ In practice, it appears that commanders overwhelmingly approve all the IO’s conclusions and recommendations. Only in a small minority of the investigations reviewed (15.5%) did the commander either not approve all findings and recommendations or make substitutions.

TRANSPARENCY TO FAMILIES, COMMUNITIES, AND THE PUBLIC

Key Takeaways and Findings

- **Transparency in investigations is vital in recognizing the dignity of victims and survivors and in strengthening the military’s legitimacy amongst local populations.**
- **U.S. investigations into civilian harm are too often opaque, and the U.S. rarely informs impacted families about the existence of an investigation or its conclusions, even where the U.S. military has a military presence on the ground.**

- **The U.S. military has periodically released results of investigations pursuant to FOIA requests, demonstrating that these records can be shared with the general public, and serve a public good. Yet the military does not automatically or proactively release investigative records, and often subjects those who submit FOIA requests to lengthy delays. This precedent of public disclosure can be built upon through more consistent voluntary disclosure of investigation results, to steadily improve transparency.**

Recommendations

- **The military should promptly release thorough and detailed investigative records, but for limited exceptions where there is a compelling national security interest, while protecting the privacy and security of affected civilians.**
- **Investigative officers, and others who oversee investigations, should ensure that family members or other survivors are informed of investigative determinations, and kept apprised of investigations as they progress.**

The Value of Transparency

Transparent reporting of investigations can bolster the investigative process’s credibility among local populations in areas where the military operates, stakeholders in the United States, and the international community at large.¹⁹⁰ Some military officers have associated transparency with operational success, as transparency may help the military respond credibly to allegations of deliberate civilian targeting, counter false information, and gain the trust of the local population during counterinsurgency operations.¹⁹¹ Conversely, the discovery of efforts to cover up incidents may lead to further mistrust, both on the part of local populations and the broader international community.

189 AR 15-6, 2 -8(b)(3).

190 Rahma A. Hussein, Abdifatah Ali Hassan, and Alex Moorehead, “Transparency on Civilian Harm in Somalia Matters—Not Just to Americans,” *Just Security*, April 9, 2019, <https://www.justsecurity.org/63554/transparency-on-civilian-harm-in-somalia-matters-not-just-to-americans/>; Knuckey et al., “Pentagon Admits Major Investigation Flaw: They Rarely Talk to Air Strike Witnesses or Victims,” *Just Security*, June 29, 2017, <https://www.justsecurity.org/42675/pentagon-admits-rarely-talks-air-strike-witnesses-victims/>.

191 “Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force,” Columbia Law School Human Rights Clinic and Sana’a Center for Strategic Studies, June 2017, <https://www.outoftheshadowsreport.com/>.



A U.S. air force jet flies over northern Iraq after conducting airstrikes in Syria, during Operation Inherent Resolve, September 27, 2014.

Senior Airman Matthew Bruch/U.S. Air Force

Different forms of transparency are important for different reasons, and at different stages. Transparency of process, and regular updates on the progress of an investigation, can be important for impacted individuals, families, and communities, and it may be appropriate to disclose more information to affected individuals and families than might be possible to release to the public at large. More broadly, transparency to the public about steps taken in assessments and investigations, and the results of investigations (including civilian casualty counts and levels of certainty), are important for the U.S. military's legitimacy and external accountability, and can help to demonstrate that the U.S. military takes reports and allegations of civilian harm seriously.¹⁹²

In response to calls for greater transparency, the military often cites concerns about operational security (e.g., disclosing sensitive information that could compromise ongoing missions or expose sensitive intelligence sources).

Transparency with Affected Communities, Survivors, and Family Members

In Afghanistan in the 2000s, many incidents were brought to light by civilians themselves who approached bases to report harm and submit compensation claims and supporting documentation.¹⁹³ There, commanders “began publicly expressing regret for civilian losses and offering amends for civilian deaths, injuries, and property damage,” and began making “themselves accessible to civil society,” responding to the media with promises to “investigate and recognize any civilian loss.”¹⁹⁴

Yet even during this time period, in which the U.S. military did have large numbers of troops on the ground, it does not appear to have been standard practice to notify and update affected individuals and families on the status of investigations. Across all of the investigations reviewed for this report—most of them from Afghanistan and Iraq during times when the U.S. military had large numbers of ground forces—there was no indication that victims or their families were notified at the start of an investigation

192 Center interview with Christopher Kolenda, Washington, D.C., December 7, 2017.

193 Chris Rogers, “Addressing Civilian Harm in Afghanistan: Policies and Practices of International Forces,” Center for Civilians in Conflict, 2010, https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf.

194 Larry Lewis and Sarah Holewinski, “Changing of the Guard,” *Prism* 4, no. 2, 2013, p. 56-65, <https://www.jstor.org/stable/pdf/26469810.pdf>.

or regarding the investigation's findings. The failure to receive information about whether an investigation took place, and how it was resolved, has weighed heavily on families who have lost loved ones in U.S. military operations. In one example, after U.S. Special Forces raided a family compound in Afghanistan's Nangarhar province in January 2010, killing nine people, the family attempted to raise the case through the Afghan Ministries of Justice and Interior. "No military investigators ever came to see us," said Rafiuddin Kashkaki, whose 16-year-old son was killed. "We did everything we could to fight for justice, but we don't even know if there was an investigation. We were left in the dark and we're still in the dark."¹⁹⁵

More recently, NGOs and independent experts have consistently raised concerns regarding the lack of communication with family members and the general public as to the findings and conclusions of investigations.¹⁹⁶ This is particularly true in investigations in which investigators did not make site visits or interview civilian witnesses during the investigation itself.¹⁹⁷ One Yemeni NGO representative, who has reported on civilian casualties caused by U.S. drone strikes, said, "I have seen online some of the public responses to some of the strikes...[but] responses to the strikes with the families—with the victims? I haven't seen that at all." A Somali human rights activist said, "We often hear the news [of civilian harm] or the statement by AFRICOM saying...there has been collateral damage. But the details...we don't know how they [investigate], the details, the procedure they follow..."

If someone just says 'we killed two people, we're sorry,' we still don't know what happened."¹⁹⁸

Proximity to families and communities—and relatedly, transparency toward them—has decreased with the increased reliance on intelligence and sensitive aerial footage of air strikes, and with U.S. involvement in conflicts in which the U.S. military has little presence on the ground.¹⁹⁹

Transparency to the Public

Transparency through the public release of information has been a "perpetual challenge" for the military, and the Pentagon itself has commented on the need for the military to be more forthcoming with its findings.²⁰⁰ In particular, OIR has made "key improvements" in assessing and disclosing civilian casualties, particularly by publishing monthly civilian casualty estimates and updates on ongoing inquiries.²⁰¹ AFRICOM releases information about its operations when requested (to cross reference with suspected civilian casualties cases), and in one case disclosed a known civilian casualty over a year after it occurred. In OIR and AFRICOM, little information other than the basic facts (place, date, and number of individuals killed or injured) are listed when information about civilian casualties are released. No similar reporting format currently exists for operations in Afghanistan or Yemen, though the annual report provided by the DoD to Congress (as required by law) includes basic information about civilian casualties in these operations (and other U.S. military operations globally).

195 "Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan," Amnesty International, August 11, 2014, p.9, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>.

196 See Alston, Philip, "Report to the Human Rights Council on Mission to Afghanistan—Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," UN Doc. A/HRC/11/2/Add 4, 2009; "Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan," Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>.

197 See "Libya: The Forgotten Victims of NATO Strikes," Amnesty International, March 19, 2012, <https://www.amnesty.org/download/Documents/24000/mde190032012en.pdf>; Knuckey et al., "Pentagon Admits Major Investigation Flaw: They Rarely Talk to Air Strike Witnesses or Victims," *Just Security*, June 29, 2017, <https://www.justsecurity.org/42675/pentagon-admits-rarely-talks-air-strike-witnesses-victims/>.

198 Human Rights Institute phone interview with Somali human rights activist, November 25, 2019.

199 See Sarah Holewinski et al., "Civilian Impact of Drone: Unexamined Costs, Unanswered Questions," Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012, https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf; Samuel Oakford et al., "Death in the City: High Levels of Civilian Harm in Modern Urban Warfare Resulting from Significant Explosive Weapons Use," *Airwars*, 2018, <https://airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf>.

200 Kyle Rempfer, "Pentagon review calls for changes to how U.S. investigates, reports civilian war casualties," *Military Times*, 2019, <https://www.militarytimes.com/news/your-army/2019/02/11/pentagon-review-calls-for-changes-to-how-us-investigates-reports-civilian-war-casualties/>.

201 Samuel Oakford et al., "Death in the City: High Levels of Civilian Harm in Modern Urban Warfare Resulting from Significant Explosive Weapons Use," *Airwars*, 2018, <https://airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf>.

NGOs have raised specific concerns about the U.S. government's lack of transparency regarding the status of those killed, as well as whether or not an investigation has adequately considered evidence that could exculpate a person from being an active member of a group that may be targeted in lethal operations (as opposed to a civilian).²⁰²

Currently, FOIA requests represent the primary mechanism through which the military releases information about specific investigations. Although the FOIA process is often riddled with extensive delays and may provide very minimal information, it has also resulted in the disclosure of the 228 investigations reviewed for this report.²⁰³ Some are incomplete: of the investigations reviewed for this project, 11 investigations' findings were entirely redacted. However, many others provided detailed records of the specific steps that the U.S. military took to investigate specific cases of harm.

However, the FOIA process is not enough to achieve transparency.²⁰⁴ It requires a request from an individual or institution, rather than serving as

a channel through which the military proactively publishes investigation results. Requests can take months or years to process, particularly if they are not reviewed on an expedited basis. Additionally, these documents are not easily accessible. While the CENTCOM FOIA reading room is a useful repository of disclosed documents, it is very difficult to use and cannot be searched for specific information, such as date and location. Greater transparency would be facilitated by improving some of its functions.²⁰⁵

The U.S. military occasionally chooses to conduct investigations and publicize results in response to large, widely-covered incidents. One academic argued that the investigation of the 2015 Kunduz strike impacting a hospital in Afghanistan demonstrated "the U.S. military's public adherence to transparency as part of its strategy to avoid alienating local populations."²⁰⁶ However, transparency should not be the norm only for high profile incidents: local populations are even more alienated when incidents are not covered by international media.

202 "Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force," Columbia Law School Human Rights Clinic and Sana'a Center for Strategic Studies, June 2017, <https://www.outoftheshadowsreport.com/>.

203 "Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan," Amnesty International, August 11, 2014, <https://www.amnesty.org/download/Documents/4000/asa110062014en.pdf>; Letta Tayler et al., "Between a Drone and Al-Qaeda: The Civilian Cost of U.S. Targeted Killings in Yemen," Human Rights Watch, October 13, 2013, https://www.hrw.org/sites/default/files/report_pdf/yemen1013web.pdf.

204 Chris Jenks, "Targeting Transparency: A Call for DoD to Automatically Release Investigations of Civilian Casualties in Armed Conflict," *Just Security*, May 27, 2014, <https://www.justsecurity.org/10904/guest-post-targeting-transparency-call-dod-automatically-release-investigations-civilian-casualties-armed-conflict/>.

205 In the course of our research, the research team had to spend many hours downloading and organizing documents to check against duplicates and verify that different documents were or were not part of the same investigation.

206 Amy Tan, "The Duty to Investigate Alleged Violations of IHL: Outdated Deference to an Intentional Accountability Problem," *New York University Journal of International Law and Politics*, 2016, p. 188-89.

MILITARY LESSONS LEARNED

Key Takeaways and Findings

- The U.S. military recognizes that investigations can be an important means to identifying lessons learned and best practices in order to mitigate or prevent future harm.
- When conducting investigations, IOs are often asked to identify lessons learned from a specific incident. However, it is difficult to assess whether the investigating officer has made the correct recommendations, how often investigations identify lessons learned in practice, and whether and how these lessons are implemented.
- The U.S. military faces several obstacles in learning from civilian harm incidents, relating to turnover, prioritization of investigations, and the storing of investigative records.

Recommendations

- Commanders should ensure that assessments and investigations can be, and are, reviewed and analyzed for lessons that can be learned or for adjustments to tactics or operations. The analysis and recommendations should be conducted by those with the requisite skills and knowledge to correctly diagnose any issues and to make suitable recommendations.
- The U.S. military should consider developing a single database to preserve and organize investigation reports to allow for investigations to be searched and for lessons to be recorded. This may encourage the identification of root causes of harm and of systemic issues, together with the dissemination and implementations of lessons learned across units within a specific theater and in other theaters.

- To the extent possible, military personnel should be provided with training and information about assessing, investigating, and tracking harm during pre-deployment preparation, and during in-service training while in deployment in a theater.

Investigations into civilian harm can help identify gaps, good practices, and lessons learned in civilian harm prevention and mitigation, which ultimately serves to prevent such incidents from recurring in the future. However, even when investigations identify specific lessons, challenges remain in ensuring that these lessons are fed back into the planning and conduct of concurrent and future operations, both within and across theaters.

The Value of Investigations for Lessons Learned

The U.S. military recognizes the central role that investigations play in identifying lessons and preventing future incidents of civilian harm in its doctrine and parts of its practice. The U.S. Law of War Manual notes that “investigations of incidents involving civilian casualties may be appropriate in order to identify measures to mitigate the likelihood of future incidents of civilian casualties.”²⁰⁷ Army doctrine recognizes the benefits of investigations not only for learning specific lessons from isolated incidents, but also as one of many sources that enable the identification of patterns that can help in preventing future incidents.²⁰⁸ For example, pattern analysis— informed by investigations—may help identify particular locations where civilian casualties incidents are more likely to occur, as well as the types of operations or units that are more likely to be involved.

According to the Army Techniques Publications (ATP), “Collection, analysis, and dissemination of civilian casualty information horizontally and vertically are critical for civilian casualty mitigation,” and “units should collect and analyze information related to the protection of civilians, including intelligence and inquiry or investigation reports, and

207 Chris Jenks, “Targeting Transparency: A Call for DoD to Automatically Release Investigations of Civilian Casualties in Armed Conflict,” *Just Security*, May 27, 2014, <https://www.justsecurity.org/10904/guest-post-targeting-transparency-call-dod-automatically-release-investigations-civilian-casualties-armed-conflict/>.

208 The ATP cites investigations along with “mission after action reviews and debriefs, assessments of unit experiences, cross-talk with other units, data management and analysis... a focused effort to gather lessons from host-nation individuals and organizations, other U.S. government agencies, nongovernmental organizations, and other actors.”

disseminate insights to higher, lower, and adjacent organizations.”²⁰⁹ Even in cases where investigations are too sensitive to disseminate widely, the ATP notes that the team conducting an investigation can “produce a summary of key lessons that can be distributed separately from the investigation itself.”²¹⁰ The ATP also notes the value of investigating “near misses” (i.e., “incidents that posed a high risk of civilian casualties which did not actually happen”) for learning valuable lessons and identifying best practices. The lessons drawn from this process can be absorbed through “training sessions, mission briefings, rehearsals, noncommissioned officer calls, and officer calls.”²¹¹

Beyond doctrine, the military’s investigative practices have at times reflected an institutional belief in the value of investigations to learning lessons. An appointment order used by the Multi-National Corps in Iraq in 2007 for escalation-of-force incidents noted that “the investigation process is a commander’s tool to assess the effectiveness of the Rules of Engagement (ROE) and EOF in the particular engagement, to capture lessons learned for [Tactics, Techniques and Procedures] analysis, and to preserve evidence of Law of Armed Conflict and ROE compliance and other procedures.”²¹²

Where lessons stemming from specific incidents are not integrated and fed back into the military—particularly when investigations have identified systemic issues, such as lack of understanding of existing procedures and ROEs or trainings—similar incidents may recur. Cross-checking and comparing results from different investigations may allow for the identification of root causes of harm. According to one study, investigations conducted by U.S. military and ISAF in Afghanistan “provided a rich dataset for analysis of causal factors, including factors that were not surfaced or seen as significant when considering a single incident but, when analyzed collectively,

emerged as a common contributing factor for many incidents.”²¹³

Tasking Lessons Learned Through Appointment Orders

Investigations into civilian harm can require IOs to identify ways to prevent similar incidents from recurring in the future. A significant majority (63.8%) of the appointment orders for the investigations reviewed for this project asked the IO to identify how a similar incident could be avoided in the future. This points to the centrality and importance of investigations in preventing future harm. Questions posed by the appointment orders included:

- **“What recommendations concerning improvements, if any, to coalition force tactics, techniques, and procedures will help avoid this type of incident in the future?”²¹⁴**
- **“What additional steps, if any, should the command take to mitigate the effects of this incident or future similar incidents?”²¹⁵**
- **“Could any individual, unit, or systemic measures have prevented this incident?”²¹⁶**
- **“What measures, if any, could have prevented this incident?”²¹⁷**

A standard template for appointment orders, which was used in 92 of the 228 investigations reviewed, included a requirement to include “a power point slide of maximum 2 slides listing lessons learned from the incident.”²¹⁸

209 ATP 3-6.

210 ATTP.

211 Ibid., 5-44.

212 Investigations 502, 503, 504, 507, 510, and 511.

213 Larry Lewis, “Improving Lethal Action: Learning and Adapting in U.S. Counterterrorism Operations,” CNA, September 2014, p. 45, https://www.cna.org/cna_files/pdf/COP-2014-U-008746-Final.pdf.

214 Investigations 250 and 251.

215 Ibid.

216 E.g. Investigations 502, 503, 507, 510, and 511.

217 Investigation 494.

218 E.g. Investigations 90, 170, 174 and 183.

Identifying Lessons Through Investigations

Our research demonstrates that some investigations have been able to identify important lessons learned. However, it is difficult to assess how often this occurs. Several investigations provide evidence that the investigative process was, at times, used to identify meaningful lessons that could prevent future civilian casualties. In one investigation involving a father and a son who were mistakenly targeted when digging an irrigation ditch, the IO noted:

“This tragic occurrence displays good lessons in establishing accurate [positive identification], exercising tactical patience, understanding local patterns of life, understanding how EOF techniques can be interpreted in unintended ways and successfully mitigating negative IO events.”²¹⁹

Other investigations’ findings stress the importance of understanding and respecting cultural differences in evaluating, preventing, and responding to civilian casualty incidents,²²⁰ or in ensuring effective preparation ahead of any operation to reduce the risk of civilian harm. As one IO notes:

“When preparing for all operations, ground and air units must evaluate the area they are operating in and take into account the agrarian nature of the country when discussing application of ROE. When evaluating these areas, there should be additional restrictions or considerations as identified in the TD for operations IVO [in the vicinity of] orchards, fields or village areas where a high probability of encounters with civilians is possible. Units should also be considerate of the civilian population; specifically noting how civilians may be dressed and what type of tools they use when working in fields, particularly if they could resemble weapons though certain types of observation devices.”²²¹

Implementation of Lessons

Even where investigations identify lessons that could prevent similar incidents from recurring in the future, whether these lessons are implemented or disseminated is another question. In only one investigation reviewed for this report did the IO specifically recommend that the lessons be disseminated to other units.

There was a general consensus among interview subjects queried on the topic that investigations had, at times, led to certain modifications in future conduct—for example, through changes to ROEs.²²² However, the dissemination and implementation of lessons learned from investigations at a broader institutional level is not happening systematically. This is a major shortfall of investigative processes. According to one former senior military official describing his time in Afghanistan, there were “very few lessons learned but many lessons relearned.”²²³ Another described the learning phenomenon as “not really lessons learned, but lessons encountered.”²²⁴

A 2011 review of the Joint Center for Operational Analysis (JCOA) examined the institutionalization of CIVCAS lessons learned by the U.S. military in Afghanistan.²²⁵ It found that, while units did learn and adapt to their operating environments, “their experiences, best practices, and lessons were not always shared within theater.”²²⁶ It concluded that “lessons learned organizations did not appear to make a significant contribution to in-theater adaptation.”²²⁷ This suggests a missed opportunity to disseminate important lessons and mitigate civilian harm, not only in that specific theater (in this case, Afghanistan), but also post-deployment, to feed into practice in other theaters.

219 Investigation 183.

220 Investigations 250 and 237.

221 Investigation 255.

222 Center interview with Richard B. Jackson, Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, Washington, D.C., November 29, 2017.

223 Center interview with a former military official with knowledge of military investigations processes (name withheld), U.S. Military Academy West Point, April 26, 2018.

224 Center interview with Richard Bew, former military official, Washington, D.C., Aug 23, 2018.

225 U.S. Joint Forces Command Joint, “Adaptive Learning for Afghanistan: Final Recommendations,” Joint Center for Operational Analysis, February 10, 2011, <https://info.publicintelligence.net/JCOA-ALA-Afghanistan.pdf>.

226 Ibid, 5.

227 Ibid.

APPENDIX: LIST OF INVESTIGATIONS REVIEWED BY CIVIC AND COLUMBIA HRI

| No. of investigation* | Date of the incident | Country | Specific location |
|-----------------------|----------------------|-------------------|---|
| 57 | 19 May 2004 | Syria-Iraq border | Syrian-Iraq border |
| 64 | 30 Oct 2005 | Iraq | Fallujah |
| 67 | 12 Jul 2007 | Iraq | New Baghdad District of Baghdad |
| 68 | 12 Jul 2007 | Iraq | New Baghdad District of Baghdad |
| 71 | 21 Aug 2008 | Afghanistan | Azizabad, Shindad District, Heart Province |
| 73 | 12 Feb 2010 | Afghanistan | Gardez District Pakyta, |
| 74 | 21 Feb 2010 | Afghanistan | Shahidi Hassas, Uruzgan District, |
| 78 | 25 Nov 2010 | Afghanistan | Shah Wali Kot |
| 81 | 28 Jul 2011 | Afghanistan | Tarin Kowt, Uruzgan |
| 87 | 11 Mar 2012 | Afghanistan | Village Stability Platform (VSP) Belambai |
| 90 | 26 May 2012 | Afghanistan | Suri KheyI Village, Wazi Dzadran District, Pakitya |
| 95 | 05 Nov 2014 | Syria | Harim City, Idlib Governate |
| 96 | 13 Mar 2015 | Iraq | Hatra District |
| 97 | 03 Oct 2015 | Afghanistan | Kunduz City |
| 101 | 07 Jul 2008 | Iraq | Baghdad International Airport |
| 104 | 01 Jun 2002 | Afghanistan | Oruzgan Province |
| 123 | 28 Nov 2013 | Afghanistan | Helmand Province |
| 124 | 04 Jan 2005 | Afghanistan | |
| 125 | 19 Jan 2005 | Afghanistan | Siminay, Oruzgan Province |
| 126 | 10 Feb 2005 | Afghanistan | Old Kabul Road at Pole Sufian |
| 127 | 22 Mar 2005 | Afghanistan | Korengal Valley, Kunar Province |
| 128 | 28 Apr 2005 | Afghanistan | Near FOB Baylough, Zabul |
| 129 | 14 Jul 2005 | Afghanistan | south of Borogana |
| 130 | 14 Sep 2005 | Afghanistan | Sayadabad Road, Ghazni |
| 131 | 04 Dec 2005 | Afghanistan | ? |
| 132 | 06 Dec 2005 | Afghanistan | Near Larzab, Deh Chopan district, Zabul province |
| 133 | 10 Dec 2005 | Afghanistan | Qualah Minar village, Mohammed Agh District, Logar |
| 134 | 05 May 2006 | Afghanistan | Highway 4 en route to Kandahar Airfield |
| 135 | 06 Oct 2007 | Afghanistan | West of FOB Zormat |
| 136 | 08 Oct 2006 | Afghanistan | Kamdesh |
| 137 | 09 Oct 2006 | Afghanistan | Ghazni City |
| 138 | 09 Jul 2006 | Afghanistan | Ghazni |
| 139 | 09 Jun 2006 | Afghanistan | Kandahar |
| 140 | 13 Jun 2006 | Afghanistan | Kabul |
| 141 | 13 Nov 2006 | Afghanistan | FOB Tillman, Gayan District |
| 142 | 13 Oct 2006 | Afghanistan | FOB Salerno |
| 143 | 13 Oct 2006 | Afghanistan | Kandahar Airfield |
| 144 | 15 Apr 2006 | Afghanistan | Landigal |
| 145 | 17 Apr 2006 | Afghanistan | Khowst Province |
| 146 | 17 Jun 2006 | Afghanistan | Oruzgan Province |
| 147 | 18 Apr 2006 | Afghanistan | Khowst Province |
| 148 | 19 Jun 2006 | Afghanistan | Shajoy |
| 149 | 25 Sep 2006 | Afghanistan | Ghazni |
| 150 | 26 Oct 2006 | Afghanistan | Pech River Road |
| 151 | 09 Jan 2007 | Afghanistan | Paktika |
| 152 | 20 Jan 2007 | Afghanistan | Kabul |
| 153 | 17 Feb 2007 | Afghanistan | Kandahar Airfield |
| 154 | 19 Feb 2007 | Afghanistan | Ghazni |
| 155 | 09 Mar 2007 | Afghanistan | Jalalabad |
| 156 | 21 Mar 2007 | Afghanistan | Shewan Village, Bala Baluk District, Farah Province |

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| No. of investigation* | Date of the incident | Country | Specific location |
|------------------------------|-----------------------------|----------------|---|
| 157 | 12 Apr 2007 | Afghanistan | |
| 158 | 19 Apr 2007 | Afghanistan | Sabari District, North of FOB Salerno |
| 159 | 11 Jun 2007 | Afghanistan | Vicinity of the Kandigal Bazaar near FOB Michigan, Jalalabad |
| 160 | 03 Jul 2007 | Afghanistan | Route Florida, Ghanzi Province |
| 161 | 16 Aug 2007 | Afghanistan | Kandahar (exact checkpoint location redacted) |
| 162 | 27 Aug 2007 | Afghanistan | Near Koshtowz |
| 163 | 29 Aug 2007 | Afghanistan | Near OP Avalanche and Camp Blessing |
| 164 | 18 Sep 2007 | Afghanistan | FOB Baylough |
| 165 | 25 Sep 2007 | Afghanistan | Near Firebase Pathfinder |
| 166 | 06 Oct 2007 | Afghanistan | Vicinity Khur Baugh and Khaki Bandeh villages, Konar Province |
| 167 | 07 Oct 2007 | Afghanistan | Vicinity Salerno Aerial Gunnery Range, FOB Salerno |
| 168 | 20 Oct 2007 | Afghanistan | Near Yakah Chinah, Kunar Province |
| 169 | 27 Nov 2007 | Afghanistan | Near FOB Kalagush |
| 170 | 01 Sep 2008 | Afghanistan | Paktika |
| 171 | 02 Mar 2008 | Afghanistan | Vicinity of Armul School |
| 172 | 04 Dec 2008 | Afghanistan | Hwy 1 in Zabul |
| 173 | 04 Jul 2008 | Afghanistan | At or near Combat Outpost Bella |
| 174 | 05 Jun 2008 | Afghanistan | near Kabul |
| 175 | 05 May 2008 | Afghanistan | Near Forward Operating Base Sharana, Paktika |
| 176 | 05 Sep 2008 | Afghanistan | Near Delaram |
| 177 | 06 Jul 2008 | Afghanistan | FOB Salerno |
| 178 | 07 Mar 2008 | Afghanistan | Near FOB Salerno |
| 179 | 07 Oct 2008 | Afghanistan | Near FOB Chamkani |
| 180 | 09 Sep 2008 | Afghanistan | Near Zambar, Khowst Province |
| 181 | 12 Dec 2008 | Afghanistan | Haft Asiab village |
| 182 | 14 Mar 2008 | Afghanistan | |
| 183 | 15 Jun 2008 | Afghanistan | Char Baran District, East Paktika |
| 184 | 15 Nov 2008 | Afghanistan | Bekharsay village, Zabu Province |
| 187 | 18 Jun 2008 | Afghanistan | |
| 188 | 19 Aug 2008 | Afghanistan | Galuch Village, Methar Lam District, Lafghman Province |
| 189 | 19 Jul 2008 | Afghanistan | COP Malekashay |
| 190 | 20 Dec 2008 | Afghanistan | Shekabad District, Wardak Province |
| 191 | 29 Apr 2008 | Afghanistan | Sasnar Khel |
| 192 | 21 Nov 2008 | Afghanistan | Khowst Province |
| 193 | 22 Aug 2008 | Afghanistan | Shindand District |
| 194 | 22 Jun 2008 | Afghanistan | Khogyani |
| 196 | 24 Dec 2008 | Afghanistan | Near COP Seray |
| 197 | 24 Nov 2008 | Afghanistan | |
| 200 | 31 Jan 2008 | Afghanistan | Kunjak, Helmand Province |
| 201 | 01 Dec 2009 | Afghanistan | Route California |
| 202 | 01 Mar 2009 | Afghanistan | Jalalabad |
| 203 | 01 Sep 2009 | Afghanistan | Mandosai District, Khowst Province |
| 204 | 02 Feb 2009 | Afghanistan | Charikar |
| 205 | 02 Jun 2009 | Afghanistan | Camp Clark, Khowst Province |
| 206 | 08 Jul 2009 | Afghanistan | COP Carwile, Wardak Province |
| 207 | 09 Dec 2009 | Afghanistan | Kabul-Jalalabad Highway |
| 208 | 11 Jul 2009 | Afghanistan | Qal-eh Wonah |
| 209 | 11 Jun 2009 | Afghanistan | Rechah Lam Village |
| 210 | 11 Jun 2009 | Afghanistan | COP Peniche, Khas Komas District |
| 211 | 11 Nov 2009 | Afghanistan | FOB Bostick, Nari District, Konar |
| 212 | 12 Apr 2009 | Afghanistan | Watapur River Valley |
| 213 | 12 May 2009 | Afghanistan | Wardak Province |

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| No. of investigation* | Date of the incident | Country | Specific location |
|------------------------------|-----------------------------|----------------|--|
| 214 | 13 May 2009 | Afghanistan | FOB Sharana, Sar Rowzah District, Paktika |
| 215 | 14 Sep 2009 | Afghanistan | Main Supply Route Rhode Island |
| 216 | 16 Jun 2009 | Afghanistan | FOB Blessing |
| 217 | 17 Feb 2009 | Afghanistan | Ezabad |
| 218 | 19 May 2009 | Afghanistan | Zormat District, Paktya |
| 219 | 20 Jun 2009 | Afghanistan | COP Michigan |
| 220 | 24 Mar 2009 | Afghanistan | COP Pol-E Alam |
| 221 | 24 Nov 2009 | Afghanistan | Main Supply Route Montana |
| 222 | 26 Dec 2009 | Afghanistan | Ghazi Khan, Ghondai Village, Narang District, Konar Province |
| 223 | 25 May 2009 | Afghanistan | |
| 224 | 27 Jul 2009 | Afghanistan | Route Ohio, Logal Province |
| 225 | 28 Apr 2009 | Afghanistan | FOB Sayed Abad, Logar Province |
| 226 | 28 Sep 2009 | Afghanistan | FOB Rushmore, Paktika Province |
| 227 | 29 Jan 2009 | Afghanistan | Highway 1, Herat Province |
| 228 | 31 Jan 2009 | Afghanistan | Orgun Bazaar |
| 229 | 31 Mar 2009 | Afghanistan | Mehtar Lam District, Langham Province |
| 230 | 31 Oct 2009 | Afghanistan | Combat Outpost Blackhawk, Nerkh District, Wardak Province |
| 231 | 02 Dec 2010 | Afghanistan | Baghlan Province |
| 232 | 03 Oct 2010 | Afghanistan | Patrol Base Roadhouse, Baraki Barak District, Wardak Province |
| 233 | 04 Dec 2010 | Afghanistan | FOB Andar in Deh Yak District, Ghazni Province |
| 234 | 04 May 2010 | Afghanistan | Route Alaska, Baraki Barak District, Logar Province |
| 235 | 02 May 2010 | Afghanistan | Watapur District, Konar Province |
| 236 | 06 Apr 2010 | Afghanistan | Tagab District, Kapisa Province |
| 237 | 06 Dec 2010 | Afghanistan | FOB Joyce, Sar Kani District, Konar |
| 238 | 06 Jan 2010 | Afghanistan | District of Road, Nagarhahr Province |
| 239 | 08 Jul 2010 | Afghanistan | Jeni Kheyl bazaar, Paktya Province |
| 240 | 10 Mar 2010 | Afghanistan | Route Florida, outside FOB Sharana, Paktya Province |
| 241 | 11 Oct 2010 | Afghanistan | COP Yahya Khel, Yahya Khel District, Paktika Province |
| 242 | 18 Jun 2010 | Afghanistan | Pharmakehel Village, Qarghah '1 District, Laghman Province |
| 243 | 19 Apr 2010 | Afghanistan | ROB Salno, Khowst Province |
| 244 | 19 Aug 2010 | Afghanistan | FOB Andar, Andar District, Ghazni Province |
| 245 | 19 Jul 2010 | Afghanistan | Main Supply Route Alaska |
| 246 | 19 Nov 2010 | Afghanistan | OP Pride Rock, Darah ye Peech District, Konar Province |
| 247 | 22 Feb 2010 | Afghanistan | Arzagal Valley, Konar Province |
| 248 | 23 Jul 2010 | Afghanistan | COP Able Main, Watahpur District, Konar Province |
| 249 | 23 Oct 2010 | Afghanistan | COP Durrani, Nerkh District, Wardak Province |
| 250 | 24 Mar 2010 | Afghanistan | COP Chergotah, Bak Distrit, Khowst Province |
| 251 | 25 May 2010 | Afghanistan | Tangi Valley, Wardak Province |
| 252 | 28 Aug 2010 | Afghanistan | FOB Salerno |
| 253 | 28 Jan 2010 | Afghanistan | Jalalabad |
| 254 | 29 Jan 2010 | Afghanistan | Main Supply Route Ohio, Ghazni Province |
| 255 | 29 Sep 2010 | Afghanistan | FOB Four Corners, Andar District, Ghazni Province |
| 256 | 31 Mar 2010 | Afghanistan | Salar Village Bazaar |
| 257 | 02 Aug 2011 | Afghanistan | COP Herrera, Jahi District, Paktya Province |
| 258 | 02 Jan 2011 | Afghanistan | Egadara and Bar Shangar villages, Asmar District, Kunar Province |

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| No. of investigation* | Date of the incident | Country | Specific location |
|------------------------------|-----------------------------|----------------|---|
| 259 | 03 Nov 2011 | Afghanistan | Dal Pori Village |
| 260 | 04 Dec 2011 | Afghanistan | Chak District, Wardak Province |
| 261 | 07 Feb 2011 | Afghanistan | Watangatu Village, Alishang District, Laghman Province |
| 262 | 10 Feb 2011 | Afghanistan | Shal Village, Asmar District, Kunar Province |
| 263 | 12 Dec 2011 | Afghanistan | Ruzi Kala Village in TF White Eagler AO |
| 264 | 12 Jul 2011 | Afghanistan | COP Monti |
| 265 | 13 Dec 2011 | Afghanistan | GOB Gamberi, Route Illinois, Qarghah'l District, Laghman Province |
| 266 | 13 Oct 2011 | Afghanistan | Gardez City |
| 267 | 14 Mar 2011 | Afghanistan | COP Penich, Tsowkey District, Konar Province |
| 268 | 14 Oct 2011 | Afghanistan | Shal Kowar, Asmar District |
| 269 | 15 May 2011 | Afghanistan | Ghaziabad District, Konar Province |
| 270 | 16 Jan 2011 | Afghanistan | Gazarak Village, Darah-Ye-Pech District, Konar Province |
| 271 | 18 Feb 2011 | Afghanistan | Mainmanah City District, Faryab Province |
| 272 | 18 May 2011 | Afghanistan | Mata Khan District, Paktika Province |
| 273 | 19 Apr 2011 | Afghanistan | FOB Gardez |
| 274 | 19 Mar 2011 | Afghanistan | Village of Menlah, Sherzad District, Nangarhar Province |
| 275 | 20 Feb 2011 | Afghanistan | FOB Connolly, Khugyani District, Nangarhar Province |
| 276 | 20 Sep 2011 | Afghanistan | Wanar Village, Dar-ye Pech District, Kabul Province |
| 277 | 21 Jul 2011 | Afghanistan | Route Ohio, Sayyidabad District, Wardak Province |
| 278 | 23 Aug 2011 | Afghanistan | COP Penich, Khaus Kunar District, Kunar Province |
| 279 | 23 Jul 2011 | Afghanistan | Nawshad, Charkh District, Logar Province |
| 280 | 26 Aug 2011 | Afghanistan | Baraki Barak District, Logar Province |
| 281 | 26 Dec 2011 | Afghanistan | Mohmand Darah District, Nagahar Province |
| 282 | 26 Jul 2011 | Afghanistan | FOB Andar, Andar District, Ghazni Province |
| 283 | 27 Aug 2011 | Afghanistan | COP Pana-TB, Chak-E Wardak District, Wardak Province |
| 284 | 27 Mar 2011 | Afghanistan | Khan Jan Kheyl Bazaar, Nerkh District, Wardak Province |
| 285 | 30 Apr 2011 | Afghanistan | Baraki Barak District, Logar Province |
| 286 | 30 Jul 2011 | Afghanistan | COP Sabari, Sabaria District, Khowst Province |
| 287 | 31 Jan 2011 | Afghanistan | Sar Markay Village, Nadar Shah Kot District, Khowst Province |
| 454 | 03-Jan-04 | Iraq | Tikrit |
| 455 | 29-Jan-05 | Iraq | Southbound Rt Brewers |
| 456 | 20-Feb-05 | Iraq | Sarabdi |
| 457 | 07-Mar-05 | Iraq | |
| 458 | 26-Mar-05 | Iraq | |
| 459 | 02 Aug 2005 | Iraq | Mosul |
| 460 | 19-Aug-05 | Iraq | |
| 461 | 11-Oct-05 | Iraq | Mosul |
| 462 | 01 Nov 2005 | Iraq | Ramadi |
| 463 | 07-Jan-06 | Iraq | |
| 464 | 11-Jan-06 | Iraq | |
| 465 | 24-Jan-06 | Iraq | Muqdadiyah |
| 466 | 26-Jan-06 | Iraq | |
| 467 | 27-Jan-06 | Iraq | Al-Kut |
| 468 | 19-Feb-06 | Iraq | Karabilah |
| 469 | 28-Feb-06 | Iraq | Somer/Domiz neighborhood, Mosul |

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| No. of investigation* | Date of the incident | Country | Specific location |
|-----------------------|----------------------|---------|-------------------------------|
| 470 | 12-Mar-06 | Iraq | |
| 471 | 14-Mar-06 | Iraq | |
| 472 | 16-Mar-06 | Iraq | Near Abu Ghraib |
| 473 | 21-Mar-06 | Iraq | |
| 474 | 24-Mar-06 | Iraq | |
| 475 | 25-Mar-06 | Iraq | |
| 476 | 03-Apr-06 | Iraq | |
| 477 | 04-Apr-06 | Iraq | |
| 478 | 16-Apr-06 | Iraq | |
| 479 | 04-May-06 | Iraq | Samarra. |
| 480 | 11-May-06 | Iraq | |
| 481 | 31-May-06 | Iraq | |
| 482 | 21-Jun-06 | Iraq | |
| 483 | 10-Jul-06 | Iraq | |
| 484 | 10-Jul-06 | Iraq | "Zone 48" |
| 485 | 13-Jul-06 | Iraq | |
| 486 | 22-Jul-06 | Iraq | Al Farouk neighborhood, Mosul |
| 488 | 02-Aug-06 | Iraq | Unclear |
| 489 | 17-Sep-06 | Iraq | |
| 490 | 21-Sep-06 | Iraq | |
| 491 | 03-Oct-06 | Iraq | Bayaa, Southwest Baghdad |
| 492 | 14-Oct-06 | Iraq | |
| 493 | 18-Oct-06 | Iraq | Baghdad |
| 494 | 20-Nov-06 | Iraq | |
| 495 | 07-Dec-06 | Iraq | Samarra |
| 496 | 24-Dec-06 | Iraq | Kirkuk |
| 497 | 25-Dec-06 | Iraq | Baghdad |
| 498 | 07-Jan-07 | Iraq | Baghdad |
| 499 | 05-Mar-07 | Iraq | |
| 500 | 07-Mar-07 | Iraq | Fallujah |
| 501 | 29-Mar-07 | Iraq | |
| 502 | 26-Apr-07 | Iraq | Basrah |
| 503 | 06-May-07 | Iraq | Tikrit |
| 504 | 08-May-07 | Iraq | Baghdad |
| 505 | 10-May-07 | Iraq | Shumait |
| 506 | 16-May-07 | Iraq | |
| 507 | 27-Jun-07 | Iraq | Al-Hurriya |
| 508 | 28-Jun-07 | Iraq | Baghdad |
| 509 | 30-Jun-07 | Iraq | Ramadi |
| 510 | 22-Jul-07 | Iraq | Baghdad |
| 511 | 23-Jul-07 | Iraq | Baghdad |
| 512 | 27-Jul-07 | Iraq | Al Dhour |
| 513 | 29-Jul-07 | Iraq | Yusufiyah |
| 514 | 09-Sep-07 | Iraq | Doura |
| 515 | 18-Oct-07 | Iraq | Bayji |
| 516 | 13-Dec-07 | Iraq | Iskandariya |
| 517 | 01 Jan 2008 | Iraq | Baghdad |
| 518 | 12-Jan-08 | Iraq | Salman Pak |

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An Iraqi Army soldier, seen during a joint operation with U.S. soldiers in Marez, Iraq, October 28, 2010.

Staff Sgt. Edward Reagan