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The Takhar attack

Targeted killings and the parallel worlds of US intelligence and Afghanistan

EXECUTIVE SUMMARY

On 2 September 2010, ISAF announced that 'coalition forces' had killed the Taliban deputy shadow governor of Takhar who was also a 'senior member' of the Islamic Movement of Uzbekistan (IMU) in an air attack. Immediately, Afghans, including the provincial governor, police chief and President Karzai insisted an egregious mistake had been made and civilians who had been campaigning in Afghanistan's parliamentary elections had been targeted. Ten were killed and seven injured. The military has remained adamant to this day that it got the right man.

Claims of civilian casualties are many in Afghanistan, but getting evidence from the field is difficult, given that most operations occur in insecure areas. In this case, the author has been able to interview survivors,

This author would like to thank the following individuals for their information and insight: Erica Gaston at Open Society Foundations; Michael Semple at the Carr Centre for Human Rights Policy, Harvard University; Candace Rondeaux and various Afghan researchers who preferred not to be named. All views in this paper, however, are the author's.

witnesses, police and senior Afghan officials to piece together an extremely detailed account of the attack. Crucially, senior officers from the US Special Forces unit that actually carried out the operation also gave lengthy accounts of what happened, including the intelligence behind the operation. This combination of sources makes this report a highly significant case study.

The findings of this investigation raise systemic concerns over the intelligence that drives this and other targeted killings in Afghanistan. Targeted killings – as one element of the so-called 'kill or capture' strategy – are one of the main metrics of success claimed by General Petraeus and an ever more important aspect of international military policy in Afghanistan. These operations are, in Petraeus's words, 'intelligence driven'. Yet, on the very day of the Takhar attack, he had voiced concerns to journalists about flaws in US intelligence operations, in particular their lack of a 'granular understanding of local circumstances'. He referred to a study by the former top US military intelligence officer in Afghanistan, which described intelligence

analysts as ‘ignorant of local economics and landowners, hazy about who the powerbrokers are’. It said that, having ‘focused the overwhelming majority of its collection efforts and analytical brainpower on insurgent groups, the vast intelligence apparatus is unable to answer fundamental questions about the environment in which US and allied forces operate and the people they seek to persuade.’ The investigation presented in this report points to the persistence of these problems and how a ‘hazy’ understanding of the wider political landscape of Afghanistan can lead to civilian deaths, possible violations of the laws of war, and attacks that are politically and militarily harmful.

The intelligence behind the killing began with the tracking of phone calls made by the man whom the US military meant to kill on 2 September 2010 – Muhammad Amin, who, investigations have shown, was indeed the deputy Taleban governor of Takhar. The special forces unit came to believe one number called by Muhammad Amin in Kabul was passed on to him and he himself began to use it and to ‘self-identify’ as Zabet Amanullah. In other words, they believed that Muhammad Amin, a Taleban deputy governor, was using the name ‘Zabet Amanullah’ as an alias.

Yet, Zabet Amanullah was not an alias; it was the name of an actual person. When the two men’s identities were mixed up, it was Zabet Amanullah who appeared in the crosshairs of the US military.

Zabet Amanullah had fought for the Taleban when they were in power, but in 2001 he surrendered and laid down his arms. The author of this report met him in 2008 when he had just fled Pakistan where he had been detained by the Pakistani intelligence agency. He described how the ISI had interrogated and tortured him, he believed, because he was a former Taleban commander who was *not* fighting. His subsequent life, led quietly and openly in Kabul and his very public return to his home province of Takhar in the summer of 2010 has been documented in detail. Zabet Amanullah had agreed to act as the agent for

his nephew who was standing in the parliamentary elections and met a wide range of government officials, including governors, police chiefs and senior officials in the presidential palace, all of whom knew him personally. On 2 September 2010, just hours after making his daily call to the district police chief to check on security, Zabet Amanullah’s election campaign convoy was bombed by US special forces. As the provincial governor, Abdul Jabar Taqwa, said, ‘Without any co-ordination, without informing provisional authorities, they attacked, on their own, civilian people who were in a campaign convoy.’

The special forces unit has insisted that the technical evidence shows irrefutably that there was only person. They also pointed to discussions about insurgent activities that were monitored during phone calls. However, when pressed about the existence – and death – of an actual Zabet Amanullah, they argued they were not tracking the name, but targeting the telephones. Final proof that the military had mixed up the identities of two men has come with the location of the man the US intended to kill on 2 September 2010, the now-former deputy Taleban shadow governor, Muhammad Amin. He is alive and well and has been interviewed in Pakistan.

This investigation has demonstrated the danger of relying on signals intelligence and social network analysis, particularly when it is used as a basis for targeted killings, without cross-checking and in the virtual absence of human intelligence and, indeed in this case, without even the ordinary common knowledge to be had from watching election coverage on television. The findings of this investigation indicate that the most basic enquiries were not made about a target the military had been tracking for months. This suggests grave flaws in intelligence collection and evaluation. The magnitude of these omissions may rise to the level of a violation of the precautionary principle, one of the basic principles of the laws of war aimed at protecting civilians during conflict.

This investigation into the attack on 2 September 2010 has uncovered two other

serious legal concerns about targeted killings that need urgent clarification. The first is whether the US military, as a general rule, deems a person's *proximity* to an individual identified for a targeted killing as sufficient to change his status from default civilian to assumed combatant. Although the military, when choosing the location of the 2 September 2010 attack did take precautions to ensure that by-standers were not targeted and took pains to ensure that only Zabet Amanullah's car was struck, ISAF press releases and discussions with senior officers suggested that proximity to a target is being used as a proxy for determining combatant status. Nine other men, all civilians and fellow election campaigners, were killed in the attack. ISAF and the Special Forces Unit, however, continue to view their death as legally justified.

The second concern is when an individual identified on the list for targeted killing (JPEL) can be rendered *hors de combat* (or 'outside the fight') – and, in particular, whether the bar to considering someone *hors de combat* – and therefore protected from attack – has been quietly raised. The circumstances of Zabet Amanullah's death and the interviews with the Special Forces unit suggest that once a person has been identified for a targeted killing and once an operation has been launched, there are extremely few circumstances under which this person may be considered *hors de combat*, a status which would mean the attack would have to be halted.

In the absence of accurate and wide-ranging human intelligence, it is no wonder that the divergent accounts of what happened on 2 September 2010 seem to come from parallel worlds. One is the world of the American military whose knowledge is often driven largely by signals intelligence and reports provided by a very limited number of local informants and who, generally, focus very narrowly on insurgent behaviour. The other is the normal, everyday world of Afghan politics. In the case of the Takhar attack, these two worlds simply did not connect.

1 INTRODUCTION

On 2 September 2010, ISAF announced that 'coalition forces' had killed a senior commander whom it named as Muhammad Amin.² The press release said he was the Taliban deputy governor of Takhar province as well as a senior representative of the Islamic Movement of Uzbekistan (IMU), a radical group, which since 2001 has become ever closer to al-Qaida:

Coalition forces conducted a precision air strike targeting an Islamic Movement of Uzbekistan senior member assessed to be the deputy shadow governor for Takhar province this morning. He regularly coordinates and conducts attacks with known IMU and Taliban insurgents and travelled from Pakistan to Takhar this spring. Intelligence tracked the insurgents travelling in a sedan on a series of remote roads in Rustaq district... The security force was unable to immediately dispatch a ground force to assess the results, but initial reflections indicate eight to 12 insurgents were killed or injured in the strike, including a Taliban commander. Multiple passengers of the vehicle were positively identified carrying weapons.³

An alternative version of events quickly emerged according to which ISAF had targeted the election campaign convoy of Abdul Wahab Khorasani, a parliamentary candidate for Takhar.⁴ Khorasani was injured

² The ISAF Public Affairs Office usually deals with operations by all international forces in Afghanistan and, rather than naming the Special Forces directly, uses the catch-all term 'Coalition Forces'. The operation was carried out by a Special Forces unit, which is referred to as the Unit in this paper. Special Forces have a different chain of command, but ultimately come under the overall command of General Petraeus.

³ Press release. ISAF Joint Command – Afghanistan 2010-09-CA-027 Kabul 'Coalition Forces Conduct Precision Strike Against Senior IMU Member in Takhar Province' Kabul, 2 September 2010, <http://www.isaf.nato.int/article/isaf-releases/coalition-forces-conduct-precision-strike-against-senior-imu-member-in-takhar-province.html>.

⁴ Details for this paragraph from press coverage. See for instance 'Afghan election campaign workers 'killed in air strike'', BBC website, 2

in the attack and spoke to journalists from his hospital bed. The ten dead ‘insurgents’, along with several injured ones, were his election workers and many were relatives of him or his agent, who was also his uncle, Zabet Amanullah.⁵ Immediately after news of the strike broke, many people in Takhar and Kabul assumed the agent, Zabet Amanullah, was the real target because he was the only person of real standing in the convoy. They also believed the Americans had their intelligence wrong and that all the dead, including Zabet Amanullah, were civilians.

The strike received brief high-profile attention when the visiting US Secretary of Defence, Robert Gates, told a press conference in Kabul, ‘I am able to confirm that a very senior official of the Islamic Movement of Uzbekistan was the target and was killed.’ However, he added, they would be looking into the allegations that civilians had been killed.⁶ Condemnation of the attack came from the man standing next to him, President Karzai, who told reporters, ‘Pro-democracy people should be distinguished from those who fight against democracy.’⁷ This fundamental impasse has remained. Afghans, including senior government officials, have been incredulous that anyone might have thought Zabet Amanullah and the others were anything but civilians, while ISAF and the US Special Forces unit that conducted the operation have remained adamant that they hit the correct target – Muhammad Amin, a

dangerous IMU/Taliban commander, who used the alias ‘Zabet Amanullah’.

The investigation for this report found overwhelming evidence that this was an entirely civilian convoy. The final proof was locating and interviewing the man whom the US military thought it had killed – the (now former) deputy Taliban governor of Takhar, Muhammad Amin. This indicates that something was catastrophically wrong with the US intelligence that led to the attack.

Zabet Amanullah’s is not the first case where civilians have been targeted mistakenly in Afghanistan or where their civilian status has been contested by the military. Getting evidence from the field is difficult, given that most operations occur in insecure areas.⁸ In this case, however, the author has been able to interview survivors, witnesses, police, senior Afghan officials – and, crucially, senior officers in the Special Forces unit which carried out the attack. This makes the Takhar attack such a significant case study. The research has uncovered serious discrepancies that raise systemic concerns over the intelligence that drives targeted killings.

By chance on the very day of the attack, General Petraeus pointed to the same sort of deficiencies in the military’s intelligence gathering operations, which this author’s report has uncovered, particularly the poor knowledge of non-insurgent power structures, and the lack of what Petraeus called a ‘granular understanding of local circumstances’.⁹

September 2010, <http://www.bbc.co.uk/news/world-south-asia-11163742>. Also Christopher Bodeen ‘NATO airstrike killed civilians, according to Afghan president’, Associated Press, 3 September 2010, accessed at <http://www.csmonitor.com/layout/set/print/content/view/print/323676>

⁵ *Zabet* means lieutenant in Dari and Pashto and, like Doctor or Engineer, is used as a title.

⁶ Quotations from both men are taken from ‘Karzai slams NATO civilian killings’, Al Jazeera, 3 September 2010, <http://english.aljazeera.net/news/asia/2010/09/2010922327104448.html>.

⁷ See ‘Afghan Election Campaign Workers “Killed in Air Strike,”’ BBC website, 2 September 2010, <http://www.bbc.co.uk/news/world-south-asia-11163742>.

⁸ Previous research into the targeting of insurgent commanders and the mistaken killing of civilians suggests that the concerns raised in this report are not unusual. See Box 3: List of incidents of civilian casualties.

⁹ See Adam B Ellick and Sangar Rahimi ‘Accounts Differ on Fatal NATO Strike on Afghans’, *New York Times*, 2 September 2010, accessed at http://www.nytimes.com/2010/09/03/world/asia/03afghan.html?_r=1&pagewanted=print. Petraeus was referring to a report by Michael Flynn, the former US head of intelligence for Afghanistan, which was highly critical of US intelligence operations. Michael T. Flynn, Matt Pottinger, Paul D. Batchelor, *Fixing Intel: A Blueprint for Making*

The divergent accounts of what happened on 2 September 2010 in Takhar seem to come from different worlds. One is the world of the American military whose knowledge is often driven by signals intelligence and reports provided by a limited number of local informants and who, generally, focus narrowly on insurgent behaviour. The other is the everyday world of Afghan politics. In the case of the Takhar attack, these two worlds simply did not connect.

This report is published in the wake of the intelligence operation which led to the killing of the leader of al-Qaida, Osama bin Laden, by American special forces in Abbotabad, Pakistan on 2 May 2011. In the 48 hours following the raid, references to the US 'kill or capture' strategy, whereby suspected insurgents are identified by intelligence operations and then targeted for detention or killing, were made in tens of thousands of news articles around the world.¹⁰ The bin Laden operation will give a boost to those US policy makers who support targeted killings.

Yet, without a doubt, this strategy carries many risks. Its legality depends in large part on the robustness and accuracy of the intelligence behind the attacks. The investigation presented in this report points to how a 'hazy'¹¹ understanding of the wider

Intelligence Relevant in Afghanistan, Center for a New American Security January 2010, 4, accessed at:

http://www.cnas.org/files/documents/publication_s/AfghanIntel_Flynn_Jan2010_code507_voices.pdf.

¹⁰ A Google search conducted by the author 48 hours after the attack, found 60,832 articles using the phrase, 'kill and capture' in reporting and commenting on the raid.

¹¹ 'The word is used by the former US intelligent chief, Michael Flynn in his report on US intelligence in Afghanistan: *'Ignorant of local economics and landowners, hazy about who the powerbrokers are and how they might be influenced, incurious about the correlations between various development projects and the levels of cooperation among villagers, and disengaged from people in the best position to find answers – whether aid workers or Afghan soldiers – U.S. intelligence officers and analysts can do little but shrug in response to high level decision-makers seeking the knowledge, analysis, and information they need to wage a*

political landscape of Afghanistan can lead to civilians deaths, possible violations of the laws of war, and attacks that are politically and militarily harmful.¹²

This report starts by providing essential background to the attack of 2 September 2010. It gives an overview of the insurgency in Takhar and the US military response. It then examines the US 'kill or capture' strategy and its relation to the laws of war and discusses the intelligence that led the Special Forces unit to attack the convoy, as well as the crucial intelligence which was *not* gathered, in particular the biographies of the two men (whom the military still insists are one person).

The next section gives a detailed account of the attack itself, as reconstructed from extensive witness testimony. Section 4 discusses the evidence that the laws of war may have been broken during the attack, especially with regard to the intelligence gathering operation. The final section touches on existing misgivings with intelligence gathering in Afghanistan within the most

successful counterinsurgency' Flynn, Pottinger and Batchelor, *Fixing Intel*, 4 [see FN 9].

¹² 'This report does not examine the wider issue of whether the strategy of targeted killings is useful. However, concerns have been raised elsewhere that the 'Kill or Capture' strategy is damaging because it causes the replacement of experienced Taliban field commanders with younger commanders who tend to be more radical, more brutal towards the population and with weaker command and control. For an analysis of the effect of this strategy on Takhar and the north, see Antonio Giustozzi and Christoph Reuter, *The Insurgents of the Afghan North: The rise of the Taliban, the self-abandonment of the Afghan government and the effects of ISAF's 'capture-and-kill campaign'* 3. Afghanistan Analysts Network, 6 May 2011, <http://www.aan-afghanistan.org/uploads/AAN-2011-Northern-Insurgents.pdf>. There is also concern about what General McChrystal called 'attrition math' in that, 'an insurgency cannot be defeated by attrition; its supply of fighters and even leadership is effectively endless.' *ISAF Commander's Counterinsurgency Guidance* ISAF December 2006 http://www.nato.int/isaf/docu/official_texts/count_ersurgency_guidance.pdf.

senior levels in the US military and discusses the possible political and military ramifications when military operations are based on limited understanding of the Afghan political landscape.

2 BACKGROUND TO THE ATTACK

Understanding what went wrong on 2 September 2010, how civilians ended up being targeted and whether the laws of war were violated requires an understanding of the background to the attack, specifically the politics of the insurgency, the US military strategy, the legal rules – particularly those surrounding targeted killings – and the intelligence operation which led to the attack.

2.1 Background to the attack: Strongmen and Taleban in northern Takhar

Takhar,¹³ with its lack of sizeable Pashtun communities, is not natural territory for the Taleban.¹⁴ When in government, the Taleban never managed to take control of the whole province, and resistance was fierce, with bloody battles in many districts. Yet in 2009 and especially during 2010, the movement started to make gains. The insurgency in northern Takhar, where the attack took place, however needs to be seen in the context of much longer-term dynamics. Provincial politics are characterized by protracted factional rivalries between various ‘strongmen’, mujahedin commanders who built up power bases during the 1978–1992 jihad period and who have sought to dominate all military and administrative structures in the province since 1992. To reinforce their control over the area they have made alliances in Kabul and sought influence

¹³ Information on the Taleban in Takhar is taken from a series of interviews with researchers on Taleban in the north, one international and two Afghans, both before and after the 2 September attack; also from Giustozzi and Reuter, *The Insurgents of the Afghan North*, 46 [see FN 12].

¹⁴ Giustozzi and Reuter cite the ethnic breakdown of Takhar: Pashtun 10 per cent (immigrants since the 1950s), Uzbek 44 per cent, Tajik 42 per cent. *The Insurgents of the Afghan North*, 45 [see FN 12].

within the Afghan security services, including through the employment of their men within the police, army and intelligence (the National Directorate of Security or NDS).

The Parliamentary elections in 2005 and 2010 have provided further opportunities to consolidate positions and, for various local rivals, to mount challenges. The pre-eminent strongmen in northern Takhar are Uzbeks: Piran Qul whose base is in Rustaq and who became an MP in 2005,¹⁵ Qazi Kabir whose base is in Yangi Qala, and Darqad and who served as a senator, at President Karzai’s request, from 2005, before becoming an MP in the 2010 election.¹⁶ He also set up his own party, the Justice Party, of which he is the leader.

A recently released AAN report on the northern Taleban argues that demoralisation with government corruption and abuses, rather than the attractiveness of the Taleban, helped the movement to mobilise in the north. Recruitment has come even in areas where the Taleban, while in government, launched cruel reprisal attacks against civilians.¹⁷

Since the fall of the Taleban regime, Takhar has remained under the often brutal control of former mujahedin commanders who rule their

¹⁵ Piran Qul did not seek re-election in 2010; instead, his deputy, Subhan Qul, stood and lost.

¹⁶ Qazi Kabir began as a Jamiat-e Islami commander, switched to Hezb-e Islami in 1985 and then to Shura-e Nizar (which is part of Jamiat) in 1989. He was a frontline commander against the wars with the Taleban during their period in power.

¹⁷ There are now cadres of Taleban from the same villages in Khwaja Gar district which were burned by the Taleban and in which dozens of Uzbek civilians were killed in 1999. Giustozzi and Reuter, *The Insurgents of the Afghan North*, 46 [see FN 12]. An Afghan researcher confirmed this information. Author’s interview, July 2010. For detail on the massacres, see *Casting Shadows: War Crimes and Crimes against Humanity, 1978–2001 – Documentation and Analysis of Major Patterns of Abuse in the War in Afghanistan*, Afghanistan Justice Project, 2005, <http://afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf>.

areas of influence like feudal lords. One example of their de facto position above the law is Qazi Kabir who rather drastically prevented the attempt of Pashtun refugees to return from Pakistan to their land in Khwaja Bahauddin¹⁸ district in northern Takhar in 2006 by imprisoning more than 80 families in an old castle. For years, all attempts by the police and the Kabul government were simply ignored to the benefit of local Uzbek and Tajik commanders who were occupying their land.¹⁹ Other cases of arbitrary behaviour include murder, rape, the theft of land, kidnapping, forced marriages²⁰ which led to numerous demonstrations against those commanders between 2005 and 2008 – but not to the removal of any of those commanders.²¹ [footnotes in the quote are added by the author].

The Taliban in Takhar have never been strong enough to take and hold territory as they have in neighbouring Kunduz and Baghlan; nor have they been able to move around openly. Instead, they established pockets of fighters who launch sporadic hit and run attacks. Recruitment has followed *ulema* networks and exploited pre-existing religious

conservatism, particularly among Uzbek communities. The Taliban have appointed Afghan Uzbeks to leadership positions in Takhar in order to help mobilise the wider population.²² These include the (now former) deputy shadow governor of Takhar, Muhammad Amin, the man whom the US wanted to kill on 2 September 2010.²³

As for foreign Uzbeks fighting with the Islamic Movement of Uzbekistan (IMU), their presence in Takhar has been extremely fleeting.²⁴ In 2010, a few IMU units, with foreign Uzbek fighters, were established and the IMU maintained a training facility in the forested area of Darqad. IMU fighters pass on IED skills and help with the fighting, but they act in support of the Afghan Taliban and do not hold positions in the shadow administration. Indeed, relations between Uzbek fighters from Afghanistan (Taliban) and Uzbekistan (IMU) may not even be warm. Shared ethnicity is not the same as shared ideology, aims or values. As one Afghan Uzbek Taliban commander commented ‘although we are all Uzbeks, there is a river flowing between us.’²⁵

¹⁸ Pronounced *baha-uddin*.

¹⁹ The dispute is more complex than presented here. Qazi Kabir’s wartime land grab should be seen in the context of pre- and post-1978 conflict, previous episodes of land-grabbing or granting of land by the state to ‘their’ ethnic communities, corruption and the leveraging by various power-holders of successive governments in Kabul.

²⁰ One recent case involved allegations against a nephew of Qazi Kabir. See ‘Afghan family seeks justice after their daughter killed by local powerful people,’ Tolo TV, Kabul, 9 February 2010, accessed via BBC Monitoring.

²¹ Giustozzi and Reuter, *The Insurgents of the Afghan North*, 45 [see FN 12]. Being forced (*majbur*) to take up arms because of oppression by the state and local power-holders is a familiar pattern in Taliban mobilisation, nationwide. For a discussion of this, see Stephen Carter and Kate Clark, *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan*, Chatham House, December 2010. See also Martine van Bijlert, ‘Unruly Commanders and Violent Power Struggles,’ in Antonio Giustozzi (ed), *Decoding the New Taliban: Insights from the Afghan Field*, New York/Chichester: Columbia University Press/Hurst 2009, 160.

²² Interview with Afghan researcher on the northern Taliban (July 2010). See also Giustozzi and Reuter, *The Insurgents of the Afghan North*, 46 [see FN 12].

²³ Muhammad Amin has a new position in the Taliban where he is still an active fighter, interview with Michael Semple, March 2011 [see FN 78].

²⁴ Information for this paragraph, specifically on the IMU presence in Takhar comes from a series of interviews with two Afghan (one Uzbek and one Pashtun) and one international researcher on the Taliban in the north. (Author’s interviews, July 2010, September 2010, December 2010, March 2011).

²⁵ Interview with the Taliban commander was carried out by an Afghan researcher on the Taliban, March 2011, and told to the author. The river refers to the Amu Daria (Oxus), which marks much of the northern border, including between Afghanistan and Uzbekistan.

2.2 Background to the attack: Enter the Americans and targeted killings

Encroachments by the Taliban into Takhar and the greater north were met with little resistance by ISAF forces stationed there or by Afghan forces.²⁶ This changed in 2010 when, as part of the 'surge', several thousand US troops were deployed to the north and 'kill or capture' operations by Special Forces started to pick off Taliban commanders. This strategy has become an ever more important aspect of international military policy in Afghanistan and was one of the main metrics of success claimed by General Petraeus, in his 15 March 2011 testimony to the United States Congress:

Over the past year, in particular, ISAF elements, together with our Afghan and international partners, have increased all the activities of our comprehensive campaign substantially. We have, for example, stepped up the tempo of precise, intelligence-driven operations to capture or kill insurgent leaders. In a typical 90-day period, in fact, precision operations by US special mission units and their Afghan partners alone kill or capture some 360 targeted insurgent leaders.²⁷

Another indication of how significant the 'kill or capture' strategy has become were comments by General Petraeus made to reporters, by chance, on the same day as the Takhar attack, explaining that special forces operations against militants in Afghanistan were taking place about four times more

²⁶ Giustozzi and Reuter say that ISAF troops, led by Germany, were restricted either by mandates or resources. As for the Afghan side, they say: 'all institutions of the Afghan government were steadily giving ground to the Taliban in 2009–10. Except for the Afghan National Army incursions, little resistance or even commitment to resist could be detected when the Taliban decreed that all mobile phone networks be closed at night, when girls schools are shut down after threats or the Taliban established their dominance by collecting *ushr*'. *The Insurgents of the Afghan North*, 27-8 and 13 [see FN 12].

²⁷ General Petraeus' Testimony to Congress, 15 March 2011. Full text retrieved from *The Long War Journal*, website: http://www.longwarjournal.org/threat-matrix/archives/2011/03/full_text_of_general_petraeus.php.

frequently than at the peak of the Iraq war and were then numbering about forty a day. 'We are at the absolutely highest operational tempo,' he told reporters.²⁸

2.2.1 Targeted killings, JPEL and the law

An attack such as the one that took place on 2 September 2010 is known as a 'targeted killing'.²⁹ The term is not defined under international law, but according to Philip Alston, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, it occurs when

...lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to use lethal force... Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal.³⁰

In Afghanistan where there *is* an armed conflict, targeted killings by either the international military or the Taliban are legal if they are within the rules of International Humanitarian Law (IHL).³¹ IHL is the body of

²⁸ Petraeus said the stepped-up pace of such missions was possible because he and his predecessor, Stanley McChrystal, had tripled the number of troops and support personnel such as intelligence, surveillance and reconnaissance. Viola Gienger, 'Petraeus Says Afghan Special Missions at Four Times Iraq Pace,' Bloomberg, 3 September 2010, <http://www.bloomberg.com/news/2010-09-03/petraeus-says-afghan-special-missions-are-running-at-four-times-iraq-pace.html>.

²⁹ Although this report does not look at the detention part of the 'kill or capture' strategy, many of the same points concerning the dangers of flawed intelligence apply.

³⁰ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston, *Addendum: Study on targeted killings* (A/HRC/14/24/Add.6), 28 May 2010, 5. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

³¹ IHL privileges combatants so that killings which would otherwise be illegal (murder) are legal if committed during conflict and within certain rules. However, it is worth noting that some members of insurgent groups may not be entitled to combatant

law, including the Geneva Conventions, which regulates hostilities, a fundamental aim of which is to minimise the harm done to civilians during conflict. It obliges military forces to distinguish between civilians and those engaged in hostilities, to not target civilians, to take all feasible precautions to spare them and, if an attack on a military target is expected to lead to civilian casualties, to ensure that civilian losses are proportional to the military advantage gained.³² Summaries by the International Committee of the Red Cross (ICRC) of the three most important IHL rules can be found in Box 1. These rules are considered customary international law, in other words, binding on all warring parties.

privilege and thus could later be prosecuted under domestic laws for any such killings, given that Afghanistan's is a non-international armed conflict [see FN 34].

³² The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions sums up what the law means for targeted killings: 'Under the rules of IHL, targeted killing is only lawful when the target is a 'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities'. In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize harm to civilians. These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited. Alston, *Study on targeted killings*, 10 [see FN 30].

Box 1.

Legal Protections for Civilians during Conflict

Distinction: 'Civilians are protected against attack, unless and for such time as they take a direct part in hostilities,' and '[a]ttacks must not be directed against civilian objects' (ICRC Study Rule 6).*

Precautions in attack: 'In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event minimise, incidental loss of life, injury to civilians and damage to civilian objects' (ICRC Study, Rule 15).**

Proportionality: 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advance anticipated, is prohibited' (ICRC Study Rule 14).***

Source: Taken from Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC, Customary International Law, CUP/ICRC*, Cambridge 2005 (online study), <http://www.icrc.org/customary-ihl/eng/docs/v1>.

* Rule 6. Civilians' Loss of Protection from Attack. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter 'Additional Protocol I'), 8 June 1977, Art. 52 (1), <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

** Rule 15. Precautions in Attack. Additional Protocol I, Art. 57.

*** Rule 14. Proportionality in Attack. Additional Protocol I, Art. 51 (5)(b).

Under international humanitarian law, all individuals are presumed to be civilians unless they are part of a State's regular armed forces or an organized armed group that is party to the conflict. Civilians may not be targeted, 'unless and for such time as they take a direct part in hostilities'.³³ However, determining

³³ ICRC Study Rule 6. Additional Protocol I, Art. 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter 'Additional Protocol II'), 8

who is a civilian, and whether they are participating in hostilities is often not straightforward, particularly in non-international conflicts such as the current conflict in Afghanistan.³⁴ In international armed conflicts – those between two or more states in which members of the warring parties tend to be recognizable because they often wear distinctive uniforms or insignia – form part of a state-controlled command, or have other distinguishing signs. These individuals are then clearly combatants, and all other individuals are usually presumed to be civilians, making status questions of who is a civilian or a combatant less frequent.

In contrast, non-international conflicts, involve a conflict between one or more state parties and non-state actors. Non-state actors often do not wear fixed signs or distinguishing marks to identify them as combatants, and may purposely try to blend in with the civilian population as an asymmetric tactic. In some non-international armed conflicts, moreover, the non-state actors may not be cohesive enough to be considered an ‘organized armed group’ that would automatically confer combatant status on its members. Thus, there is a much wider range of individuals who may

June 1977, Art. 13(3), <http://www.icrc.org/ihl.nsf/FULL/475>.

³⁴ A ‘non-international armed conflict’ is ‘restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other’. A more limited range of rules apply than in international conflicts, and can be found primarily in Article 3 common to the four Geneva Conventions, Additional Protocol II to the Geneva Conventions, and other principles which have risen to the level of customary international law. ICRC, ‘What is International Humanitarian Law?’ accessed at <http://www.scribd.com/doc/53274556/What-is-IHL>. For the limited time in late 2001 that US forces fought the Taliban in government, many jurists consider it was an international conflict, ie one between two states. For discussion, see Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, ‘International Law and Armed Non-state Actors in Afghanistan’ *International Review of the Red Cross*, Vol 93 No 881, March 2011, <http://www.icrc.org/eng/assets/files/review/2011/irrc-881-maslen.pdf>.

sometimes be participating in or contributing to the ongoing conflict, but are not clearly identifiable as regular combatants that can be targeted at any time by the opposing party. These features of non-international armed conflicts, all of which are pervasive in the conflict in Afghanistan, make IHL status questions about whether a civilian is ‘directly participating’ in the conflict extremely difficult.

Ongoing debates mainly focus on status – how to determine whether a person is a member of an armed group – and tricky, temporal issues. According to ICRC Guidance,³⁵ civilians lose protection for the duration of each specific act amounting to direct participation in hostilities – for example, a farmer who picks up a gun and fights becomes a legitimate target, but only for as long as he is fighting. However, ICRC Guidance also recognises that individuals who are members of organized armed groups, which are party to the conflict and whose ‘continuous function it is to take a direct part in hostilities’ lose their civilian protection. They can legally be targeted at any time and in any place, ‘for as long as they assume their continuous combat function.’³⁶

2.2.2 Targeted killings and the law

America’s Rules of Engagement, specific to the war in Afghanistan, are classified.³⁷ Like many

³⁵ ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009),’ *International Review of the Red Cross*, No. 872, December 2008, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

³⁶ ICRC *Guidance on Direct Participation in Hostilities* 995. This ICRC Guidance is not IHL and debates are ongoing on these issues. Alston, for example, warns that the ‘creation of the Continuous Combat Function category raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function...’ *Study on Targeted Killings*, 21 [see FN 30].

³⁷ For reference to this, see the US military lawyers’ manual, *Operational Law Handbook*, the International and Operational Law Department of the Judge Advocate General’s Legal Center &

states, the US also does not reveal its criteria for defining 'direct participation in hostilities'.³⁸ Philip Alston, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, considers this 'deeply problematic... because it gives no transparency or clarity about what conduct could subject a civilian to killing'.³⁹ However, in the last year, more details of how some Afghans have lost their default civilian status and become 'continuous' military targets has been revealed in secret military dispatches published by Wikileaks.

The dispatches confirmed the existence of the Joint Prioritised Effects List (JPEL), a list of men whom the international forces believe to be 'insurgent leaders'. The *Guardian* journalist Nick Davis, who reported on the secret dispatches, said that 'a joint targeting working group meets each week to consider Target Nomination Packets and has direct input from the Combined Forces Command and its divisional HQ, as well as from lawyers, operational command and intelligence units including the CIA.' Davis writes that '[t]he process of choosing targets reaches high into the military command.'⁴⁰

The US Field Manual on Counter Insurgency, published in 2006, also gives an idea of the thinking behind the JPEL. 'Intelligence analysts,' it says, 'need to identify individuals and groups to engage as potential COIN supporters, targets to isolate from the population, and targets to eliminate... the targeting board produces a prioritized list of targets and a recommended course of action

School, U.S. Army, Virginia, 2010, 74, <http://www.scribd.com/doc/37398119/Operational-Law-Handbook-2010>.

³⁸ However, it seems that membership criteria may be considered sufficient by US military lawyers, rather than also having to prove a continuous combat function. Author interview with IHL lawyer, April 2010.

³⁹ Alston, *Study on Targeted Killings*, 21 [FN 30].

⁴⁰ Nick Davis, 'Afghanistan War Logs: Task Force 373 – Special Forces Hunting Top Taleban,' *The Guardian*, 25 July 2010, <http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban>.

associated with each.'⁴¹ Reviews of targets on the JPEL are said to take place weekly and people who are identified as targets for 'kill or capture' can come off, as well as be put on the JPEL.⁴²

The legal reasoning behind the targeted killing of someone on the JPEL can be gleaned from unclassified aspects of the US military Standing Rules of Engagement, which are published in the US military lawyers' handbook, (emphasis added):

Declared Hostile Force [is] any civilian, paramilitary, or military force, or terrorist that has been declared hostile by appropriate US authority. Once a force is declared to be 'hostile,' US units may engage it without observing a hostile act or demonstration of hostile intent; i.e. **the basis for engagement shifts from conduct to status**. Once a force or individual is identified as a DHF, the force or individual may be engaged, unless surrendering or hors de combat due to sickness or wounds. The authority to declare a force hostile is limited.⁴³

If the basis for engagement shifts from conduct (e.g. a live-fire incident, observing a person laying an IED) to status, the intelligence on which that status has been determined becomes critical. 'Kill or capture' operations are, as General Petraeus indicated, 'intelligence driven.'⁴⁴ The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions underlines the legal necessity, therefore, for robust and accurate intelligence:

...the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based. States must, therefore, ensure that they have in place the

⁴¹ *The US Field Manual on Counter Insurgency, No FM3-24*, University of Chicago Press, 15 December 2006, 131, <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

⁴² Email communication with international security official, April 2011.

⁴³ The details on who has the authority to declare an individual or group to be a 'hostile force' is classified. *Operational Law Handbook*, 75 [see FN 37].

⁴⁴ General Petraeus' Testimony to Congress, 15 March 2011 [see FN 27].

procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.⁴⁵

2.2.3 Targeted killings: Determining the legality of the attack

On 2 September 2010, the US military targeted a convoy in which they believed Muhammad Amin, an insurgent leader was travelling. If this had been the case, there might have been a lawful basis for targeting the convoy. However, the evidence presented below will show that the man who was targeted and killed was a civilian. He was Zabet Amanullah, who was not an active leader in the IMU, the Taleban, or any other conflict-related, anti-government group and therefore deserved the full protection of the law.

The legality of the attack, in large part, hinges on whether adequate precautionary measures were taken to confirm the intelligence and ensure the man they targeted was not a civilian. IHL does not expect troops to have perfect knowledge, but it does look to what a 'reasonable commander' should have known or been able to know.⁴⁶

⁴⁵ Alston, *Study on targeted killings*, 2 [see FN 30]. Alston also warns that for states that chose to use the Continuous Combatant Function to justify targeted killing, 'the onus will be on them to show that the evidentiary basis is strong.'

⁴⁶ Recent jurisprudence from international courts and national military manuals typically use a 'reasonable commander' standard to judge whether an attack has met the standards for distinguishing civilians. In *Prosecutor v. Stanislav Galic* for example, the defendant was charged with the crime of deliberate and indiscriminate attacks on civilians. The The International Criminal Tribunal for the former Yugoslavia (ICTY) explained that '[i]n determining whether an attack was proportionate is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.' See eg *The Prosecutor v. Stanislav Galic - Case No. IT-98-29-T 'Judgement and Opinion'* 5 December 2003, http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp46-e/galic.htm.

An analysis of the intelligence operation behind the attack therefore is crucial for determining its legality. However, even if Zabet Amanullah had been correctly targeted – which this paper argues was not the case – there would still be the additional question of how the US military determined the status of those around him – the nine other civilians who were also killed in the attack. As will be seen, all indications are that *proximity* to a JPEL target appears to be enough, in the eyes of the military, for a person to lose his default civilian protection and be deemed a military target.

2.3 Background to the attack: The intelligence behind the 2 September attack

Senior officials from the Special Forces unit involved in the operation, briefed the author on the 2 September 2010 attack. They provided the opportunity, over two extended interviews and follow up questions, for a frank exchange of views and information, in which both the author and the military attempted to pin down what had actually happened.⁴⁷ Although this report is highly critical of the intelligence operation, the author would like to acknowledge the openness with which the discussions were conducted.

The intelligence operation which ultimately led to the 2 September 2010 attack, started, according to the Special Forces unit, with information came from a detainee in US custody. This allowed them ultimately to identify a relative of the detainee as the shadow deputy governor of Takhar, one Muhammad Amin, and to map a Taleban- and IMU-related cluster through the monitoring of cell phones.

The intelligence analysts came to believe that the SIM card of one of the numbers that Muhammad Amin had been calling in Kabul was passed on to him. They believed that he started to use this phone and to 'self-identify' as Zabet Amanullah. In other words, they

⁴⁷ The interviews took place in December 2010 and March 2011.

believed that Muhammad Amin was using the name 'Zabet Amanullah' as an alias.

However, Zabet Amanullah was not an alias; it was the name of an actual person. When the two men's identities were mixed up, it was Zabet Amanullah who appeared in the crosshairs of the US military.

Friends, family and even active Taleban have all confirmed that Zabet Amanullah was in occasional telephone contact with active members of the Taleban.⁴⁸ This is not unusual in a country where fortunes change and it is prudent to stay on the right side of both those in power and those who might take power. Zabet Amanullah also kept in touch with senior members in the government. What may have looked like a suspicious cluster of calls and contacts, in reality proved nothing about the actual conduct of the caller. The special forces unit said that conversations monitored discussed insurgent activities,⁴⁹ but by all accounts, as will be discussed below, Zabet Amanullah, was living quietly and openly at home in Kabul until the summer of 2010 when he travelled again, very publicly, to Takhar to campaign in the parliamentary elections.

The Special Forces unit denied that the identities of two different men, Muhammad Amin and Zabet Amanullah, could have been conflated; they insisted the technical evidence that they were one person is irrefutable.⁵⁰ However, the intelligence analysts had not built up a biography of their target, Muhammad Amin – where he was from, what his jihadi background was and so on – and were not aware of the existence of a well-known person by the name of Zabet Amanullah. When pressed about the existence – and death – of an actual Zabet Amanullah,

they argued that they were not tracking a name, but targeting the telephones.⁵¹

2.3.1 Failure to vet intelligence as required by the precautionary principle

Tracking phone usage and analysing who calls whom deploys the methodology of 'social network analysis'. This is used widely in academic disciplines and has become a key tool for those trying to build up a picture of and ultimately target insurgent groups.⁵² It can help reveal the relationships between people and groups, assessing the importance of members of a social network by identifying, for example, 'social nodes' – those individuals who are at the centre of a group or who link disparate groups – and assessing whether a community is tight and closed, or more diffuse, and so on. Using these methods, knowledge of networks can be built up which is determined, not by the attributes of the individuals involved, but by the relationships between them.⁵³

Network analysis and other technical intelligence may have looked valuable in a context where, repeatedly after 2001, Afghans have falsely informed on their rivals; the rivals were then killed or captured by international forces in the mistaken belief that they were Taleban. The international military has become much less credulous, but reliance on technical data carries its own problems, as

⁵¹ Author's interview, December 2010.

⁵² Social network analysis is used by anthropologists, geographers, sociolinguists, biologists and other academics. For examples of how it is used in counter-terrorism, see Alexander Dryer 'How the NSA Does "Social Network Analysis,"' *Slate*, 15 May 2006, <http://www.slate.com/id/2141801/>. For a social network analysis of the relationships between the 9/11 bombers, see Valdis E Krebbs, 'Uncloaking Terrorist Networks,' *First Monday*, 7, 4 April 2002, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/941/863>.

⁵³ The methods used to analyse such social structures are 'specifically geared towards an investigation of the relational aspects of these structures. The use of these methods, therefore, depends on the availability of relational rather than attribute data.' John Scott, *Social Network Analysis*, 2000, Newbury Park California: Sage, 38.

⁴⁸ Author's interviews with friends, family members in September 2010 and transcript of an interview with Muhammad Amin, conducted by Michael Semple in March 2011.

⁴⁹ Author's interviews, December 2010 and March 2011.

⁵⁰ Author's interviews, December 2010 and March 2011.

evidenced by this report.⁵⁴ In particular, the human intelligence which would have revealed the real and separate identities of two different men was not gathered. The life of Muhammad Amin was almost as invisible to the military as that of Zabet Amanullah.

The next section presents a detailed account of Zabet Amanullah's life, partly in order to convey the reality of the man who is now dead, but also to demonstrate how much information the military failed to gather about the man they killed. Much of the following account of Zabet Amanullah's life is common knowledge among anyone connected in any way with the resistance against the Soviet occupation of the 1980s in the northeast; in other words a large number of government officials, police and army officers, MPs and civil society figures both regionally and in Kabul. Zabet Amanullah had met many of these people in the summer of 2010, just

⁵⁴ Reliance on technical data carries additional risks that are not outlined in this report. As Thom Shanker and Matt Richtel wrote after visiting the intelligence centre in Langley (officially called Distributed Common Ground System-1), 'Data is among the most potent weapons of the 21st century. Unprecedented amounts of raw information help the military determine what targets to hit and what to avoid. And drone-based sensors have given rise to a new class of wired warriors who must filter the information sea. But sometimes they are drowning. Research shows that the kind of intense multitasking required in such situations can make it hard to tell good information from bad. The military faces a balancing act: how to help soldiers exploit masses of data without succumbing to overload.' Thom Shanker and Matt Richtel, 'In New Military, Data Overload Can Be Deadly', *New York Times*, 16 January 2011, http://www.nytimes.com/2011/01/17/technology/17brain.html?_r=1. See also Alston's concerns: '...because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed, there is a risk of developing a 'Playstation' mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instil respect for IHL and adequate safeguards for compliance with it. Alston, *Study on targeted killings*, 25 [see FN 30].

before the election campaign.⁵⁵ This explains the incredulity of many Afghans when they heard about the killing. Because Zabet Amanullah was such a well-known figure, they could not believe that the US military had not also known him. 'Zabet Amanullah was an ordinary person and lived among normal people,' said the Takhar Chief of Police, Shah Jahaan Nuri.⁵⁶ The attack was an 'obvious mistake'⁵⁷ said the provincial governor, Abdul-Jabar Taqwa, hitting 'civilian people'.⁵⁸

2.3.2 *The intelligence that was not gathered: Zabet Amanullah*

Zabet Amanullah had an enduring reputation from his days fighting the Soviet occupation of the 1980s and an unmistakable appearance; at only five foot, two inches, his nickname was the Ant (*murcha*). He was given the title *Zabet* or lieutenant because of his military training from the military college in Peshawar in 1982–1984 where he specialised in infantry and artillery.⁵⁹ On his return to Afghanistan in 1984, he was arrested by Soviet forces and taken to Tajikistan where he was badly tortured. He was eventually handed over to the Afghan government, which said they had no case against him, and he was deployed with the Afghan army to Khost. From there, he escaped and joined the mujahedin, coming to his home area in Takhar to fight. Zabet Amanullah rose through the ranks to eventually serve as deputy and head of finance to the man who is now the pre-eminent strongman in Northern Takhar, Qazi Kabir. Both were initially with Jamiat-e Islami and then switched to Hizb-e Islami after other Jamiat commanders in the province went over to the Soviet-backed Afghan government in 1985.⁶⁰

⁵⁵ See Section 2.4 for more details.

⁵⁶ Author's interview, September 2010.

⁵⁷ Bodeen, 'NATO Airstrike Killed Civilians,' [See FN 4].

⁵⁸ 'Afghan Election Campaign Workers "Killed in Air Strike,"' BBC website 2 September 2010 [See FN 4].

⁵⁹ Graduation certificate seen and copy taken.

⁶⁰ From the start of the jihad, even by the standards of the general rivalry between Hizb-e Islami and Jamiat-e Islami (which Shura-e Nizar

In 1989, the two men fell out. Kabir joined the rival faction, Shura-e Nizar, and Zabet Amanullah was arrested and held in that faction's prison in Lejde,⁶¹ where he was severely tortured.⁶² Eventually, after three years, he managed to escape.⁶³ His decision to join the Taliban in their fight for the north in the late 1990s seems to have been partly motivated by his experience of detention and torture by those whom the Taliban were then fighting. Certainly, his background was highly atypical for a Taleb: he was an Uzbek-speaking *sayed*⁶⁴ from a land-owning family and, although pious, had received a secular education.

In 2001, when the Taliban lost power, Zabet Amanullah was one of the many thousands of Taliban on the Kunduz front who surrendered, handed in their weapons and were allowed to leave by the Shura-e Nizar commander of that front, General Daoud (former head of the 6th Corps, former deputy Interior Ministry and now Security Commander of the Northern Zone).⁶⁵ Zabet Amanullah moved to Peshawar where he worked as a researcher with a human rights organisation, the Afghanistan Justice Project, documenting war crimes committed in northeastern Afghanistan during the pre-2001 phases of the conflict, including those carried

out by Hezb-e Islami, Jamiat and the Taliban.⁶⁶

This author met Zabet Amanullah in Kabul in 2008 after his third bout of detention and torture. This time he had been a prisoner of the Pakistan intelligence services, the ISI, in Peshawar, spending 16 months in various jails. His interview was detailed and compelling, the testimony of a man who was known for his near-photographic memory. He believed the ISI had arrested him because he was a former Taliban commander who was *not* fighting. 'The ISI interrogators asked me why I wasn't reporting to *them*?' he said, referring to his human rights work. 'I was deprived of sleep and food... They hung me from the ceiling by my wrists and by my ankles and beat me with chains. On one occasion, I was given an injection into my ear – a two-milligram injection. It was like a thousand wasps stinging. I lasted for ten minutes and then lost consciousness.'⁶⁷ On his release, he fled to Kabul where he met this author. He was extremely frightened, believing his old enmities with some of those now in power in Afghanistan made him extremely vulnerable to malicious arrest.⁶⁸ 'I am not safe in Pakistan,' he said. 'I am not safe in Kabul. Where can I go?'

However, Zabet Amanullah did manage to get the necessary security guarantees from senior members of the government for him to live quietly in Kabul. The fact of his life in Kabul is evidenced in paperwork: documents showing

grew out of), the internecine struggle to control Takhar was particularly vicious, involving murders of each other's cadres.

⁶¹ Zabet Amanullah believed Qazi Kabir informed the Shura-e Nizar leader, Ahmad Shah Massud, that he was a traitor (author's interview, April 2008). Kabir has denied this and instead named another local commander of having informed Massud (author's interview, April 2011).

⁶² Zabet Amanullah said the torture included being kept in a box that was 60 x 60 x 60 cm for six months (author's interview, April 2008).

Amanullah's account matches those of other former inmates at Lejde, see *Casting Shadows*, Afghanistan Justice Project, 57–58 [see FN 17].

⁶³ This happened in 1992 when the communist government in Kabul fell and the mujahedin turned their attention to the factional war for the capital.

⁶⁴ A descendent of the Prophet Muhammad.

⁶⁵ Confirmed in interview with General Daud, March 2011.

⁶⁶ The project's major publication was *Casting Shadows: War Crimes and Crimes against Humanity, 1978–2001* [see FN 17].

⁶⁷ After the initial month of interrogation, he was kept hooded and in solitary confinement for another five months and then a further nine months in a public cell in Peshawar police jail in a cell with 60 others. Interview, April, 2008.

⁶⁸ This was a reasonable fear. Many Taliban commanders who tried to go home and live peacefully in 2001 were arrested. For details, see Anand Gopal, *The Battle for Afghanistan: Militancy and Conflict in Kandahar* (Counterterrorism Strategy Initiative Policy Paper), New American Foundation, November 2010, http://www.newamerica.net/publications/policy/the_battle_f_or_afghanistan.

his half ownership of a pharmacy, the leases on two flats where he lived, certificates for driving, English and computer lessons, and visas and paperwork for going on Hajj.⁶⁹ Villagers from his area would also come to see him in Kabul and he would help them if they were having difficulties with the government or with education.⁷⁰ He visited Delhi for medical treatment.⁷¹ An Indian visa in his passport, stamped on his arrival in Delhi on 23 April 2010 and on his arrival back in Kabul on 28 April 2010,⁷² is evidence that at a time when the intelligence gatherers believed their target was in the north running the insurgency.⁷³ Zabet Amanullah was in India, seeing doctors about the consequences of three bouts of torture. According to a family member, he was given medicine and advised not to do too much mental work, not to put pressure on his mind, but to stay calm and relaxed.⁷⁴

The Special Forces unit said that the monitored conversations provided evidence of an involvement in the insurgency. Yet, given the wealth of documented detail about Zabet Amanullah, it is implausible that he was living a double life – living openly in Kabul, studying English and computing,⁷⁵ while at the same time acting as the deputy shadow Taleban governor of Takhar and making secret trips to his home province (despite being well known there and physically unmistakable).

Even if Zabet Amanullah *had* been active in some way, it seems highly doubtful that, living in Kabul, he could have satisfied the criteria of

‘directly participating in hostilities’, especially amounting to a ‘continuous combat function’ which would have made killing him legal. The question, moreover, remains as to why international forces did not seek his arrest, either in Kabul where he was living openly or Takhar where his last few months of life were lived very publicly. The answer seems to be that Zabet Amanullah’s life was utterly invisible to them.

When asked how they squared the fact of Zabet Amanullah’s life in Kabul with their judgement that this was an alias for an insurgent leader whom they had tracked in Takhar, Kunduz and Pakistan in 2010, the Special Forces unit maintained that, ‘he was living where he felt most comfortable.’ There were contradictions, they said, between their own account of the attack and its target and the one which this author had gathered which were never going to be reconciled. Nevertheless, they stood by their intelligence.

Zabet Amanullah was a highly unusual former Taleban commander. He had received a secular higher education, had a background in human rights reporting and, despite fighting since the 1980s, had no allegations of war crimes or abuses to his name. He had deep enmities with some individuals in the province, but also old and enduring links to senior figures in both the Taleban and the government. ‘Before he was killed,’ one senior provincial official said, ‘we had been wondering if he would be a useful conduit for reconciliation [with the Taleban].’⁷⁶

Yet the military had not checked whether their ‘alias’ had a real life existence, separate from Muhammad Amin’s.⁷⁷ Nor did they have the kind of information about Amanullah that was ‘common knowledge’ for many Afghans. This matters when assessing the attack from a legal perspective as it suggests a failure in the due diligence required under IHL to ensure that intelligence is correct and civilians are not subjected to targeted killing – something which will be explored in more detail in Section 4.

⁶⁹ The author has copies of these documents.

⁷⁰ Interview with family member, September 2010.

⁷¹ Medical files seen by author and copies made.

⁷² Passport seen and a copy taken.

⁷³ ISAF said that Muhammad Amin ‘travelled from Pakistan to Takhar in spring 2010.’ ISAF Press release ‘Coalition Forces Conduct Precision Strike,’ [see FN 3].

⁷⁴ Author’s interview, September 2010. [See FN 70].

⁷⁵ Course graduation certificates seen and copies taken, including a graduation certificate received on 30 January 2010 following a ten-month course in English and computing from an education centre in Kabul, registered with the Afghan Ministry of Education.

⁷⁶ Author’s interview, September 2011.

⁷⁷ Author’s interview, December 2011.

2.3.3 The intelligence that was not gathered: Muhammad Amin

One of the most conclusive ways to determine whether the US military had killed the wrong man was if the real Muhammad Amin could be located alive. Finding insurgents is not necessarily easy; they often take trouble to hide themselves and their activities from the Afghan authorities and the international military and frequently use *noms de guerre*. However, the former deputy Taliban governor of Takhar, Muhammad Amin, was located and interviewed in Pakistan in March 2011 by Michael Semple, one of the foremost experts on the Taliban. Amin told Semple:⁷⁸

There should not be any serious doubt as to my identity. I am well known...and my family is well known for its role in the jihad in [names home village]. Anyone who knows the personalities of the jihad and the Emirate in Takhar will know me and that I am alive. My real name is [withheld], but I am known as Muhammad Amin... I completed my religious studies in Peshawar, graduating from [name of madrassa withheld]. Two months before the incident, I had been appointed deputy governor. Later on, I was replaced by [name withheld] who is currently the acting governor.

Muhammad Amin confirmed that one of his relatives had been in ISAF detention in Afghanistan. The name of the relative, his relationship to Amin and the dates he spent in detention matched the details the Special Forces unit had given this author about the man who gave them their original tip off. Muhammad Amin also listed the names of various figures in Takhar – both friends and rivals in and out of government – who know him or his family.

⁷⁸ Michael Semple supplied the author with a transcript of the interview. It included many details that seem to positively confirm that the man interviewed was Muhammad Amin. To protect his anonymity, we have not published these. Semple additionally verified that he had in the name of Muhammad Amin. Interview, March 2011. All quotes by Muhammad Amin are from this transcript.

Two other people who are familiar with the Taliban in Takhar⁷⁹ were asked about the former shadow deputy governor of Takhar, Muhammad Amin. They provided the same details as Amin had given about himself to Semple. They provided his real name, *nom de guerre*, place of birth, the name and faction of one of his brothers who was a commander and was killed during the Soviet occupation of the 1980s, details about Amin's studies at the same named *madrassa*, his position during the Emirate regime and his current position. Both interviewees said Amin was currently in Pakistan and specified the same location where Semple had interviewed him. There was further triangulation between biographical details provided by the Special Forces unit (which the author agreed to keep confidential), what Amin said about himself, and what the two interviewees said about Amin. In other words, Amin has been identified as a real person in Takhar history, with a confirmed and cross-referenced identity.

Monitoring phone calls had uncovered a real relationship between the two men. Muhammad Amin confirmed that he used to speak to Zabet Amanullah by phone about once a month. Muhammad Amin said he had held Zabet Amanullah in high regard, seeing him as a wise man from a good family, a *sayed*, who thought things through politically. He used to go to him for advice:

My relationship with Zabet Amanullah was based on friendship, rather than my role in the movement. He had suffered under every regime. He was captured and tortured by the Soviets. He served as the deputy of Qazi Kabir. But under Massud, he was arrested and tortured again. Then in Pakistan, the ISI arrested and tortured him. After Zabet Amanullah was thrown out of Pakistan he lived in Kabul and supported himself by running a pharmacy. He was a partner in the shop. It was ridiculous to suggest that he was involved in the insurgency. When he did go back to his homeland in Takhar, it was after a

⁷⁹ One, an active Taliban commander, had all these details. The other, a former mujahedin commander, had some. Author interviews, April 2011.

gap of 22 years⁸⁰ and in all this time he has not spent two months in the province...

According to Muhammad Amin, the two men had been in touch just before the attack – a time when Amin said he was in Takhar but in a different district, which was also when ISAF said it was tracking the ‘target’.⁸¹

About two days before his death Zabet Amanullah spoke to me on the phone and told me that he was determined to block Qazi Kabir from being elected to parliament. That is why he was supporting Abdul Wahid Khorasani, that and the fact that they are related... After the incident, I saw my name in the media and realised the attack was intended for me... I did not discuss this with anyone...

The fact that two people who were being tracked as one person spoke to each other by phone apparently did not strike those monitoring the calls as strange.

2.3.4 Allegations of IMU membership

Muhammad Amin is certainly in contact with IMU commanders.⁸² Yet casting him – as ISAF did – as a ‘senior member’ of the IMU does not match what is known either about him personally or about the insurgency in Takhar, where Afghan Uzbeks and Uzbekistan Uzbeks follow different chains of command in different organisations (the Taliban and the Islamic Movement of Uzbekistan).⁸³ Labelling a commander as being both Taliban and IMU adds to the narrative of an external ‘terrorist’ threat. It can help justify a killing in the public imagination if not in law because foreign jihadists are viewed by almost all Afghans as beyond the pale in a way which the Taliban are not, even by their enemies.

Yet the author has been given no evidence by the military to support its allegation that Muhammad Amin was a member of IMU, the so-called ‘double-hatting’ referred to, for

⁸⁰ Actually 16 years.

⁸¹ ISAF ‘Coalition Forces Conduct Precision Air Strike,’ [see FN 3].

⁸² Muhammad Amin’s interview with Semple [see FN 78].

⁸³ Giustozzi and Reuter, *The Insurgents of the Afghan North* [see FN 12]. Also, see section 2.1 of this paper for detail.

example in the online article for the *Long War Journal*, whose sources frequently come from within the military. It described how Amin’s ‘dual role...highlights the interconnectedness of the Taliban and al Qaeda and Central and South Asian terror groups’.⁸⁴ In terms of the media, ISAF’s IMU accusation in the Takhar case was the headline detail picked up by many journalists covering the attack. If Afghan Uzbek Taleban commanders like Amin are named as IMU on the JPEL, this raises questions about the rigour of the intelligence analysis⁸⁵

2.4 Background to the attack: The election campaign

In 2010, Zabet Amanullah took a fateful decision: to act as the election agent for a candidate in the September 2010

⁸⁴ Bill Roggio ‘Uzbek Terror Commander Serving as Taliban Shadow Governor Killed by US Special Forces,’ *The Long War Journal*, 2 September 2010, http://www.longwarjournal.org/archives/2010/09/uzbek_terror_command.php.

⁸⁵ Muhammad Amin gave several other examples of Taleban wrongly labeled as IMU. He traced these allegations back to internecine *Afghan* struggles: ‘The network of Tajik commanders who dominate the administration in the North East have systematically exploited the IMU issue to concoct a case for the continuation of the backing which Kabul and the US provide them. They misrepresent us local Uzbeks as IMU, so as to give a misleading impression of an external terrorist threat and disguise their own unpopularity. Somehow this has resulted in a series of attacks carried out by US forces against local Taleban in which NATO has wrongly described the targets of the attacks as IMU, ie foreigners, when actually they were local Uzbek Taleban.’ Amin gave the following examples: Drone attack on Sirajudin, alias Omar, in Khwaja Bahauddin on 1 September 2010: ‘Siraj was our *masul* (Taleban representative) for Khwaja Bahauddin and had no link to the IMU, but they described him as IMU.’ Helicopter-borne raid on Nurullah of Taloqan, in late January 2011: ‘Nurullah was our *masul* for Hazar Smooch. Several youngsters from Khwajagar were killed along with him. They wrongly described him as IMU.’ NATO’s killing of the shadow Taleban governor of Faryab: ‘In some of the reports about it they described him as IMU.’ Transcript of interview by Michael Semple, March 2011 [See FN 78].

parliamentary elections, his nephew Abdul Wahab Khorasani. This was not taken lightly. Amanullah was a serious enough figure to upset the electoral politics of northern Takhar. Khorasani had been a television station manager with the national broadcaster (RTA), including in Kabul during the Islamic State era in the 1990s and had good links to Jamiat and Shura-e Nizar, but it was the backing of Zabet Amanullah, who was a much better known and connected figure, which made Khorasani a serious contender. Acting as Khorasani's agent put Zabet Amanullah in direct confrontation with his old rival, Qazi Kabir, who was a standing candidate. It also meant visiting Takhar for the first time in 16 years. Because of fears about Qazi Kabir's intentions, Zabet Amanullah met senior people – governors, police chiefs, two senior aides to President Karzai, elders and district governors – to get the security guarantees he felt were needed. Zabet Amanullah also met Qazi Kabir himself three times. He reportedly urged Zabet Amanullah to support him in the elections instead and also reportedly threatened him over the matter, although Qazi Kabir himself denies this account.⁸⁶

If Zabet Amanullah had been a Taleban deputy shadow governor, it seems implausible he would have met such a range of government officials, consulting them on security and then travelled openly around the province, checking in with district police officials on a

⁸⁶ Several government officials in Kabul and Takhar confirmed that Zabet Amanullah had contacted them and discussed his security concerns before going to Takhar to campaign for his nephew. Officials, friends and family also said that he and Qazi Kabir met during this time (also confirmed by Kabir). Several reported that Amanullah said he had been threatened by Kabir. This was denied by Kabir who said he had told Amanullah that he was an 'ordinary person who could do what he pleased.' Author's interview, April 2011. These issues are also referred to obliquely in some of the press coverage at the time. See for example, Christopher Bodeen: 'A local politician with knowledge of the incident, but who declined to be identified due to the sensitivity of the matter, said the attack was likely linked to rivalries among ethnic Uzbek politicians in the province.' Bodeen, 'NATO Airstrike Killed Civilians,' [See FN 4].

daily basis. The last weeks of his life are particularly well documented: as an election campaign agent, it was lived firmly in the public eye.

Zabet Amanullah travelled with his family to the north in July 2010, first to Mazar and then to Takhar where he spent 15 to 20 days at the end of July. When he went to his village in July 2010, a convoy of about fifty cars came to the district capital to accompany him home and there were three days of celebrations with local notables, including Qazi Kabir, coming to welcome him home.⁸⁷ He returned to Kabul for 10 to 15 days and then went back to Takhar with one of his daughters on 25 July, for the election campaign itself. From 13 August to 1 September, he criss-crossed the province with the rest of Khorasani's campaign team, speaking in mosques, appearing in the media and speaking to district police chiefs daily to inform them of the campaign's movements and to get security advice.⁸⁸

Much of the campaign was caught on video and even though the footage was largely destroyed in the bombing, some video clips and pictures have survived in mobile phones.⁸⁹ For example, in one film taken on 25 August 2010, Zabet Amanullah tells voters, 'I'm so glad that you all came... I really appreciate it. For a long time, I was away from here, as you know due to some difficulties and problems. I am not a man who belongs to the *sayeds* or the Pashtuns, the Uzbeks or the Turkmen. I am from here and in this district now. I am among you and I am one of your people...' One member of the crowd says to

⁸⁷ Information on this itinerary came from a family member. It has been crosschecked with the various public officials he met, including provincial governors and provincial and district police chiefs. Author's interviews, September 2010.

⁸⁸ The author has a dated list of the meetings and speeches, where and at what time both Zabet Amanullah and Khorasani spoke, and with whom they stayed.

⁸⁹ The author has film, pictures and newspaper clippings of the campaign, featuring Zabet Amanullah.

the driver as Zabet Amanullah leaves, 'Drive carefully, don't take risks, be cool and calm.'⁹⁰

For weeks, the election team was mainly canvassing in Khwaja Bahauddin district. For days, the military had been tracking them.⁹¹ On 2 September 2010, the team would cross into Rustaq district, where the Special Forces unit would attack their election convoy.

3 THE ATTACK

What follows is a detailed account of the attack on the election convoy. Because the US military has remained adamant that the convoy was a military target, it was crucial to determine as precisely as possible what happened. To this end, the author interviewed almost all the survivors, local villagers who witnessed the attack, the police who were the first to arrive on the scene and senior civilian and military officials in Takhar. Most of those who survived did so by gradually making their way away from the scene of the bombing, hiding in water channels until they were between 60 and 100 metres away. One survivor was actually at the scene of the attack and gave very detailed testimony. Full biographies were obtained of those in the convoy as well as exact information on where they were sitting, so that there was no question that an extra person – a Muhammad Amin – could have been travelling with the election campaigners. To preserve the anonymity of witnesses (some of whom have since been threatened), only the names of those who were killed in the attack are mentioned.

The author was shown the immediate 'crime scene' footage taken by police. The author asked for, but was refused, an opportunity to watch the cockpit footage of the attack recorded at the time.

⁹⁰ The video, shot at 18:00, shows Zabet Amanullah and Khorasani arriving at the mosque, greeting the voters and being formally welcomed.

⁹¹ ISAF 'Coalition Forces Conduct Precision Strike,' [see FN 2].

3.1 Before the attack

On 2 September 2010, before departure and as per normal, Khorasani and Zabet Amanullah notified the district police chief, Commander Basir who is in charge of Khwaja Bahauddin, that they planned to travel to Rustaq district. He told them security was fine, but offered a police detail anyway. They said they were happy to travel without one, if security was alright.⁹² The team had been provided with firearms' licenses, as was normal for election candidates. In the four cars caught in the attack, there were three Kalashnikov rifles, two in Zabet Amanullah's car and one in Khorasani's.⁹³ The cars, plastered with campaign posters,⁹⁴ set off from Khwaja Bahauddin to Kaiwan village in neighbouring Rustaq district. The campaigners included farmers, elders landowners, shopkeepers, labourers, teachers, a university student, a school student, a driver and a village representative (*arbab*). Many were related to Khorasani or Zabet Amanullah or were old friends. Others were poor men hired as drivers or guards. The plan had been to campaign in Kaiwan, Nawabad and Langar villages. Supporters were waiting in Kaiwan for the convoy to arrive.⁹⁵

The cars passed through mountains, stopping for the campaigners to take pictures of the scenery,⁹⁶ then came to flatter land and eventually to low hills about 2 km west of

⁹² Interviews with Basir and Khorasani, September 2010.

⁹³ Provincial security officials confirmed they had given licences to Zabet Amanullah and Khorasani. Author saw a copy of one of the licenses. Witness statements determined who had been carrying the guns and where they were sitting and what happened to the guns during and after the attack.

⁹⁴ Author's interviews with occupants in three of the four cars caught up in the attack, September 2010. All the occupants of Zabet Amanullah's car were killed.

⁹⁵ Author's interviews with survivors, September 2010. Biographical details were obtained for all those in the four cars caught up in the attack, with details of who sat where and who held guns, to rule out the possibility of an additional passenger who could have been Muhammad Amin.

⁹⁶ Author's interview with survivor. February 2011.

Kaiwan. Beyond the hills was desert-like, flat farmland (*lal-mi*), with no houses or trees until one reached the village, except for a few leafy shelters (*kapas*) located in the farmland. Two cars had passed through a short, narrow pass in the hills when the car in which Zabet Amanullah was travelling came under attack.⁹⁷

Witnesses in Kaiwan village said that one hour before the first bomb, what they described as a ‘white coloured jet’ flying very high (presumed to be a drone)⁹⁸ and then two black jets had been circling over the area. It was the black jets, which bombed the convoy.⁹⁹

Witnesses and survivors place the attack as starting and ending at different times, but the likely time of the first bomb is between 09:00 and 10:00.

3.2 The bombing

The first bomb was huge and hit the ground in front and to the left of Zabet Amanullah’s car, turning it on its side.¹⁰⁰ All the passengers in this car were injured, but only one person, the driver, a school student named Atiq ul-Rahman, who was 18–20 years old and a cousin to both Zabet Amanullah and Khorasani, was hurt badly. He described his insides as ‘burning’.¹⁰¹ Zabet Amanullah received a head wound, which was bleeding.¹⁰² Those in the convoy thought

⁹⁷ Author’s interviews with survivors, September 2010.

⁹⁸ Author’s interview with Kabul-based security official, February 2011.

⁹⁹ Author’s interviews with villagers, September 2010.

¹⁰⁰ Multiple witnesses testified that the first bomb was the largest and left a noticeable crater (measured by police and others as about 0.5m deep and 1.5m across).

¹⁰¹ The candidate, Khorasani, who was also the boy’s uncle, was very concerned about him. He and many of those who survived were at this point still at or very close to the scene and gave detailed testimony about the attack up to the dropping of the second bomb. Author’s interviews, September 2010.

¹⁰² Multiple witnesses described this. Author’s interviews, September 2010.

there had been a roadside bomb or ambush; they feared Taleban, not international military forces. All six cars in the convoy came to a halt.

Many members of the election campaign team ran forward to help. They got the car back on its wheels and broke a window to open the doors and get the passengers out. Some, including Khorasani, then ran towards the village to get help for the injured. Others from the convoy had already run away and hid. Zabet Amanullah took charge and posted two people on the top of the steep banks of the pass on either side of the road to act as lookouts.¹⁰³

About ten minutes after the first bomb, a second bomb was dropped on Zabet Amanullah’s car. Shrapnel hit those who had gathered – both those who had been injured in the first bomb and those who had been trying to help them. At this point, all realised that they were under air attack. Four bombs were dropped in approximate 10-minute intervals. One fell harmlessly on the hill. Another also fell some way away and did not explode.¹⁰⁴ Witnesses among the survivors and in the neighbouring village described the two black jets swooping down on the stranded convoy to about 200–500m from the ground, flying in along the line of the road from the direction of Kaiwan village and towards Khwaja Bahauddin (west to east) one jet dropping a bomb and then both flying on and circling back over the village.

According to the close eyewitness,¹⁰⁵ the second bomb killed seven people outright: the school student driver Atiq ul-Rahman who had been badly injured by the first bomb and who

¹⁰³ Three witnesses, including the two lookouts supplied this detail. Author’s interviews, September 2010.

¹⁰⁴ The fact that only two of the bombs hit the target probably explains discrepancies in witness testimony – with the number of bombs said to have been dropped ranging from two to four and some witnesses also saying the helicopters fired a rocket at Zabet Amanullah’s car.

¹⁰⁵ One of the lookouts who had a direct view. The other was injured in the second bombing. Author’s interviews, September 2010, February 2011.

had been sitting at the side of the road, leaning against his older brother, a teacher, Faiz ul-Rahman (also killed). The two other men who had received minor injuries in the first bombing were also killed: Sayed Qader, a man in his late 70s, who 'didn't really travel except to walk from his house to the mosque for prayers'¹⁰⁶ and Ghulam Muhammad, a labourer. Also killed were three others who had run to help those wounded in the first bombing: a car mechanic turned shopkeeper, Maistari Ibrahim; a farmer in his early 60s, Sayed Naheb; and a 26 year old labourer, Gul Muhammad, who had been hired as Khorasani's bodyguard for the campaign. Another man hired to drive one of the cars in the convoy, Merajuddin, was badly injured, with both legs cut off. He phoned different policemen twice for help at around 10 o'clock.¹⁰⁷ Police said he told them the convoy had been attacked (unspecified by whom), that he was injured and his friends had been killed. This would put his call after the second bomb.

The police also said Zabet Amanullah tried to call them and they placed this after Merajuddin's first call. They were unable to get a signal to call him back. Zabet Amanullah's security focal point, who lived in Kabul, was alerted to the attack by friends in the village. He also tried to telephone Zabet Amanullah but could not get through.

3.3 The helicopters arrive

After the bombing two helicopters arrived, flying first high up and then coming lower. Multiple witnesses described how, over the next 20–25 minutes, one helicopter circled further out, as if searching or monitoring, and

the other hovered directly over the scene of the attack, so close to the ground several witnesses said they thought it was landing. It pointed its nose in different directions and witnesses assumed those inside were scrutinising the scene from different angles. Witnesses said it fired with a 'DShK' (mounted machine gun).¹⁰⁸ All witnesses said they heard no Kalashnikov rifle fire, only DShK.¹⁰⁹

At this point, the accounts by witnesses and that of the Special Forces unit that carried out the attack diverge. The unit said the helicopter did not target individuals on the ground, only the car in which the target had been travelling. 'Something was seen fluttering in the car, so the pilots were authorised to re-engage against the occupants who were in the vehicle. The re-strike was against the people in the car.'¹¹⁰ And 'the direction of [machine gun] fire was into the ravine in order to avoid collateral damage.'¹¹¹

However, all the survivors maintain that all passengers had gotten out of the car after the first bomb and that when the helicopters came, there was no-one in the car.¹¹² The close eyewitness gave this account of what happened:

After the second bomb, Zabet Amanullah and Gul Agha were both alive. Both spoke to me. Zabet Amanullah said, 'Wait a moment, I'll look at the injured and dead, then all three of us will leave.' He had an injury to his face. While he was going to see the martyrs, he was trying to speak to someone on the phone, but there was no reception. He saw Atiq ul-Rahman, his 18-year-old cousin and kissed his face. Both he and Gul Agha were trying to scramble up the steep ground by the road. Then the helicopters came, one was shooting DShK and one was flying around.

¹⁰⁶ Description by one of the survivors. Author's interview, September 2010.

¹⁰⁷ Author's interviews with two senior police officers and one junior officer who asked not to be named, as they were not authorised to speak. One of the senior officers said, 'We received a call about 10.10 from Merajuddin. His exact words were: "I'm injured, two of my legs have been cut off. My friends have all been killed. We are in Kaiwan village. Please help us... I'm in Khorasani's campaign,"' September 2010.

¹⁰⁸ Since the 1980s jihad, Afghans have used the names of Soviet weaponry as generic terms. In this case, DShK (*Krupnokaliberny Pulemet Degtyareva-Shpagina*), pronounced *dashaka*, is used for any kind of mounted machine gun.

¹⁰⁹ Every witness among the survivors and villagers confirmed this. Author's interviews, September 2010.

¹¹⁰ Follow up question by telephone, March 2011.

¹¹¹ Author's interview, March 2011.

¹¹² Author's interviews, September 2010.

Gul Agha still had his gun with him, but he was not shooting. Merajuddin was screaming, calling on Khorasani to help him. But the helicopter only targeted Zabet Amanullah. It seemed as if the helicopter pilot had a picture of Zabet Amanullah in his hand and then shot him. The helicopter was very low to the ground. I thought it was going to land and they would take the bodies away with them, but it didn't. It just stopped and shot straight at Zabet Amanullah. It shot no-one else. The helicopter flew around and came up to me and looked at me and at the bodies. But they didn't shoot.¹¹³

The close eyewitness' account fits with what was found at the scene: the bodies of seven men – presumed to have been killed by the second bomb – were found in a small area (estimated to be about 20 square metres) near Zabet Amanullah's car. Multiple witnesses describe the bodies as being in a very bad condition, with heads, legs, arms and fingers missing, body parts so strewn around that it was difficult or impossible to tell what belonged to whom.¹¹⁴ All the bodies were covered in thick dust. Merajuddin was also in this location, still alive, but badly hurt.

The bodies of Zabet Amanullah and Gul Agha were found lying next to each other about 10–15 metres away from the others. Their bodies were intact, the injuries less serious and they were much less dusty. Several witnesses, including two policemen who saw the bodies, said Zabet Amanullah had been shot in the face. When pressed, one of the police officers said, 'I know the difference between a bullet wound and a wound from shrapnel; a bullet makes a small hole where it goes in and a larger hole where it comes out.'¹¹⁵ Zabet Amanullah was also wounded in the leg and

had lost the fingers of his right hand.¹¹⁶ One officer also said Gul Agha had been shot.¹¹⁷

Provincial officials said that as soon as they were informed about the attack, they tried to stop it and to remove the casualties and dead from the area.¹¹⁸ They contacted the Defence and Interior Ministries and the National Security Council, but said it took nearly one hour until the helicopters left and they could approach the scene and reach the dead and injured.¹¹⁹ The Special Forces unit said there had been no intent to keep 'first responders' away, but rather the role of the helicopters was to keep everyone at bay until the operation was over, in case insurgent reinforcements came. They said, categorically, that they 'do not engage first responders.'¹²⁰

Those first on the scene found nine people dead and one survivor, the badly wounded Merajuddin, who was taken to hospital where he subsequently died. An Afghan National Army helicopter arrived and the bodies were taken away for burial.

Five of the ten people who were killed were close relations. The fact that multiple men were killed from a few extended families has left their widows and orphans in a much more vulnerable position.¹²¹ The names of the dead can be found in Box 2 (names of close relatives are starred).

¹¹³ Close eyewitness, interviewed February 2011. Other eyewitnesses, further away, described the helicopter as deliberately appearing to point its nose in different directions as if scanning the site and scrutinising those who had been killed or injured. Author's interviews, September 2010.

¹¹⁴ Testimony from villagers and police. Author's interviews, September 2010.

¹¹⁵ Author's interview, September 2010.

¹¹⁶ Author's interviews with different witnesses, September 2010.

¹¹⁷ Author's interview, September 2010.

¹¹⁸ The police had been alerted, not just by Merajuddin, but also by local villagers and Zabet Amanullah's security focal point in Kabul who was in touch with people in the village. Police arrived from both Khwaja Bahauddin and Rustaq. Author's interviews, September 2010.

¹¹⁹ They did manage to reach some of the injured who were sheltering in a *kapa* (a leafy structure giving shade) 100–150m from the bomb site and get them to a clinic.

¹²⁰ Author's interview, December 2010.

¹²¹ Usually, male relatives look after widows and orphans in an extended family; multiple deaths make that much more difficult.

Six other people (including the candidate, Khorasani) were injured but survived. Five survived unhurt.¹²²

Box 2.

The men who died in the 2 September attack

1. Zabet Amanullah.* son of Abdul Rashid. From Sujani village, Rustaq district. Former commander, pharmacy owner and landlord. Lived in Kabul. 45 years old.
2. Attiqullah.* son of Akhund Jan; cousin to both Zabet Amanullah (son of Amanullah's maternal uncle) and Khorasani (son of Khorasani's maternal aunt); younger brother of Faiz ul-Rahman (also killed); 12th grade high school student, from Khwaja Bahauddin, 18–20 years old.
3. Faiz ul-Rahman.* son of Akhund Jan and brother of Atiqullah, who was also killed; deputy head of Khwaja Bahauddin Boys High School, 38 years old.
4. Ghulam Rasul. son of Habibullah. Labourer and wood-seller from Shuturai villager, Khwaja Bahauddin district. 39 years old. Hired for the campaign. Carried an AK-47.
5. Gul Agha. son of Gul Nazar; farmer from Khwaja Bahauddin, 37 years old. Former group commander under Qazi Kabir, fought the Taleban during the Emirate; hired as Zabet Amanullah's bodyguard. Carried an AK-47.
6. Sayed Maistari (Mechanic) Ibrahim.* son of Sayed Sabur, Zabet Amanullah's cousin (his paternal uncles' son); from Rustaq district, had been living in Khwaja Bahauddin. A carpet shopkeeper (but had formerly had a mechanic workshop) from Nawadabad village. 48 years old.

¹²² The author has the names and biographies of the people in the convoy, but for their own protection is not identifying them publicly. There were twenty people in the four cars that were caught up in the attack. One person from one of the two first cars ran back to help and was also injured.

7. Gul Muhammad. son of Zakir, the only Tajik in the convoy. Originally from Tulaki village, Rustaq District, living in Gulbahar; a labourer, 26 years old. Hired as a driver for the campaign.
8. Haji Sayed Qader.* son of Ghulam Muhammad. Zabet Amanullah's paternal uncle. From Rustaq, a farmer and elder who normally 'only went from house to mosque.' 77 years old.
9. Muhammad Merajuddin. son of Issa Bayi Khan. Katakjar village, Khwaja Bahauddin district. 38 years old. Rented his Corolla to the campaign team. A non-related taxi driver.
10. Sayed Naheb. son of Ghulam Qadr. From Rustaq, had been living in Khwaja Bahauddin. Elder, landlord, farmer, 62 years old.

* having a close relative who was also killed.

4 THE CONSEQUENCES: INTELLIGENCE, LAW AND POLITICS

Great efforts have been taken to get as accurate a picture as possible of the lives of Zabet Amanullah and Muhammad Amin and of the 2 September 2010 attack. The international military, however, has yet to accept the existence of two separate individuals or the fact that they mistakenly attacked a civilian convoy.¹²³ The gravity of the disconnect between the US military's account of the attack and what these investigations have revealed raises systemic concerns over the intelligence which drove this targeted killing. Similar concerns have previously been raised by the most senior figures within the US military.¹²⁴ Moreover, the details that were uncovered in this

¹²³ The military accepts that some civilians may have been killed in the attack, but remains convinced that they killed the right man who was a legitimate military target, an IMU/Taleban commander called Muhammad Amin who used the alias 'Zabet Amanullah'. Author's interviews, December 2010, March 2011.

¹²⁴ See Section 5.

research, as will be shown below, point to possible violations of the laws of war, in addition to grave flaws in the intelligence gathering operation.

This section discusses the three main concerns with how intelligence-led operations are prepared, executed and justified, as identified by this author. The first refers to a failure to gather, or properly evaluate, intelligence that should have been readily available. This seems to have resulted in the failure to adequately comply with the precautionary principle and the continuous obligation to avoid civilian harm. The second issue relates to a line of reasoning that suggests that proximity to a JPEL target may, in the eyes of the US military, be considered sufficient to lose the protection awarded to civilians. If this is a more general rule, which interviews have suggested it is, it is serious indeed. The third issue is the ambiguity surrounding when an individual identified on the JPEL for a targeted killing becomes *hors de combat*, a status that means he or she may no longer be considered a legal target.

4.1 Cross-checking intelligence to comply with the precautionary principle

All parties agree that there was no live-fire incident before the attack.¹²⁵ This means that the incident cannot be judged through a 'self-defence' or 'troops in contact' lens.¹²⁶ Instead, this was a pre-meditated, targeted killing, based on the military's assumption that the targeted individual was a member of an

¹²⁵ The Special Forces unit confirmed that no live fire incident preceded the attack. Author's interview, March 2010. All witnesses said no Kalashnikov rifles shots were fired. Author interviews September 2010.

¹²⁶ 'Broadly speaking, air strikes are used in two different circumstances: planned strikes against predetermined targets, and unplanned 'opportunity' strikes in support of ground troops that have made contact with enemy forces (in military jargon, 'Troops in Contact' or TIC).' *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan* Human Rights Watch, September 2008.

<http://www.hrw.org/en/reports/2008/09/08/troops-contact-0>.

organized armed group, party to the conflict, or otherwise participated in hostilities so regularly that he might be targeted at any time. The investigations discussed in this report have proven these assumptions to be wrong. An attack aimed at Muhammad Amin killed Zabet Amanullah and nine other civilians.

Network analysis of phone calls revealed the relationship between two individuals: Muhammad Amin and Zabet Amanullah. However, the two men were conflated and attributes of one – deputy Taleban governor, fighting commander – were assigned to the other. This mistake could have been picked up, but there appear to have been no efforts to cross-check this information with human intelligence. In particular:

- There appears to have been no historical or political background knowledge to draw on – knowledge which would have allowed them to put the intended target Muhammad Amin into a geographic and historical context and could have identified the insurgent's 'alias', Zabet Amanullah, as a real, well-known figure in Takhar. Publically available 'current affairs' information – from the media, reports about the elections, etc. – which featured Zabet Amanullah, was apparently not accessed or included by the intelligence gatherers.
- No crosschecks were made with Afghan officials, either at provincial or national level. As the governor, Abdul Jabar Taqwa, said, 'Without any co-ordination, without informing provisional authorities, they attacked, on their own, civilian people who were in a campaign convoy.'¹²⁷

¹²⁷ As discussed before, many provincial officials knew Zabet Amanullah personally and all knew of him, as did several senior figures in government in Kabul. Cross-checks would have revealed that Zabet Amanullah was a known individual, living openly. The familiarity of local officials with Zabet Amanullah allowed them to be categorical in their assertions that this was an entirely civilian convoy. Governor Taqwa, for example, said that no Uzbek militants, foreigners or members of the IMU were in the convoy and called the attack an 'obvious

Security officials said that standard procedures used by ISAF to inform them before undertaking military operations, were not taken before this operation.¹²⁸

This lack of cross-checking was strongly criticised. 'If NATO had wanted to arrest Zabet Amanullah,' said the Takhar Chief of Police, Shah Jahaan Nuri, for example, 'I could have captured him with one phone call.'¹²⁹ When asked whether they should have checked details of the intended target with Afghan officials before the attack, the unit which carried out the attack said previous experience of plans leaking back to an intended target, which then gave him the opportunity to disappear, meant they normally do not discuss such operations beforehand.¹³⁰

- Knowledge of the insurgents' *modus operandi* seems to have been either lacking or not taken into account – with the unlikelihood of a six car Taleban/IMU convoy travelling in broad daylight through Takhar apparently not prompting a review of the available intelligence.¹³¹

Intelligence failures, including over-reliance on signal and other technical intelligence, have led to civilian casualties in Afghanistan before, as the list of incidents in Box 3 indicates.¹³² At this point in the conflict, a 'reasonable

mistake.' 'Afghan Election Campaign Workers "Killed in Air Strike"' [see FN 4].

¹²⁸ Interviews with the provincial governor, Abdul-Jabbar Taqwa; the provincial police chief, Mawlana Shah Jahan Nuri; and the director of the Harmonization Office (*Shoba-e Hamahangi Ensejam-e Welayat-e Takhar*), General Abdul Aziz Wazeri. This group of senior provincial officials liaises with ISAF. Usually, Wazeri said, NATO informs officers from the Harmonization Office or the governor directly before an operation, but in this case, he said they found out about the attack from media reports, based on ISAF press releases. Authors' interviews September 2010, February 2011.

¹²⁹ Author's interview, September 2010.

¹³⁰ Author's interview, March 2011.

¹³¹ See section 2.1. for a discussion of the 'hit and run' nature of Taleban operations in the province.

¹³² In particular, the killing of civilians on the Daikundi/Urozgan border on 21 February 2010 (see also Box 3).

commander' in Afghanistan should be on notice that cross-checking intelligence through several different streams is necessary to comply with IHL requirements to take all feasible precautions to avoid civilian harm.¹³³ That even basic inquiries about a target whom the unit said they had been tracking for months were not made, or did not inform the operation, suggests serious flaws in the collection and evaluation of the intelligence. The magnitude of these omissions rise to the level of a violation of the precautionary principle.

The lack of concern shown by the military for much of this background information, or the lack of recognition that such queries might be important in determining status, raise serious concerns about systemic weaknesses in intelligence collection that may lead to broader IHL violations and significant tactical weaknesses.

Box 3.

List of incidents of civilian casualties, and allegations of civilian casualties, involving mistaken targeting or faulty intelligence before and after the Takhar attack

(Not all are accepted as civilian casualties by ISAF.)

14 March 2011, Sawakai, Kunar. General Petraeus suspended a ground forces commander and the helicopter air weapons team that had opened fire and killed two boys. According to Afghan officials the boys, aged 10 and 15, had been watering their fields at night. They had been mistaken for Taleban planting a roadside bomb.¹³⁴

¹³³ As discussed in footnote 43, recent jurisprudence from international courts and national military manuals typically use a 'reasonable commander' standard to judge whether an attack has met the standards for distinguishing civilians.

¹³⁴ See Bill Roggio, 'ISAF Suspends Ground Commander, Helicopter Crew During Investigation into Civilian Deaths in Kunar' *The Long War Journal*, 16 March 2011, <http://www>

1 March 2011, Darah-ye Pech district, Kunar. Nine children collecting firewood were killed. The commander of ISAF, David M. Rodriguez, publicly apologised two days later, saying that helicopter pilots had mistakenly identified the boys as insurgents, based on intelligence reports.¹³⁵

18 February 2011, Ghaziabad, Kunar. According to ISAF, an 'air weapons team' opened fire on 'a large number of armed insurgents' killing 'more than 35 Taliban fighters during a four-hour-long engagement.' Afghan officials have maintained that more

.longwarjournal.org/archives/2011/03/us_military_suspends.php.

¹³⁵ 'General Apologizes for Civilian Deaths in Afghanistan' press released from the Office of the Secretary of Defence Public Affairs, 3 March 2011, accessed at DIVIDs website, <http://www.dvidshub.net/news/66428/general-apologizes-civilian-deaths-afghanistan>.

¹³⁶ 'NATO accused of killing dozens of Afghan civilians', BBC 20 February 2011, <http://www.bbc.co.uk/news/world-south-asia-12518798>.

¹³⁷ Emma Graham-Harrison, 'NATO's 'successful' Afghan night raids come with high civilian cost', Reuters, 14 February 2011, <http://in.reuters.com/article/2011/02/24/idINIndia-55118620110224?feedType=RSS&feedName=everything&virtualBrandChannel=11709>

¹³⁸ David S. Cloud, 'Anatomy of an Afghan war tragedy: Combat by camera', *Los Angeles Times*, 10 April 2011, <http://articles.latimes.com/2011/apr/10/world/la-fg-afghanistan-drone-20110410>.

¹³⁹ UN News centre, 'At least 90 Afghan civilians killed in recent military operations, says UN', 26 August 2008, <http://www.un.org/apps/news/story.asp?NewsID=27816&Cr=Afghan&Cr1>.

¹⁴⁰ 'US-led force says 5 Afghan civilians killed in strikes' AFP, 26 August 2008, <http://www.abc.net.au/news/stories/2008/08/26/2347302.htm>.

¹⁴¹ 'US re-examines Afghan civilian deaths from attack', AP, 9 September 2008, <http://www.thefreelibrary.com/US+re-examines+Afghan+civilian+deaths+from+attack-a01611638260>

¹⁴² 'Report into the role and oversight of private security contractors in Afghanistan', Committee on Armed Services, US Senate, 28 September 2010, <http://www.scribd.com/doc/38954854/Sasc-Psc-Report-20101007>.

¹⁴³ James Risen, 'Afghans Linked to the Taleban Guard U.S. Bases', *New York Times*, 7 October 2010, http://www.nytimes.com/2010/10/08/world/asia/08contractor.html?_r=1&hp.

than 65 civilians, mostly women and children, were killed in the attack.¹³⁶

August 2010, Surkh Rod, Nangarhar. A father and grown son were killed in a night raid. A surviving son, Abdullah, said the family had been asleep when troops arrived on the roof, broke down the front door and killed his father. He said his brother grabbed a gun, but was shot before he could open fire. ISAF said troops came under fire when they arrived in the area, tried to call people in the house to come out peacefully, and only started shooting when attacked from inside by two men. They said 'several' people in the small compound identified the dead men as Taleban. Abdullah said he, his brother and father were the only adult men there. The local MP told Reuters that a visiting mullah, whom the US may have believed was Taleban, could have caused the house to be identified with the insurgents.¹³⁷

21 February 2010, Daikundi/Urozgan border. General McChrystal, then commander of ISAF, apologised after two Hellfire missiles, fired from a Predator drone at two SUVs and a pick-up truck, killed and wounded a large number of men, women and children. An investigation by the *Los Angeles Times*, which used Freedom of Information requests to get access to cockpit, radio conversations and Pentagon investigations revealed the eagerness of the crews to target the convoy, the downplaying of a possible sighting of children and the stressing of the possible sighting of a rifle as evidence that the convoy was a hostile force.

The teams piloting the drone did suspend the attack after seeing indications that civilians were present: "The thing is, nobody ran," one crew member said. "Yeah, that was weird," another replied. At 9:15 am, the Predator crew noticed three survivors in brightly coloured clothing waving at the helicopters. They were trying to surrender. "What are those?" asked the camera operator. "Women and children," the Predator's mission intelligence coordinator answered.¹³⁸

22 August 2008, Azizabad, Herat. During an ISAF and Afghan forces operation, an airstrike aimed at a Taleban commander, Mullah Sediq,

killed 90 people, including women and children, according to a UNAMA investigation.¹³⁹ ISAF initially asserted it was a legitimate strike on a Taleban commander and there were no civilian casualties. During the next few weeks, particularly after video evidence of the casualties was shown on television, ISAF admitted to increasing numbers of civilian casualties: first from zero to five,¹⁴⁰ then to 'up to 7 civilians and 35 militants',¹⁴¹ and eventually to 33 civilians. Two years later, a Senate investigation into the awarding of security contracts described much of what had gone wrong: rival armed groups, one with Taleban connections, had been hired by a private security firm to guard the nearby ISAF Shindand airbase.¹⁴² It was the brother of the leader of one of these groups who hosted Mullah Sediq who appears to have been the target of the strike.¹⁴³

4.2 Continuous obligation to take precautions to avoid civilian harm

The obligation to take precautions to avoid civilian harm extends beyond the simple planning phase¹⁴⁴ is a continuous obligation. Even if Zabet Amanullah and those travelling with him were presumed to be legitimate military objectives, if it became apparent that civilians were likely to be harmed in the attack, the military would be obligated to take feasible precautions to prevent attacking them, including suspending or ceasing the attack.¹⁴⁵

Although second-guessing appraisals made during an attack is always difficult, the behaviour of those present in the convoy and the markings on the vehicles are significant evidence and should have suggested at least the possibility of civilian status to a reasonable commander on the scene. Moreover, the helicopter pilots – who generally have good visibility given their close range at such a scene – should be reasonably expected to question why, in the aftermath of an attack on a man presumed to be a major insurgent leader and his personal security detail, the 12

'insurgents' who were still at the scene had so few weapons. Among the nine dead and three wounded, one AK-47 was on the body of a dead man and two others were held by wounded men: none were firing.

Whether election posters were still visible on the cars during the operation is still a question. Survivors from three of the cars caught up in the attack said their vehicles had posters on them.¹⁴⁶ Those coming to the scene immediately after the attack said the posters were still visible. Even three months later, remains of the posters on Amanullah's burnt car could still be seen.¹⁴⁷ The military has said they saw no evidence of political campaign material,¹⁴⁸ but those who came onto the scene after the attack wondered how this had been possible.¹⁴⁹

Thus, strong indications exist that, in addition, to the potential violations of the precautionary principle in the pre-planning stage, those engaged in the attack also failed in their ongoing duty to avoid civilian harm, based on the evidence available to them at the scene during the operation.¹⁵⁰

¹⁴⁶ All those travelling in Zabet Amanullah's car were killed. However, other witnesses say it too had posters on it.

¹⁴⁷ Authors' interviews, September 2010; photograph of car taken for a documentary for PBS Frontline series, seen by author, December 2010.

¹⁴⁸ Author's interview with General Petraeus' spokesman, December 2010.

¹⁴⁹ Author's interviews with police and villagers, September 2010.

¹⁵⁰ It has by now been established that helicopter or drone pilots are instructed to break off or suspend the engagement when confronted with the presence of civilians. The recordings of cockpit, radio conversations and Pentagon investigations, obtained by the *LA Times* through Freedom of Information requests, of a Predator drone attack on 21 February 2010, show that the pilots did suspend an attack on what they had assumed was a convoy of insurgents when they saw signs of the presence of civilians. Unfortunately by that time more than a dozen civilians had already been killed. David S. Cloud 'Anatomy of an Afghan war tragedy' *Los Angeles Times*, 10 April 2011. See Box 3.

¹⁴⁴ Rule 15 ICRC Study (see Box 1).

¹⁴⁵ Protocol I, art. 57(2)(b).

4.3 Proximity as Crime?

Zabet Amanullah was not the only civilian killed on 2 September 2010. Nine others died with him and seven more were injured. While the rationale for targeting Zabet Amanullah, albeit mistaken, was clearly articulated, the military offered little explanation for why these other individuals were also attacked. While collateral damage is not unlawful per se under IHL, public statements by ISAF and interviews with the special forces unit suggest the other individuals may have been targeted because of their association with Zabet Amanullah.

Under IHL, in non-international conflicts, civilians must be protected, 'unless and for such time as they take a direct part in hostilities.'¹⁵¹ The unit which carried out the attack never suggested that others travelling in the convoy were on the JPEL. No shots were fired before the attack or at the helicopters, which makes the argument that those surrounding Zabet Amanullah could be targeted for 'participating in hostilities' or were otherwise demonstrating 'hostile intent' a difficult one. In the absence of evidence that other passengers were combatants, an inquiry should have been made into whether others in the convoy were civilians, if not a presumption that they were.¹⁵²

Although ISAF has stressed that pains were taken to only bomb the car in which Zabet Amanullah was travelling, given the number and weight of the bombs used, some of the other individuals in the convoy were bound to be killed and injured as well.¹⁵³ The unit was thus willing to use lethal force on more than twenty persons, about whom it knew nothing.

Even if the special forces unit assumed that some civilians in the convoy might be harmed, that would not make it an unlawful strike per

¹⁵¹ Rule 6 ICRC Study (see Box 1).

¹⁵² The principle that, 'in case of doubt, military forces must presume a target is civilian' is found in Additional Protocol I (53.3), which, although not binding in non-international conflicts, can be argued by analogy to be applicable.

¹⁵³ ISAF, 'Coalition Forces Conduct Precision Strike,' [see FN 3].

se. The military could have argued that any expected civilian casualties would have been 'collateral damage' that would be proportional – and therefore arguably legal – to the military gain achieved by killing an important insurgent leader.¹⁵⁴ However, this argument was not made, either in ISAF press releases or in interviews. Instead, it was implied and argued that the other passengers' *proximity* to a 'known insurgent leader'/JPEL target caused them to lose their civilian status. Neither the idea of proximity or guilt by association conferring combatant status is present in IHL.¹⁵⁵

The initial ISAF press release presumed the other passengers in the convoy were combatants:

...initial reflections indicate eight to 12 insurgents were killed or injured in the strike, including a Taliban commander [i.e. in addition to Muhammad Amin]. Multiple passengers of the vehicle were positively identified carrying weapons...

While the presence of weapons in the convoy together with a suspected insurgent leader's presence could have raised suspicions that others in the convoy were also combatants, in Afghanistan many plausible explanations exist for convoys to be armed.¹⁵⁶ Given the absence of other patterns of life analysis or human intelligence involved in this raid, and the other signs suggesting those present might have been civilians, greater care might have been taken to ensure that those present were actually combatants.¹⁵⁷

¹⁵⁴ See Box 1, Rule 14, ICRC Study.

¹⁵⁵ Indeed, a principle in Additional Protocol I (which is binding only in international conflicts, but, by analogy may be applicable here) states that military forces within a civilian population do not change the civilian character of the population (which therefore still needs to be protected, military targets distinguished from civilians and any attack should be proportional). API (50.3).

¹⁵⁶ In this case, the firearms had been licensed for the duration of the election campaign.

¹⁵⁷ In a later press statement, ISAF officials admitted that civilians might have been present, but implied if they had been killed, it was somehow their own fault, saying, 'We are very confident that the targeted individual was in the

Requests for a more detailed account of the legal basis of this attack from US military lawyers, including whether they believed proximity to a target could confer combatant status, went unanswered. However, interviews with officers from the Special Forces unit suggested that proximity to a target is used as a proxy for determining combatant status, as a general rule.¹⁵⁸ One said, 'If someone is a targeted individual or someone is with that person, they are unlawful combatants.'¹⁵⁹ Another said, 'If we think it is Muhammad Amin and he has a PSD (Personal Security Detail), if we decide he's a bad person, the people with him are also bad.'¹⁶⁰

4.4 Hors de combat

The close eye-witness at the scene of the attack said Zabet Amanullah was shot while he was wounded, bleeding, unarmed, not showing any aggression and trying to scramble up the steep side of the pass and get away. Gul Agha, who was with him, also wounded and still carrying his Kalashnikov, was also shot. The unit which carried out the attack has denied this version of events, saying the

vehicle struck by the air weapons team and was killed. The question remains why an election official or candidate was travelling with a known terrorist.' The quote is from Brig. Gen. Luigi Scollo, ISAF Joint Command operations chief and team leader on the investigation. ISAF Press Release, 'Assessment of Civilian Casualties in Takhar Complete,' 12 September 2010, <http://www.isaf.nato.int/article/isaf-releases/assessment-of-civilian-casualties-in-takhar-complete.html>.

¹⁵⁸ This idea of guilt by association or that proximity confers combatant status is not present in IHL. However, a principle in Additional Protocol I, binding only in international conflicts, exists, but analogies could be made. According to this principle, military forces within a civilian population do not change the civilian character of the population. By consequence, military targets still need to be distinguished from civilians and civilians should still be protected Additional Protocol I 50.3. Concerning the requirement for distinction, see Box 1, ICRC Rule 6.

¹⁵⁹ Author's interview, December 2010.

¹⁶⁰ Author's interview, March 2011.

helicopters did not target individuals or strafe people on the ground, but only and 'unequivocally' fired at the target's vehicle, after the pilot had observed some movement there.¹⁶¹

Direct firing on injured civilians, if it happened, would have been a clear violation of the laws of war. Any signs that civilians were among the wounded would have created a higher burden to ascertain the status of those wounded, before carrying on with the operation.

The direct targeting of the wounded, if it happened, might also have been unlawful if they were presumed combatants. Under the laws of war, attacks on those who are not directly participating in hostilities, and on fighters who are *hors de combat*, are unlawful. The principle of *hors de combat* (outside the fight) is intended to protect those who have become defenceless. Under IHL, those who are *hors de combat* 'shall in all circumstances be treated humanely, without any adverse distinction.'¹⁶² This includes violence to the person or execution 'without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees.'¹⁶³

A person *hors de combat* is:

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender

provided he or she abstains from any hostile act and does not attempt to escape.¹⁶⁴

¹⁶¹ Authors interviews, December, March 2011; follow up questions by telephone, March 2011.

The unit has not said how exactly they believe Zabet Amanullah was killed (they have, in fact, yet to accept that Zabet Amanullah was present).

¹⁶² Geneva Conventions, common Article 3 Art 1.

¹⁶³ Geneva Conventions, common Article 3, 1 (a) and (d). Also AP II Art4 (adopted by consensus).

¹⁶⁴ ICRC, 'Rule 47. Attacks against Persons Hors de Combat,' *Customary IHL*. http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule47. See also

Protection is premised on the presumed combatant not committing any 'hostile act' or attempting escape.¹⁶⁵ A presumed combatant who was wounded, but still showed signs of fighting back would not be considered *hors de combat*, and thus might be considered a legitimate target under IHL. When and how a person can become *hors de combat* can be contested. For example, the second provision on 'attempting escape' has been used in the past to justify firing on those *hors de combat* after an initial attack.¹⁶⁶

API Art 41 (2); Geneva Conventions common Article 3; Additional Protocol II, Article 4. That those who are *hors de combat* are not protected from collateral damage is worth noting. This is most likely the relevant analysis for the second bomb dropping. It does not matter if people were wounded and *hors de combat* when it was dropped – assuming that the target was legitimate – because those *hors de combat* are not protected from collateral damage so long as it is not disproportionate. (This hinges, of course, on whether the target itself was lawful, or would have been deemed lawful by a reasonable commander given the information available at the time.)

¹⁶⁵ Rule 47. See also, Art. 41, Additional Protocol I, codifying reflecting international law.

¹⁶⁶ For example, in the case of the attack on a group of presumed insurgents, later found to include two Reuters cameramen and several civilians, in Iraq in February 2007, the leaked US military after-reports and investigation suggested that preventing wounded combatants from escaping the scene was deemed a sufficient justification to fire. For reporting of the initial incident, see Jemima Kiss, 'Reuters Staff Killed in Iraq,' *The Guardian*, 12 July 2007, <http://www.guardian.co.uk/media/2007/jul/12/reuters.pressandpublishing>; and Alissa J Rubin, 'Iraqi Journalists Killed as U.S. Forces Clash With Militias,' *New York Times*, 13 July 2007, <http://www.nytimes.com/2007/07/13/world/middleeast/13iraq.html?ref=middleeast>. For a report of the leaked military video and investigations, see Chris McGreal, 'Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians,' *The Guardian*, 5 April 2010, <http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-army-iraq-attack>. Also see Jonathan Steele, 'Iraq War Logs: Apache Helicopters Kill 14 Civilians in Hunt for Insurgents,' *The Guardian*, 22 October 2010, <http://www.guardian.co.uk/world/2010/oct/22/apache-helicopters-kill-iraqi-civilians>.

However, while escaping might be considered a sufficient reason to fire or otherwise attempt to disable a combatant who has received *hors de combat* status (because she or he had already been captured or expressed an intention to surrender),¹⁶⁷ some commentaries to Additional Protocol I and the general principles of IHL suggest that the provision on escape was not intended to apply to combatants who are not yet in the power of the hostile party.¹⁶⁸ Legal commentators have made the argument that treatment and evacuation of the wounded, included the walking wounded evacuating themselves by non-violent means, is one of the most fundamental principles of international humanitarian law and cannot be enough to trigger a lawful attack.¹⁶⁹

Particular problems may arise when dealing with *hors de combat* issues in relation to air attacks. Commentary contemporaneous to the Additional Protocol 1¹⁷⁰ suggests that, in relation to the difficulties of falling into enemy hands if an attack is conducted by an air force,

¹⁶⁷ Under provisions of API Art. 41 (2)(a) or (b).

¹⁶⁸ API Art. 41 (2)(c).

¹⁶⁹ For example, Michael Bothe, Karl Josef Partsch and Waldemar A. Solf argue that 'The escape exception, however, can have relevance only with respect to those who express an intent to surrender and those who are in the power of the enemy. There is no rule which limits the protection prescribed by the Conventions for the wounded and sick to those who are likely to fall into the power of an adverse Party. Accordingly, para.2 [which deals with escape] should not be misconstrued so as to restrict the protection afforded to the wounded and sick and to the medical personnel and transports undertaken to evacuate them from the battlefield. This protection remains applicable to the walking wounded evacuating themselves. Inasmuch as the purpose of Protocol 1 is to reaffirm and develop humanitarian protections to the victims of armed conflict, it would be inadmissible to construe the paragraph to reduce protections to the wounded and sick which have been universally recognised since 1864.' *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, 1982, 222–223.

¹⁷⁰ Additional Protocol I applies to international armed conflicts, but the argument is analogous.

it is a person's 'defencelessness' which is key.¹⁷¹ US military lawyers in Iraq, however, suggested it was 'impossible to surrender to a helicopter'.¹⁷²

The case of Zabet Amanullah is not straightforward. If the eye-witness described him accurately, he was fired on while wounded, but not incapacitated to the point of unconsciousness. He had been able to organise lookouts, for example, after the first bomb. He was unarmed but with a bodyguard with a weapon, although he was not firing. There was nowhere in the area that the two men could possibly have run to and hidden themselves: there were no nearby houses or trees or vegetation and only leafy shelters (*kappa*) several dozen metres away in the arid land. Zabet Amanullah and Gul Agha were trying to escape, which, as illustrated above is an action that is interpreted by some as a

¹⁷¹ '...the air force...can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example in the case of an attack by helicopters). In other cases, land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat. A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted... A defenceless adversary is "hors de combat" whether or not he has laid down arms.' API(a) 1612. In addition '...it is not only because a person of the adverse Party is wounded or partially handicapped that this obligation arises, but because he is incapable of defending himself.' API II (a) 1620. <http://www.icrc.org/ihl.nsf/COM/470-750050?OpenDocument>. Additional Protocol I applies to international armed conflicts, but the argument is analogous.

¹⁷² In response to the pilot of an Apache helicopter who in April 2007, had reported two insurgents attempting to surrender, the ruling was, 'Lawyer states they can not surrender to aircraft and are still valid targets' (according to the log, published on Wikileaks). See David Leigh 'Iraq War Logs: Apache Crew Killed Insurgents Who Tried to Surrender' *The Guardian* 22 October 2010 <http://www.guardian.co.uk/world/2010/oct/22/iraq-war-logs-apache-insurgents-surrender>.

demonstration of 'hostile' intent, but not by other experts on the laws of war.

4.4.1 *Hors de combat* and the Joint Prioritised Effects List (JPEL)

Although the US rules of engagement in Afghanistan and the criteria for putting someone on the JPEL for targeted killing are classified, in principle, the *hors de combat* principle is clear cut. It is mentioned in relation to those who are a declared hostile force in the *2010 Operational Law Handbook* for US military lawyers:

Once a force or individual is identified as a DHF [declared hostile force], the force or individual may be engaged, unless surrendering or hors de combat due to sickness or wounds.¹⁷³

The killing of Zabet Amanullah raises the question of how – and indeed whether – he or others, if once they are identified for targeted killing on the JPEL list, can become *hors de combat*. Based on the interviews with the unit that carried out the attack, how the US military was interpreting *hors de combat* rules in relation to JPEL targets was not clear. One commander of the Special Forces unit suggested that *hors de combat* status would come after an assessment that the targeted individual was, 'unwilling or unable to be a threat'. He suggested this could happen in two ways: primarily through official enrolment in the reintegration programme or if the target dropped his weapon and raised his arms.¹⁷⁴

Another commander pointed out that US soldiers who were wounded, but still armed, would still have the will and capability to be a threat and therefore would not be *hors de combat* – and this framed the manner with which they generally approached the issue vis-a-vis wounded Taliban. Moreover, he said they had lost soldiers after Afghans who pretended to surrender had perfidiously detonated suicide vests or called in support

¹⁷³ *Operational Handbook* 75 [see FN 37]. The author has found no other published details on this subject.

¹⁷⁴ Author interview, March 2011.

using mobile phones.¹⁷⁵ This is why, one interviewee said, if a target was wounded, he was still deemed to have 'hostile intent' and they were allowed to strike him again. Additionally, someone who was injured and without a gun could still be deemed a threat, he said 'maybe not that day, but tomorrow or the next day – it's the same basis as the original targeting.'

This appears to be at odds with the US Standing Rules of Engagement that defines hostile intent as follows (emphasis added):

Hostile Intent (is) the threat of **imminent** use of force against the United States, U.S. forces, or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.¹⁷⁶

It appears that, in practice, the bar on according *hors de combat* status to a JPEL target who is wounded, unarmed or apparently surrendering, may have been raised: as well as abstaining from any hostile act (as per IHL), the target must also be deemed not to have 'hostile intent' – which may be very difficult once he has been identified as an insurgent leader and put on the JPEL. At the extreme end of possible violations, an order to 'give no quarter' – i.e. ignoring the prohibition to attack a person recognised as *hors de combat* – to those on the JPEL, would be a serious violation of IHL.¹⁷⁷ Clarification was requested from the military lawyers, but was not forthcoming.

¹⁷⁵ There is a ban on perfidy – the treacherous injuring or killing of an adversary after deceiving him into thinking he must give you protection, for example pretending to be injured or of having surrendered (ie *hors de combat*) or being a civilian, for example dressing up as a woman. See Rule 65: Perfidy, ICRC, *Study on Customary International Humanitarian Law*, 2005, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65. Additional Protocol I, Article 37(1); ICC Statute, Article 8(2)(e)(ix).

¹⁷⁶ *Operational Handbook* 75 [See FN 37].

¹⁷⁷ 'Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited.' ICRC notes,

4.5 Preventing civilian casualties among bystanders

The one area of IHL where precautions appear to have been taken seriously and effectively, was the obligation to prevent civilian casualties among bystanders. The commanders of the unit made clear that the convoy was deliberately attacked in an isolated area far from human habitation and farmland, in order to reduce the risk of civilian passers-by being hurt.¹⁷⁸ As the first ISAF press release stated: 'After careful planning to ensure no civilians were present, coalition aircraft conducted a precision air strike on one sedan and later followed with direct fire from an aerial platform. ...these vehicles were nowhere near a populated area and we're confident this strike hit only the targeted vehicle after days of tracking the occupants' activity.'¹⁷⁹

5 CONCLUSIONS

What was extraordinary to Afghans (and indeed to many foreigners) about the Takhar attack was how the intelligence operation had missed what was obvious, indeed common, knowledge. That so many civilians were killed on 2 September 2010 and that the international military has steadfastly refused to acknowledge this has left many interviewees baffled and many of them bitter. 'Poor Afghans will never be able to get to see

'The duty to grant quarter is a basic rule that prohibits attacking a person recognized as *hors de combat* in combat situations on the battlefield.' And that, 'while all those who take a direct part in hostilities must respect this rule, in practice it will be particularly relevant for commanders.' Rule 46. Orders or Threats that No Quarter Will Be Given. *Customary International Law* http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter15_rule46?OpenDocument&highlight=quarter. Hague Regulations, Article 23(d); Additional Protocol I, Article 40 ; Additional Protocol II, Article 4(1) ; ICC Statute, Article 8(2)(e)(x) .

¹⁷⁸ Author's interviews, December 2010 and March 2011.

¹⁷⁹ ISAF, 'Coalition Forces Conduct Precision Strike,' [see FN 3].

the right people to get justice,' said one survivor who sustained serious injuries from the bombing. 'The foreigners want us to have elections and then they bomb us when we do,' said another.¹⁸⁰

The way the military has stuck to its account of the attack on 2 September 2010 is in itself problematic. According to survivors, ISAF's investigation into alleged civilian casualties did not ask them about what had happened; several provincial officials emphasised that they had not been properly consulted.¹⁸¹ Instead, the internal military investigation mainly seemed to involve going over its own intelligence gathering operation without due attention to existing alternative accounts. The Special Forces unit has acknowledged the contradictions between their account of the attack and its target and the one this author had gathered, saying that the two were never going to be reconciled. However they stand by their intelligence.¹⁸²

This author's investigation has shown the risk of relying solely on signals intelligence, in particular on network analysis, in the complex political environment that Afghanistan presents. Indeed, when signals intelligence is used as a basis for ordering a killing, without human intelligence and without crosschecks, the intelligence may be so weak that the military has breached its legal duty to take 'all feasible precautions' to protect civilians.¹⁸³

This author's investigation has shown that the killing of ten civilians in the 2 September 2010 attack could have been avoided with comprehensive and crosschecked intelligence.

As mentioned before, on the same day as the Takhar attack, General David Petraeus also

¹⁸⁰ Author's interviews, September 2010.

¹⁸¹ Author's interviews September 2010. Pajhwok also reported that the governor's spokesman rejected ISAF's investigation report, 'The report is not acceptable, nor has the assessment been shared with us.' 'Afghan Officials Dispute NATO Air Strike Findings,' Pajhwok news agency website, 13 September 2010. Accessed from BBC monitoring.

¹⁸² Author's interview, March 2011.

¹⁸³ Similar concerns have been raised elsewhere. See for instance Alston, *Study on Targeted Killings* 43 [see FN 30].

admitted to shortcomings in intelligence, especially the lack of 'granular understanding of local circumstances in Afghanistan'.¹⁸⁴ He referred to a study by the former top American military intelligence officer in Afghanistan, which described US intelligence analysts as 'ignorant of local economics and landowners, hazy about who the powerbrokers are'. It said that having 'focused the overwhelming majority of its collection efforts and analytical brainpower on insurgent groups, the vast intelligence apparatus is unable to answer fundamental questions about the environment in which US and allied forces operate and the people they seek to persuade.'¹⁸⁵ The US military says it has recognised this problem and is now making progress on getting better systems in place, which use Afghan expertise to help give more sense of the Afghan political landscape. However, some of those systems were already in place on the day of the attack.¹⁸⁶

Having an understanding of the politics of the place where a war is fought is of fundamental importance. In a province like Takhar, simple schematics which place the Taliban as bad and the government as good belie the actual complexity of the place. In the north of Afghanistan, there is a long and difficult history of armed groups – mujahedin, Taliban and government (which overlap, morph and change). They are the result of war, migration,

¹⁸⁴ Petraeus was briefing journalists [see FN 9].

¹⁸⁵ Flynn, Pottinger and Batchelor, *Fixing Intel*, 4 [See FN 9].

¹⁸⁶ In March 2011, Petraeus told Congress that '...intelligence-driven operations are now coordinated with senior officers of the relevant Afghan ministries and virtually all include highly trained Afghan soldiers or police, with some Afghan elements now in the lead on these operations.' [See FN 27]. This system was in place in September 2010, but restricted to senior Afghan officials with a national purview. The US military hopes to establish similar groups with regional expertise (author's interview, SF unit commander, March 2011). The NDS is also reportedly now working to include Afghan assessments and priorities for identifying individuals for the JPEL whom they believe should be killed/captured/or not killed, according to one international security source (author's email communication, April 2011).

land disputes, the championing and repression of different ethnic groups depending on who was in power locally and in Kabul, and the successful leveraging by armed groups against their local rivals. This all means that the targeted killing of influential actors has immediate consequences for the local power equation, which may superficially seem to strengthen the hand of the counter-insurgents, but can in reality distort the balance of power and sow the seeds for future instability.

The main political consequence of the killing Zabet Amanullah was the strengthening of a man whom the US military command had not heard of,¹⁸⁷ the most powerful figure in northern Takhar and Amanullah's old rival, Qazi Kabir. When Qazi Kabir won a seat at the elections just two weeks later, many people locally saw this as proof that he was backed by the Americans and nothing could be done against him. One senior provincial official said that following the attack, 'he is stronger and more assured.'¹⁸⁸ Given that the oppressive nature of local power structures has been a major reason for the rise of the Taliban in Takhar, this should worry the international military, as it may feed grievances and actually strengthen the appeal of the insurgency.

This investigation also uncovered two serious legal concerns that would benefit from clarification from US military lawyers. The first is whether the US military, as a general rule, deems a person's *proximity* to a target identified for killing on the JPEL as sufficient to change his status from default civilian to assumed combatant. Although the military,

¹⁸⁷ Many Afghans, as well as some international observers, assumed that malicious intelligence must have been passed on to the US military and suspected Qazi Kabir, who has extensive networks in the Afghan security services. However, the US military was insistent that they received no such human intelligence; they said they had been tracking the target for months, they had learned to be wary of false allegations and tip offs and besides, they had not even heard of a Qazi Kabir (author's interviews, December 2010). Qazi Kabir himself also denied the accusation (author's interview, April 2011).

¹⁸⁸ Author's interview, February 2011.

when choosing the location of the attack on Zabet Amanullah did take precautions to ensure that bystanders were not targeted and that only his car from the six-vehicle convoy was hit, the presumption appeared to be that proximity conferred combatant status on those who were travelling with Amanullah.

The second concern is whether the bar to a person identified for a targeted killing to become *hors de combat* – and therefore protected from attack – has been quietly raised. The eyewitness and US military accounts about whether Amanullah and Gul Agha were shot after they were wounded, differ. Being wounded also does not automatically place a target *hors de combat* – he must also abstain from any hostile act. However, discussions with the US military suggested that a JPEL target who is wounded, unarmed or apparently surrendering, must not only abstain from any hostile act, but also be deemed not to have 'hostile intent'. This may be very difficult once a person has been identified as an insurgent leader and put on the JPEL.

The consequences of attacks such as took place in Takhar on 2 September 2010 are far-reaching. They involve possible violations of the laws of war, and the unexpected – and sometimes negative – changes in local power dynamics. Moreover, if there is a mismatch between the actual identity of those who have been killed and how they are labelled in death, local people will recognise this and the credibility of the foreign military is dented. Finally, of course, those who have lost family members and friends suffer. The many costs of flawed intelligence cannot be over-estimated.

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