

# THE COMPLIANCE TRAP AND THE PROTECTION OF CIVILIANS

AN EMPIRICAL INVESTIGATION  
OF 'THE ACHIEVEMENT OF  
LEGALITY' IN AN AERIAL  
TARGETING OPERATION



---

WRITTEN BY  
ALEXANDER HOLDER

EDITED BY  
ANNA DE COURCY WHEELER  
AND ELIZABETH MINOR

# CONTENTS

03	EXECUTIVE SUMMARY AND RECOMMENDATIONS
07	PART I: THE COMPLIANCE ARGUMENT
13	PART II: THE URUZGAN INCIDENT AND ITS ACCOUNTS
19	PART III: THE ACHIEVEMENT OF COMPLIANCE
35	CONCLUSIONS: IMPLICATIONS FOR THE PROTECTION OF CIVILIANS
38	NOTES

---



## EXECUTIVE SUMMARY AND RECOMMENDATIONS

This report constitutes an empirical response to claims often made by militarised states regarding the capacity of international humanitarian law (IHL) to provide a sufficient mechanism for the protection of civilians during periods of armed conflict. Claims of this kind, which are maintained despite the clear and well-documented patterns of harm that continue to be associated with the use of certain tactics and technologies in contemporary military operations, rest upon a very particular orientation to IHL compliance. It is the intention of this report to demonstrate that such an orientation is misaligned with what the realities of ‘compliance’ in the course of actual instances of targeting and the use of force can entail.

First, the report introduces what will be referred to as ‘the compliance argument’, which captures the forms of argumentation which are mobilised by various militarised states as part of political efforts to dismiss attempts to develop legal or political mechanisms to regulate the use of force beyond existing IHL. This section outlines a proto-typical formulation of the compliance argument and establishes its fundamental pre-suppositions. These pre-suppositions are that (1) the key to ensuring the adequate protection of civilians in armed conflict lies in a reduction of the number of instances of non-compliance with IHL; and (2) provided an instance of the use of force is compliant with pre-existing international law, any and all resultant civilian harm may be regrettable, but is acceptable.

Having identified the foundations of the compliance argument, the report turns to an investigation of a single military incident in order to illuminate the ways in which such an argument is detached from the realities of how compliance can be ‘achieved’ in practice.

This incident, now known as the ‘Uruzgan incident’, took place in Afghanistan in 2010 and led to the deaths of as many 23 civilians following an air strike on three vehicles which were believed to be carrying Taliban insurgents towards a United States (US) Special Forces team.<sup>1</sup> The documents which surround this strike, principally two internal investigations into what took place, provide an important insight into the legal reasoning of some military personnel engaged in targeting and the use of force.

By detailed reference to real-time transcripts of the talk of the US personnel involved in the incident, this report will demonstrate the ways in which ‘compliance’ was, at all times, an achievement of military personnel working together, who were practically occupied with ensuring the legality of their activities.

That is, the ‘achievement of compliance’ in this report is the set of methods by which those involved in the Uruzgan incident sought to ensure that a

strike they had decided was desirable operationally would be considered justifiable within the rules (i.e. that it would be legal) – both at the point at which munitions were released as well as following multiple investigations into what took place. These methods can be categorised in accordance with the three primary requirements for the compliant use of force during the operation:

- ✗ The identification of weapons onboard the vehicles.
- ✗ The identification of ‘military aged males’ onboard the vehicles and, inversely, the management (i.e., dismissal) of the possible presence of women and children.
- ✗ The ability to characterise the vehicles’ movements as constituting ‘tactical manoeuvring’ or ‘flanking’ as part of the identification of ‘hostile intent’.

In producing detailed descriptions of the methods by which these requirements could be satisfied, the report will argue that the strong capacity of military personnel to produce and maintain the legality of the targets during the operation led to a failure to scrutinise the scene on the ground in any context other than one of achieving IHL compliance. As such, far from constituting a sufficient means for preventing civilian harm, the pre-occupation with compliance during Uruzgan incident merely resulted in an instance of unnecessary and unacceptable loss of civilian life – undertaken in ways which meant it could be declared legal, whatever the outcome. The argument is not that the personnel knew the vehicle occupants to be civilians and deliberately mischaracterised this in order to be authorised to strike. Rather, in their focus on achieving compliance, they were incentivised to assess available information in such a way that the legitimacy of the strike they had already determined to carry out would not be threatened. The fact that the occupants might not be insurgents, for example, was never entertained: the focus was purely on seeking to meet the administrative criteria outlined above that allowed the use of force, rather than making an external evaluation of the situation.

As this study is of a single case, which has no comparable data, we cannot say definitively whether the activities captured in the Uruzgan incident documents would be discoverable in other military operations. Nevertheless, there are reasons to treat the process and practice of the ‘achievement of compliance’ identified in this report as potentially having broader significance: firstly, because similar practice to achieve ‘compliance’ is seen in a wide variety of rules-based settings; and secondly, because the activities involved in the achievement of compliance in the Uruzgan incident are overwhelmingly treated as unremarkable aspects of normal practice in the investigations into the incident, rather than anything out of the ordinary or problematic.<sup>2</sup>

In conclusion, the report will return to the compliance argument, concluding that the over-emphasis on compliance not only fails to provide an alternative to, but can ultimately be incompatible with, serious humanitarian efforts to reduce harm to civilians during periods of armed conflict.

Based on this analysis, this report makes the following recommendations:

- ✗ States, civil society and others should reject attempts to defer to IHL in order to discourage the development of weapon and tactics-specific regulations to protect civilians, such as standards and directives on where and when certain weapons/tactics can and cannot be used, as well as the prohibition of certain weapons. As this report demonstrates, this political tactic is a commonplace one, deployed to dissuade the adoption of more stringent measures to ensure the protection of civilians.
- ✗ Any assertion or inference that harm during conflict only results from illegality – and thus frame increased ‘compliance’ as the primary or only solution – should be rejected at the national, regional and international levels. Such assertions are not supported by the evidence established in this report and elsewhere,<sup>3</sup> serve to politicise civilian harm, and are corrosive of established law.
- ✗ Instead, states and others should recognise IHL as the baseline, or minimum, set of criteria for establishing the protection of civilians rather than an entirely adequate system for ensuring this. States’ deference to the law as a mechanism for civilian protection ignores the ways in which compliance can be ‘achieved’ in practice by their own forces and the effects this can produce – and can thus rest upon a faulty conception of the place the law can have in military operations.
- ✗ States should make available documents which display the interactions which precede the use of force, so that these processes can be better understood and scrutinised, as an important step towards ensuring more effective civilian protection. The documents which surround the Uruzgan incident were not released with the intention of making possible investigations such as this report but are incredibly valuable in this regard. Access to the practical reasoning which goes into the use of force allows for an assessment of the ways in which IHL features in actual military practice – access to which in turn aids the public accountability of states for the actions of their personnel, and can feed into the development of policy better to protect civilians. The release of documents need not put operations or personnel at risk. Such documents also need not be related to high-profile incidents, or even military ‘mistakes’. Indeed, transparency around and increased understanding of instances of the use of force which proceed apparently unproblematically would be just as informative as those which do not. Useful releases would include incident transcripts, cockpit audio recordings, video footage and other forms of data which are routinely collected as part of military operations.





## PART I: THE COMPLIANCE ARGUMENT

One of the most common obstructions to progress in addressing patterns of harm to civilians from the use of particular weapons – or their use in particular areas – has been the notion that compliance with pre-existing international law constitutes a sufficient mechanism for ensuring against unnecessary and unacceptable harm to civilians. Whilst the patterns of harm that are associated with certain weapons have long been part of global debates surrounding the protection of civilians, efforts to develop preventative or responsive measures have often been stifled or mired in protracted discussion by an over-emphasis on the capacity of pre-existing international humanitarian law (IHL) to adequately protect civilians.

Though the full protection of civilians requires a broader approach, for which IHL can only provide a baseline, an emphasis on the sufficiency of IHL for protecting civilians presently pervades the discourse surrounding the harms caused by certain weapons.<sup>4</sup> This is due in no small part to the efforts of militarily active states with an interest in the maintenance of a status quo whereby military conduct is not restricted any further through legal or political mechanisms.

The discussion below is concerned with the means by which this emphasis on pre-existing IHL as a regulatory end point is produced and maintained in international discourse. Through an empirical examination of a particular discursive move which supports such an arrangement (referred to throughout as the ‘compliance argument’) it will seek to demonstrate that a narrow recourse to the regulatory capacity of international law is reflective of a tendency to conflate IHL compliance with the protection of civilians.

### THE STRUCTURE OF THE COMPLIANCE ARGUMENT

As it is used in this report, the ‘compliance argument’ is a term used to characterise a particular line of argumentation – one which seeks to discourage efforts to develop mechanisms and frameworks to regulate the use of force beyond pre-existing IHL. In recent years, the compliance argument has been prevalent in conversations surrounding the use of explosive weapons in populated areas, the use of weapons with incendiary effects, the use of militarised drones, the development of lethal autonomous weapons (LAWS), and before with anti-personnel landmines and cluster munitions. Its typical general formulation is something like the following:

*‘There is no pressing need to initiate the development of a mechanism or regulatory framework to place restrictions upon ‘Practice A’ because the current structure of legal protections/risk exposures is optimal. As such, no additional legal rule or policy commitment is necessary, nor*

*could it be made without undermining both the law and the vital interests of militaries. Therefore, rather than seeking the development of specific new mechanisms or frameworks, states should instead ensure that their general military practices are conducted in compliance with pre-existing international law.'*

Arguments which take this form provide, at least on a *prima facie* basis, a persuasive rebuttal to efforts to instigate the development of mechanisms and frameworks that would seek to govern the use of certain weapons. In theory, according to this argument, the core principles of IHL provide all of the necessary tools required to distinguish between legal and illegal military conduct (which are completely congruent with what is acceptable and what is unacceptable) – and, as such, the development of further mechanisms would only involve the implementation of the same restrictions by different means. Here, it is proposed that unacceptable outcomes only ever result from illegal conduct, and the protection of civilians is equated straightforwardly with obeying IHL. Such a line of reasoning attempts to enlist us in the view that 'lawful' harm is acceptable (though regrettable) harm, but the compliance argument does not readily provide an answer to the following question: how much lawful harm to civilians are we to accept before we can call into question the sufficiency of IHL as a mechanism for protecting non-combatants?

The limitations of assertions that better compliance with IHL is all that is needed to protect civilians from harm are particularly conspicuous in light of the staggering rates of civilian casualties associated with the use of explosive weapons in populated areas (EWIPA). At present, monitoring of media-reported casualties (which assumes civilian status in the absence of identification as an armed or security actor) suggests that 90% of the direct casualties of the use of explosive weapons in cities, towns and villages are civilians,<sup>5</sup> with the increasing urbanisation of conflict in recent years seeing civilians placed at increasing risk from such weapons during periods of armed conflict. 90% is an astonishing figure, and by highlighting it, states, civil society, the UN Secretary General and others have helped catalyse reinvigorated political talks about the development of mechanisms which would seek to address such stark and widespread harm. For the moment these efforts are aimed at the development of politically binding international standards to better protect civilians from the use of explosive weapons in populated areas,<sup>6</sup> rather than new law relating to EWIPA *per se*.

In response to these efforts, various renditions of the compliance argument have appeared. For example, as part of the general statements to the last Meeting of the High Contracting Parties to the Convention for Certain Conventional Weapons (CCW) in 2019, a number of countries, including the United Kingdom and Poland, presented formulations of the compliance argument. Belgium, at the time of publication, is a state that is supportive of responding to the civilian harm caused by the use of explosive weapons in populated areas through new politically binding standards, and is involved in the current process to develop a political declaration to do so. Its general statement at the CCW in 2019 nevertheless gives a good example of the formulations under discussion, so will be used to explore the structure of the compliance argument here:

*“The use of explosive weapons in urban areas is complex because of the impact on civilians and the indirect effects. My country believes that IHL is a sufficient legal framework to ensure the balance between military necessity and humanity. This framework must be strictly adhered to by all parties to conflicts, including non-state actors. My country believes that it is not necessary to develop a new legal framework. The focus must be on the promotion, strengthening and exchange of good practice, particularly for the reduction of risks and protection of civilians.”<sup>7</sup>*

This excerpt constitutes a proto-typical formulation of the compliance argument, providing a demonstration of each of the form’s key features: (1) an articulation of a legitimate humanitarian concern, (2) a recourse to the capacity of pre-existing international law to address that humanitarian concern without infringing upon states’ rights to military freedom, and (3) a dismissal of efforts to develop further legal or political mechanisms which would seek to address that humanitarian concern by other means.

The renditions of the compliance argument at the 2019 Meeting of States Parties to the CCW were not the first and will by no means be the last. The following for example is an excerpt from a position paper on cluster munitions submitted to the CCW Group of Governmental Experts by the Russian Federation in 2007:

*“13. Russia considers that the real humanitarian consequences of using cluster munitions stem principally from the manner in which the provisions of international humanitarian law are implemented in practice.*

*14. The technical parameters of cluster munitions, although important, are of secondary significance in this regard. That is why Russia thinks it is premature to impose legally binding quantitative restrictions on the technical characteristics of cluster munitions.*

*15. It would be better to draw up recommendations on best practice in this field, including, perhaps, the design of cluster munitions.”<sup>8</sup>*

Alternatively, consider the following statement, also made by the Russian Federation, which prospectively mobilises the compliance argument towards the issue of LAWS:

*“The work of the GGE [Group of Governmental Experts] should not in any way harm existing research related to peaceful robotics and artificial intelligence. We also believe that norms of international law, including IHL, are fully applicable to LAWS and need not be adapted in light of the specific features of these weapons systems. In this respect we don’t see any need in any legally binding instrument on laws and imposing a ban or moratorium on the development of such systems or relevant technologies”.<sup>9</sup>*

The above examples should provide some sense of the scope of the problem the compliance argument presents for initiatives to develop new policy or legal standards for protecting civilians. It exists as a generally available

catch-all for states seeking to restrict progress towards meaningful change and can be mobilised in relation to any given issue. It seeks to dismiss the specificity of any given weapons technology, the evidence of specific harms (or patterns of harm) that are caused, and seeks to direct discourse back to the generalities of the structures of IHL into which these can be subsumed – and to ‘best practice’ in maintaining the balance between military and humanitarian objectives. Ultimately, powerful militarised states generally wish to resist *any* form of further restriction on their conduct, and the compliance argument provides a powerful means by which the status quo can be maintained. In order to properly interrogate the compliance argument, therefore, it is important to engage in a serious investigation of its grounds.

## THE PRE-SUPPOSITIONS OF THE COMPLIANCE ARGUMENT

The pre-suppositions upon which the compliance argument rests can be identified in Belgium’s statement to the CCW quoted above. The following paragraphs will identify two key claims built into the compliance argument regarding the relationship between compliance and civilian harm.

At the heart of the Belgian statement lies the claim that existing rules of international law alone have the capacity to address the potential that 90% of the direct casualties of the use of explosive weapons in cities, towns and villages are civilians. In the first instance, therefore, the compliance argument pre-supposes that **(1) the key to ensuring the adequate protection of civilians in armed conflict lies in a reduction of the number of instances of non-compliance with IHL.** Up to a point, this is a reasonable proposal. There is no doubt that a reduction of the number of instances of non-compliance would reduce civilian harm, and in turn it seems appropriate to suggest that the “promotion, strengthening, and exchange of good practice” would provide a valuable means by which instances of non-compliance might be reduced. Nevertheless, if such an account is provided as the sole explanation of the high rates of harm caused by EWIPA, a difficult question arises: if a paradigm of full compliance was established, can it be imagined that the humanitarian concerns that surround the use of explosive weapons in populated areas would be fully alleviated? For reasons that will become clear in a moment, this report will proceed on the grounds that the answer to this question is no.

A justification for such a response can be found with further reference to the Belgian statement, in which it is asserted that “IHL is a sufficient legal framework to ensure the balance between military necessity and humanity”. This assertion constitutes a guarded reminder that the protection of civilians is not the sole purpose of international humanitarian law. That is to say, IHL does not prohibit conduct which causes harm to civilians; it prohibits conduct which causes indiscriminate, disproportionate, unnecessary, or inhumane harm to civilians. The obvious consequence of such an arrangement is that there are instances of civilian harm that are permitted by international law. For this reason, it can be stated unproblematically that a regime of full compliance would not necessarily alleviate the humanitarian concerns that surround the use of certain weapons. With this being

the case, a second pre-supposition for the compliance argument can be formulated: namely that **(2) *provided an instance of the use of force is compliant with pre-existing international law, any and all resultant civilian harm is acceptable*** (though it may be regrettable).

## AN INVESTIGATION OF THE REALITIES OF COMPLIANCE

It is with regards to the two pre-suppositions identified above that this report makes its intervention vis-à-vis the compliance argument. Rather than rejecting these pre-suppositions out of hand, the remainder of this report will provide the resources necessary for a significant re-orientation to what those pre-suppositions could entail in practice, seeking to establish whether they can credibly be used to support the compliance argument.

As part of that re-orientation, the report will undertake an empirical investigation of the concept of compliance as it was available for military personnel engaged in an actual instance of military activity in which compliance with IHL constitutes an eminently practical concern. Focusing upon a catastrophic strike which killed at least sixteen civilians in Uruzgan province, Afghanistan in 2010, the report will produce descriptions of the ways in which United States' military personnel were oriented to compliance as a practical feature of their work both during the operation itself as well as throughout the investigations which were conducted subsequently. It will be demonstrated that the achievement of compliant strikes – irrespective of the threat to civilian life – is a fundamental aspect of the work of targeting in military operations, resulting in a regime in which military personnel are engaged in a project of “finding in the rule the means for doing whatever needs to be done”.<sup>10</sup> Throughout, it will be demonstrated that whilst the pre-suppositions of the compliance argument appear tenable with regards to de-contextualised accounts of the theoretical capacity of IHL, they hold an entirely different sense when they are contextualised by actual instances of civilian harm.



## PART II:

# THE URUZGAN INCIDENT AND ITS ACCOUNTS

The incident which serves as the basis for the descriptions presented below has come to be known as the ‘Uruzgan incident’. In the decade since it took place, the Uruzgan incident has been the subject of a vast amount of commentary – not only because of its catastrophic outcome, but also because the documents which surround the incident constitute the *only* publicly available record of the activities of a militarised drone crew during a live operation. Though this report’s conclusions are by no means applicable to the drone exclusively, the fact that the Uruzgan incident was the result of a drone-led operation is consequential insofar as the structure of militarised drone operations – the character of which will be addressed in a moment – make particularly perspicuous the work involved in conducting a lethal strike in compliance with international law.

The following section provides an account of what took place during the Uruzgan incident, followed by a discussion of the ways in which the Uruzgan incident has been made available to the public through the publication of the US military’s investigations into the incident.

### THE URUZGAN INCIDENT

At 3:00am local time on the 21st of February 2010, a US Special Forces team touched down just outside of Kohd, a small village in Uruzgan province, Afghanistan, accompanied by 30 soldiers from the Afghan National Police and the Afghan National Army. The village was believed to be the site of a Taliban explosives factory and the Special Forces team, or Operational Detachment Alpha (ODA), had been tasked with locating it. From the moment the troops disembarked the helicopters, however, it became apparent that that Taliban had advance warning of their arrival. The village itself was deserted, but intercepted radio communications revealed calls for the insurgent forces to prepare for an attack on the ‘infidels’ who were now moving through the settlement. In the darkness, the troops could see lights flashing around the village and figures could be seen taking cover in nearby fields.

A few miles to the north, an AC-130 gunship had identified three vehicles travelling south towards the village of Kohd. Following a series of discussions with the ODA’s Joint Terminal Attack Controller (JTAC) – the individual responsible for co-ordinating air support in this ‘battlespace’ from a forward deployed position on the ground – the initial plan of engaging the vehicles indirectly with containment fire was deemed undesirable. Despite a desire to engage the vehicles directly, the AC-130 gunship was unable to verify whether or not the vehicles constituted a hostile force and they could not, therefore, be engaged in accordance with the rules of engagement (ROEs). At 05:00am, the JTAC began to initiate a ‘fire mission’ requesting

---





Figure 1: Map of the Vehicles' Journey Provided in the AR 15-6 Report

that the AC-130 release munitions *between* the vehicles and the ODA in order to disrupt their journey. Before this non-lethal course of action was completed, however, the AC-130 crew requested that a nearby MQ-1 Predator drone, callsign Kirk97, be re-tasked to the vehicles to in order to train a second, more powerful, camera lens on the potential threat. The JTAC agreed with this course of action, and within minutes the Predator crew - which consisted of a pilot, a sensor operator, and a mission intelligence coordinator (MC) - 'had eyes' on the vehicles.

Following the AC-130's departure from the scene a short while later, the Predator crew became the sole intelligence, reconnaissance and surveillance unit tracking the vehicles. In fulfilling this task, the Predator crew were engaged in a relentless endeavour to interpret everything that they saw on the ground, relaying that information to the JTAC. On one hand, this work constituted the means by which the crew maintained the ODA commander's "situational awareness" of developing events. At the same time, however, this interrogation of what was visible on the ground was the primary means by which a case for the legitimate lethal engagement of the vehicles was established.

As the vehicles moved west, away from the village, the Predator crew took careful note of their every action, searching constantly for a suggestion that the vehicles might be displaying hostile intent towards the ODA and the accompanying Afghan forces. This process of seeing, interpreting and relaying continued for almost four hours. During this period, the Predator crew were primarily concerned with discovering whether or not the passengers of the vehicles were carrying weapons. Lengthy discussions took place regarding where and how such weapons might be concealed as well as how best to position the Predator in order to catch sight of them. Over the course of the operation the Predator crew identified three rifles being handled by the passengers of the vehicles. This assessment was corroborated by image analysts, commonly known as screeners, viewing the Predator feed from Hurlburt Field, an airbase in Florida.



A similarly prominent concern for the Predator crew were efforts to specify the demographic profiles of the vehicles' passengers. Over the course of the operation this matter was a continued source of disagreement between the Predator crew and the Florida-based image analysts. On more than one occasion the Predator crew contested the screeners' calls that children had been seen near the vehicles. Following an extended negotiation between the image analysts, the Predator crew and the JTAC, these calls were eventually downgraded to "adolescents". In the JTAC's words: "Twelve to thirteen years old with a weapon is just as dangerous."<sup>11</sup>

Over the course of the four hours the Predator crew spent observing the vehicles, there is no doubt that the Predator crew were convinced that the vehicles constituted a hostile force, and they routinely discussed their preference for engaging them kinetically: "that truck would make a beautiful target."<sup>12</sup> This 'outcome oriented' mode of tracking meant that the vehicles' movements were seen and described in terms that rendered them suitable for targeting. The vehicles' westward trajectory was described in terms of 'tactical manoeuvring' and 'flanking' and the vehicles were described as forming a 'convoy'. Furthermore, the accounts of the passengers' activities during the periods in which they had disembarked the vehicles were described in terms that emphasise the passengers' propensity for violence. At 05:40am, when a 'scuffle' was seen outside one of the vehicles, it was immediately passed to the JTAC that the crew had observed the "potential use of human shields". Just 20 minutes later, when the vehicles stopped and the occupants got out and began to pray, the Predator pilot remarked: "This is definitely it, this is their force. Praying? I mean seriously, that's what they do."<sup>13</sup>

Given the Predator crew's intimate involvement with tracking the vehicles, as well as their significant role in maintaining the ODA commander's situational awareness, it is noteworthy that when a decision was finally made regarding the fate of the vehicles it appears to have come as a surprise to the crew. At 08:46am, a team of two Kiowa helicopters arrived on the scene, engaging and destroying all three of the vehicles. At the time of the strike they were 21km away from the village of Kohd and they had been travelling west for almost three hours. Much to the confusion of the Predator crew, following the strike the occupants of vehicles surrendered immediately and made no effort to leave the vicinity of the vehicles. Within six minutes the first call was made that women had been seen amid the wreckage. Within 25 minutes the first children were identified. Amidst the confusion of the aftermath of the strike, the Predator crew scoured the area around the vehicles in search of weapons, though by this time it was becoming increasingly clear that those travelling in the vehicles had not been in possession of any weapons so there were none to be found.

After the Predator's eventual departure, assessments of the scene would uncover no evidence that the vehicles constituted a hostile force. The passengers of the vehicles were not Taliban insurgents. In fact, they were Hazaras, an ethnic group that has seen considerable persecution by the Taliban, seeking safety in numbers and in darkness as they made the journey to Kandahar through what they knew to be Taliban territory. The precautions they had taken for their own safety had been read as evidence of their guilt as they were unwittingly judged from above for crimes they had taken no part in. Following the strike, elders from the victims' villages identified

23 individuals who had been killed, though the US armed forces' internal investigating procedures – which began the following day – only identified between 15-16 casualties.<sup>14</sup>

## THE RECORD OF THE URUZGAN INCIDENT

Major General Timothy P. McHale's AR 15-6 report on the Uruzgan incident is a sprawling, 2,000-page account of the events of the 21st of February 2010.<sup>15</sup> In large part, the report's size can be attributed to the vast and diverse range of documents contained within its appendices, which include interviews with the individuals involved, transcripts of talk during the incident, annotated maps depicting the vehicles' journey, medical evaluations assessing the extent of the passengers injuries, and a substantial amount of information regarding the US military's preparation for the operation and its reporting in retrospect. For present purposes, these documents, which constitute the foundational material for McHale's report, are of considerably more interest than the report itself, but it is important to note that the report found no evidence that the strike constituted a breach of IHL or the ROEs that were operative at the time. That said, McHale does assert that the strike ran counter to the intention of Gen. Stanley McChrystal's 2009 tactical directive,<sup>16</sup> which sought to mitigate against the high levels of civilian harm that had characterised the conflict in Afghanistan in recent years.

Of the documents which surround the Uruzgan incident, this report is concerned primarily with two different kinds of transcript. The first, which will be referred to as the 'incident transcript', is a 76-page document which depicts, in real time, the talk of nine individuals as they discuss the fate of the vehicles which would eventually subject to an airstrike. Five of these individuals were members of the Predator crew, who watched the vehicles' journey from Creech Airforce Base, Nevada. The three further individuals were responsible for the communications of the AC-130, the Kiowa helicopter team, and the ISR aircraft which replaced the Predator following the strike respectively. The JTAC is the only individual represented in the transcript who was located on the ground in Afghanistan, where he co-ordinated the aircraft from alongside the Ground Force Commander who would eventually authorise the strike. The nature of the recording, which effectively places the reader 'in the room' with the Predator crew, means that everything the Predator crew said, whether it be talk amongst themselves or radio transmissions to other individuals involved in the operation, is documented in the transcript. In contrast, the other individuals present in the transcript are only represented via their radio communications with the Predator crew but not others.

The second form of transcript that will be used in this report are the 'interview transcripts'. These transcripts make up the vast majority of the AR 15-6 report's appendices and constitute 57 interviews with individuals involved in the incident. These include interviews with personnel from the ODA special forces team, members of each of the Predator, Kiowa and the AC-130 crews, military lawyers known as judge advocates generals (JAGs), and screeners who were involved in assessing the images produced by the drone. Though the content of each interview is directed by the specific role of the interviewee during the incident, this report's interests in these interviews lies in a particular line of questioning that is ubiquitous in how they were conducted. At the beginning of almost every interview, the interviewer

asks a series of general questions about the ROEs, asking the interviewees to provide their interpretation about what certain aspects of the ROEs might mean and how they think they apply to the Uruzgan incident. In some cases, these questions are asked, answered, and never mentioned again – but for many individuals these discussions often take up considerable portions of the interviews.

With reference to each of these two forms of data, this report will demonstrate the ways in which military personnel are oriented to a conception of compliance which involves individuals' working towards the achievement of legal strikes. In the following two sections, this work towards achieving compliance will be described as taking place both as the Uruzgan incident was unfolding as well as in retrospect during the internal investigations that followed the incident. As a final word before doing so, however, the report will discuss some considerations that arise from the use of a single incident from 2010 to draw out more general recommendations concerning the use of force.

## CONSIDERATIONS FOR THE ANALYSIS OF A SINGLE-CASE INCIDENT

A basic feature of qualitative research which engages with small – or indeed singular – datasets is that they are open to challenge in terms of their being artefactual, incidental, or epiphenomenal:<sup>17</sup> how can it be known that the observations that have been made in *this* case are representative of other cases or more general phenomena? The onus for verifying the relevance and reliability of claims lies with those who make them, but the value of the analysis of single cases should not be dismissed – particularly in areas where the available data is so sparse.

As noted, despite having taken place more than a decade ago, the Uruzgan incident remains the only operation involving a militarised drone which has been made available in its minutiae, and its associated documents are almost entirely unique insofar as they make visible the procedures associated with targeting and the use of force. Whilst comparisons to similar incidents, such as the 2009 Kunduz incident<sup>18</sup> or the Wikileaks 'Collateral Murder' case,<sup>19</sup> are likely to be productive, the contingencies of each case and the documents surrounding them make comparisons extremely challenging.

The key claim that is borne out by the analysis presented in this report is that, as the Uruzgan incident unfolded, the US personnel's pre-occupation with achieving a compliant strike, and their proficiency at doing so, came at the expense of a serious consideration that the scene on the ground was not as they believed, and that their actions could cause significant harm to non-combatants. This claim, which is concerned with the Uruzgan incident in its own terms, stands on firm ground given the extent and character of empirical materials which surround the incident. As we begin to look beyond the Uruzgan incident, however, generalisability becomes more difficult. In light of the absence of comparable data, we cannot say definitively that the activities captured in the documents surrounding the Uruzgan incident would be discoverable in other military operations conducted in different circumstances, or by different parties.

With that being said, there are reasons why we should treat the achievement of compliance in the Uruzgan incident as having a more general significance. Firstly, the achievement of compliance is discoverable in all manner of rules-based settings, with studies having been conducted in halfway houses,<sup>20</sup> courts,<sup>21</sup> bureaucratic offices,<sup>22</sup> police patrols,<sup>23</sup> and scientific experiments<sup>24</sup> – each demonstrating an orientation to rules similar to that identified here.

Secondly, the forms of conduct which will be identified over the course of this report as constitutive of the achievement of compliance are overwhelmingly treated as *unremarkable* aspects of normal practice in the investigations into the incident. The investigations that were subsequently conducted into the incident raised certain aspects of the conduct of those involved as being inappropriate or inadequate. Nevertheless, the actions of those involved were never problematised in terms of their lack of interest in discovering whether or not the individuals onboard the vehicles were, in fact, combatants. In order to draw attention to this omission, reference will be made at various points in the following section to the assessments contained within the AR 15-6 investigation, principally with the intention of demonstrating that the investigating officers were, as a rule, uninterested in the contortions that were required of those involved in the incident in order to ensure compliance. In this way, this report will take advantage of what makes endogenously produced documents so analytically valuable: the ways in which they make transparent what is – and, crucially, what is not – important, ordinary or transgressive to the institutions who produce them.

## PART III: THE ACHIEVEMENT OF COMPLIANCE

This section is concerned with the methods employed by the individuals involved in the Uruzgan incident to ensure that the eventual lethal engagement of the three vehicles driving to the west of Kohd was compliant with international law. This section will present three distinct methods for achieving compliance that are discoverable in the incident transcript. Those methods are: (1) the positive identification of weapons, (2) the negotiation of the presence of non-combatants, and (3) the description of vehicle movements as ‘tactical manoeuvring’.

### COMPLIANCE WITH WHAT? THE RULES OF ENGAGEMENT FOR THE WAR IN AFGHANISTAN

From the outset, efforts to empirically demonstrate the achievement of compliance by military personnel are complicated by the fact that the five hours of activity presented in the incident transcript does not appear to include a single reference to any aspect of IHL. Indeed, the Predator crew and their interlocutors cannot be said to demonstrate any direct concern for IHL whatsoever. This, perhaps unexpected, feature of the work that is presented in the incident transcript may at first glance appear to constitute a serious obstacle to the sort of analysis that this report proposes to undertake. In actual fact, the absence of any reference to IHL is a necessary consequence of ways in which international law is mediated by other sets of rules and regulations. In and of itself, IHL has “no inherent enforcement powers”.<sup>25</sup> In such an arrangement, it is understood that states who consent to regulations imposed by IHL are obligated to develop domestic legislation to bring any individual believed to have acted in violation of IHL to justice. Once again, whilst this legislation is undoubtedly relevant to the individuals involved in the Uruzgan incident, the incident transcript does not contain any reference to domestic law either.

This raises the question as to how the achievement of compliance make itself visible in the documents surrounding the Uruzgan incident if no one ever talks about the law. The answer to this question lies primarily in the ‘rules of engagement’ (ROEs). For the US armed forces, ROEs serve as the primary command-and-control mechanism for regulating the use of force, and – though they are undoubtedly rooted in IHL – they are developed in alignment with a complex array of political, military, and legal imperatives.<sup>26</sup> Where ‘the law’ is absent in the documents surrounding the ROEs, references to the ROEs are commonplace – and it is through the ROEs that the legal orientations of those involved in the incident are made visible. For the most part, this report will not expand significantly upon the relationship between specific concepts in the ROEs and the laws of war, as this task quickly becomes convoluted and is not necessarily productive. In any case, the US would maintain that any strike conducted within their rules of

engagement would, by extension, fall within the laws of war (though that is not to say that other parties would necessarily hold the same view).

Within the terms established by the ROEs for the war in Afghanistan, the Uruzgan incident constituted a legitimate exercise of what is known as ‘anticipatory self-defence’. In short, this means that the strike was conducted in response to what the ROEs call ‘hostile intent’, which is defined as “[t]he threat of imminent use of force against the United States, US forces, or other designated persons or property”.<sup>27</sup> In the ROEs, hostile ‘intent’ is distinguished from a hostile ‘act’ insofar as the former need not require a hostile act to have actually taken place when defensive action is taken. It is in this regard that it is *anticipatory* self-defence. For this reason, reference to the ‘imminent use of force’ is crucial. Controversially, in 2005 the Bush administration amended the operative definition of imminence that was established in US ROEs, defining the concept of imminence as follows:

*“The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous”.*<sup>28</sup>

This definition is significantly more permissive than generally accepted interpretations of the concept and has considerable implications for the availability of the use of force in anticipatory self-defence. The traditional doctrine for anticipatory self-defence is rooted in Webster’s account of the infamous *Caroline* incident – which saw the British Empire sink a small steamer ship which was believed to be carrying rebel forces from the US into Canada during the rebellions of 1837 – which stated that the attack had been legitimate on the grounds that there existed a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation”.<sup>29</sup> As this report will demonstrate with reference to the Predator crew and the ODA’s discussion of the direction, character, and destination of the vehicles’ movements, this controversial interpretation of imminence provided the personnel involved in the Uruzgan incident an expanded set of resources using which they could ensure that the eventual strike was compliant with the ROEs.

The ROEs for the war in Afghanistan also provided a technical means for the identification of ‘hostile intent’: the concept of ‘positive identification’ (PID). This concept is defined as “the reasonable certainty that the proposed target is a legitimate military target.”<sup>30</sup> In this way, it can be said that those individuals involved in the incident were pre-occupied with ‘positively identifying’ a legitimate military target by reference to the demonstration of hostile intent. As we shall see in the forthcoming analysis, the concept of PID was generally used in reference to the identification of weapons and, to a lesser extent, the identification of ‘military-aged males’. For example, from the incident transcript: “we cannot PID weapons at this time” or “we have possible weapons but no PID yet”. Though the use of PID in this way is incoherent in the context of the definition provided in the ROEs, the basic logic of its use is that these features are treated as constituting the evidentiary basis for the designation of ‘hostile intent’. McHale’s AR 15-6 did raise the misuse of PID in this fashion as being inadequate, stating that it was reflective of a broader lack of understanding of the ROEs.



## ORIENTATIONS TO THE ACHIEVEMENT OF COMPLIANCE

Prior to a discussion of the specific methods involved in the achievement of compliance, a valuable place to begin is in the opening moments of the incident transcript – prior to the Predator crew’s arrival on the scene. The exchange follows the AC-130 communications officer’s informing the JTAC that the gunship was now tracking the three vehicles that would eventually be subject to the catastrophic airstrike. The JTAC’s response to this information provides an invaluable summation of the conception of compliance that underwrites this report:

### **Excerpt 1**

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	04:54	SLASHER03	We are now tracking three vehicles and standby we will give you an update.
2.			
3.			
4.	04:55	JAG25	*Broken Radio Comms* Slasher03, Jag25, yeah those vehicles are bad we’re gonna have to work on trying to get enough to engage. From what we are hearing on [intercepted communications] traffic a [quick reaction force] is coming in for a *Broken Radio Chatter*. <sup>31</sup>
5.			
6.			
7.			
8.			

There are two crucially important lessons to be learned from this short excerpt. Firstly, the passengers of the vehicles were considered to be a hostile force from the moment they were identified by the AC-130. The primary justification for this can be found in the JTAC’s reference to intercepted Taliban communications – which suggested that an insurgent force was amassing to attack the soldiers in Kohd. Importantly, nothing about the three vehicles being tracked by the AC-130 explicitly connected them to these transmissions beyond their presence in the wider area. Nevertheless, the JTAC expresses no doubts regarding their guilt: “yeah, those vehicles are bad” (lines 4-5). Throughout the incident transcript, the possibility that the passengers of the vehicles could have been anything other than Taliban soldiers is never expressed, with the concerns of those involved in the incident being overwhelmingly directed elsewhere.

The second lesson lies in the JTACs utterance at lines 5-6: “we’re going to have to work on getting enough to engage”. For those individuals involved in the incident, the identification of a military target is only the beginning of the work that goes into the legitimate, legally compliant use of force. This remark by the JTAC provides, in the opening moments of the incident transcript, a powerful summation of the character of the work which those captured in the transcript would be engaged in over the course of the next four hours. Several examples of the details of this work will be presented below, beginning with the Predator crew’s efforts to identify weapons in the possession of the individuals involved in the Uruzgan incident.

THE ACHIEVEMENT OF COMPLIANCE I:  
THE IDENTIFICATION OF WEAPONS

As we have already seen, there was explicit intent to engage the vehicles from the moment that they were identified by the AC-130. In the period following their identification, however, the primary obstacle to conducting a legal strike was the inability of the AC-130 to confirm that the vehicles’ passengers were in possession of weapons. As a result of this absence, the initial course of action which was considered was for the AC-130 to conduct a non-lethal strike, referred to as ‘containment fires’, between the vehicles and the ODA. As the JTAC began to authorise this course of action, however, the AC-130 crew suggested that the Predator crew might be better able to identify weapons using the Predator’s high-fidelity cameras.

Excerpt 2

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	005:06	JAG25	When able I would like you to engage with (containment) fires forward of their line of movement between their position and friendlies over.
2.			
3.			
4.			
5.		SLASHER03	03, if Kirk97 hasn't departed yet is it at all possible to get them to take a look at these people.
6.			
7.			
8.		JAG25	That's affirmative. Break, break. Kirk97, Jag25.
9.	05:07	CLASSIFIED	CLASSIFIED
10.			
11.		JAG25	Slasher03 request you pass co-ordinates to Kirk97 we will have them go over to see if they can PID any weapons, over. <sup>32</sup>
12.			
13.			
14.			

In this excerpt, it is stated in no uncertain terms that the Predator crew’s role in the operation was to identify weapons where the AC-130 gunship had been unable to do so. Crucially, the AC-130’s reluctance to engage in containment fires was not a product of any uncertainty about the hostile status of the vehicles, at least not publicly so. Instead, the recommendation that the Predator crew be summoned was a step to legitimise the use of a *greater* degree of force. This much is evidenced by the JTAC’s assessment of the new course of action a moment later: “We’re going to hold on containment fires and try to attempt PID, we would really like to take out those trucks”.<sup>33</sup> Thus, two courses of action were presented: non-lethal containment fires or a lethal strike. Evidently, the latter was deemed more advantageous, but its legitimacy was dependent upon the ODA’s ability to confirm that the vehicles were demonstrating hostile intent towards US forces. Without the confirmation of the presence of weapons, a lethal strike would not be compliant with the ROEs. When the Predator crew were summoned to the scene, this was the challenge that the ODA faced, and their contribution to the mission objective was straightforward: find evidence that the passengers were carrying weapons.



As we now know, the passengers were not carrying weapons, so this task proved to be a difficult one. Consider the following excerpt, which gives an insight into how the Predator crew accounted for the difficulties they encountered in identifying weapons:

Excerpt 3

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	005:29	K97PILOT	What about the guy under the North arrow, does it look like he is hold'n something across his chest?
2.			
3.			
4.		K97SENSOR	Yeah, it's kind of weird how they have a cold spot on their chest.
5.			
6.			
7.		K97PILOT	It's what they've been doing here lately, they wrap their *expletive deleted* up in their man dresses so you can't PID it. <sup>34</sup>
8.			
9.			

Aside from being overtly racist, this passage is a disturbing one in the context of the achievement of compliance. The Predator crew's inability to PID weapons is here attributed to the fact that the supposed Taliban insurgents must be hiding their weapons so that they could not be seen by any US personnel who might be surveilling them. The first problem here is that the presence of weapons was entirely pre-supposed, with the crew's difficulties being considered entirely in terms of finding something which was undoubtedly present but as yet unseen. The second, related problem is that the vehicles' passengers were conceived of as being knowing, willing participants in a contest over the detectability of weapons. So not only were the weapons presumed to exist, it was also presumed that the passengers were intentionally trying to hide them. Framed in this way, the absence of weapons was never treated as evidence that the passengers of vehicles could be something other than a hostile force. Perversely, the absence of weapons was, in actual fact, treated as *evidence* of the passengers' active participation in a contest they had no knowledge of.

It wasn't until around 06:30, an hour and a half after the Predator crew began tracking the vehicles, that the first confirmed weapons were identified. During the period in which all the passengers had disembarked the vehicles for prayer, two weapons were identified by the Predator crew and the Florida-based image analysts. Now, we know in retrospect that both of these calls were incorrect but there is no available data, nor any serious metric, for assessing how credible they might have been. With that being said, it should be clear by this point that identifying weapons was something that the Predator crew, and indeed the image analysts, were incentivised to do. Indeed, it is precisely why they were tracking the vehicles in the first place.

Following the confirmed weapons calls, the JTAC informed the Predator crew of the GFC's revised strategy for engaging the vehicles:

"Kirk97, Jag25, roger, ground forces commander is intent to let the situation develop permit the enemy to close, and we'll engage them closer when they've all consolidated. Over."<sup>35</sup>

This might seem like a clear course of action, but in the time that it had taken to identify these weapons, their absence had ceased to be the sole obstacle to the achievement of compliance. Two further difficulties had emerged. First, the image analysts in Florida had made calls regarding the possible presence of children onboard the vehicles; and second, the vehicles no longer appeared to be travelling towards the ODA. The negotiation of these two obstacles to compliance required an entirely different set of methods than those we have seen up to this point.

## THE ACHIEVEMENT OF COMPLIANCE II: NEGOTIATIONS REGARDING THE PRESENCE OF CHILDREN

In the context of the ascription of hostile intent to the vehicles, the concept of 'military aged males' (MAMs) is of considerable operational significance. This concept is not present in the ROEs but is believed to have been used by US Armed Forces as part of the means of identifying legitimate targets both in Afghanistan and elsewhere.<sup>36</sup> Infamously, a source from the US intelligence community once told *The Intercept* that "if there is no evidence that proves a person killed in a strike was either not a MAM, or was a MAM but not an unlawful enemy combatant, then there is no question" that they would be labelled as an 'enemy killed in action'.<sup>37</sup> In short, MAMs were considered to be combatants unless proven otherwise, a logic which is consistent with the assessments produced during the Uruzgan incident. Women, children and the elderly are thus the operational inverse of MAMs, and their presence problematises the legitimacy of the use of force on the (similarly heavily gendered) grounds that they are generally considered to be non-combatants until proven otherwise.

Given their certainty that the three vehicles constituted a Taliban fighting force, the Predator crew took the passengers' status as MAMs more or less for granted in the opening period of their surveillance. Indeed, the term was not used until the passengers disembarked the vehicles for prayer, at which point an individual was referred to as "the MAM mounted [at] the back of the truck". Shortly after this first reference to MAMs, the passengers' presumed status as such was disrupted by a call from the image analysts stating that children had been identified to the rear of one of the vehicles. As we shall see, the Predator crew responded to this call with surprise, frustration and, crucially, doubt.

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	005:37	K97MC	Screeener said at least one child near SUV.
2.			
3.		K97SENSOR	Bull*expletive deleted* where!?
4.			
5.		K97SENSOR	Send me a *expletive deleted* still, I don't think they have
6.			kids out at this hour, I know they're shady but come on.
7.			
8.		K97PILOT	At least one child... Really? Assisting the MAM, uh, that
9.			means he's guilty.
10.			
11.		K97SENSOR	Well, maybe a teenager but I haven't seen anything that
12.			looked that short, granted they're grouped up here, but.
13.			
14.		K97MC	They're reviewing.
15.			
16.		K97PILOT	Yeah review that *expletive deleted*, why didn't he say
17.			possible child, why are they so quick to call *expletive
18.			deleted* kids but not to call *expletive deleted* a rifle. <sup>38</sup>

The crew's concerted dissatisfaction with the image analysts' call is plain to see, but the roots of this frustration are worth interrogating. In the first instance, there is a dispute taking place over what there is to be seen on the ground, as evidenced by the sensor operator's utterances at line 3 ("where!?"), and lines 11-12 ("I haven't seen anything that short"<sup>39</sup>). With the crew's primary role being one of surveillance, there is a normative element to a failure to have seen something which is purportedly there – particularly something as operationally consequential as a child.

In terms of legality, the presence of children does not *ipso facto* mean that the desired strike would be illegal. The most prominent reason for this is that IHL does not prohibit military activities which cause harm to non-combatants outright: instead, it establishes extensive restrictions upon the specific circumstances in which such conduct can legitimately be undertaken. In accordance with the core principles of IHL, provided an instance of harm to non-combatants is not *indiscriminate*, and can be justified both in terms of its *military necessity* as well as its *proportionality*, it can be considered legal. This is an overly brief summary of IHL's core principles – and the Predator crew and the ODA make no effort to legitimise the strike by reference to these concepts. Instead, they appeal to other methods for legitimising the strike.

The first of these methods was very straightforward and is already visible to a certain extent in the excerpt above. That is, the Predator crew sought to call the existence of the children into question. The logic is simple. If there are no children, there is no obstacle to compliance. The second method, adopted primarily by the ODA JTAC, was to claim that the children were not non-combatants, but were instead direct participants in the conflict. The notion of 'direct participation in hostilities' has a clear place in IHL and through state practice has been established as customary law (its clearest elaboration in treaty law is found in Additional Protocol I to the Geneva Con-

ventions, which states: “Civilians shall enjoy the protection that is afforded by this Section, *unless and for such time as they take a direct part in hostilities*”).<sup>40</sup> Though the recruitment of child soldiers is recognised as a grave violation of their rights, this practice persists in many contexts. The UN have reported on the Taliban’s recruitment of child soldiers in the past.<sup>41</sup> It is an unpleasant reality that the rule of direct participation in hostilities applies to child soldiers. This is a fact to which the personnel involved in the Uruzgan incident are oriented.

In the following excerpt, which took place almost two hours later, both of the methods outlined above are visible, and the competence with which legal obstacles are resolved is made starkly visible.

Excerpt 5

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	07:38	K97PILOT	And Jag25, our screeners are currently calling 21 MAMs, no females and two possible children. How copy?
2.			
3.			
4.		JAG25	Roger. And when we say children, are we talking teenagers or toddlers?
5.			
6.			
7.		K97SENSOR	I would say about twelve. Not toddlers. Something more towards adolescents or teens.
8.			
9.			
10.		K97PILOT	Yeah adolescents.
11.			
12.		K97PILOT	And Jag25, Kirk97. Looks to be potential adolescents. We’re thinking early teens. How copy?
13.			
14.			
15.	07:39	K97SENSOR	Screeners agree. Adolescents. There’s still a couple of stragglers at the other vehicles. Still upwards at 24-25. People.
16.			
17.			
	...	...	...
41.	07:40	JAG25	We’ll pass that along to the ground force commander. But Like I said, 12-13 years old with a weapon is just as dangerous.
42.			
43.			
44.			
45.		K97SENSOR	Oh yeah, we agree. Yeah.
46.			
47.		K97PILOT	Hey Kirk97. Good copy on that. We understand and agree. <sup>42</sup>

The first observation to be made regarding this excerpt is that the Predator pilot has chosen to continue to refer to the children as “possible children” (line 2). The image analyst’s original call did not include any reference to ‘possible’, and though the Predator crew themselves had not confirmed the presence of children it was not within their authority to alter the calls of the image analysts. The AR 15-6 report was strongly critical of the Predator crew’s conduct in this regard, ultimately arguing that the Predator crew’s “failure to pass... Screener assessments to the JTAC that could have prevented the strike” played a direct causal role in the incident’s outcome.<sup>43</sup>

To a considerable extent this is probably true, and even were it contestable this report is not concerned with assessing the accuracy of the AR 15-6 report's conclusions.

That being said, if we follow this excerpt to its end, it does not appear that the JTAC shares the Predator crew's orientation towards questioning the existence of the children onboard the vehicles. Quite to the contrary, the JTAC's response at lines 4-5 – “and when we say children, are we talking teenagers or toddlers?” – evidences an entirely different approach to the problem at hand. Where the Predator crew had demonstrated a preference towards asserting the non-presence of children, the JTAC initiated a negotiation of whether, *if there were children*, those children could be treated as combatants. It is here that the question of ‘direct participation in hostilities’ becomes relevant, manifested through a set of negotiations regarding the specific age of the children and their capacity to participate in hostilities.

As is plainly visible in the remainder of excerpt 5, such a re-categorisation only takes a couple of minutes. What were previously “possible children” (line 2) quickly become “adolescents” (line 12), and no sooner had they become adolescents than they became combatants on the grounds that “12-13 years old with a weapon is just as dangerous” (lines 41-42). This excerpt, more than any other, demonstrates the extent to which compliance is as a rhetorical accomplishment. Between 7:38 and 7:40am, the features of the scene did not change. What *did* change were the agreed-upon terms that were used to describe that scene – and in the context of the achievement of compliance, that was the change that mattered.

In closing this section, it will be worth re-emphasising a point that was raised earlier. In talking about the achievement of compliance in the context of the possible presence of children, it must be understood that the analysis here is not that the ODA and the Predator crew knew that there were children onboard the vehicles and intentionally mischaracterised that fact so that they would be authorised to kill them. Instead, the conclusion is that, in their focus on compliance, the Predator crew and the ODA were incentivised to see the world in such a way that the legitimacy of the strike they had already determined to carry out would not be threatened. In equal measure, they were dis-incentivised from seriously considering whether the presence of children might mean that the vehicles were not carrying Taliban insurgents. Again, this possibility is *never entertained*. There are points in the transcript where the Predator crew and the ODA's inability to depart from the belief that they were looking at an insurgent force is difficult to fathom. Apparently sincere references to “short dudes” and men “wearing jewellery and stuff like a girl” are almost incomprehensible. That said, viewed in the context of their dogged pursuit of the achievement of compliance, such remarks can be explained by virtue of the fact that the professional concerns of the personnel involved in the incident had little to do with discovering who the passengers really were. For this reason, the contradictions that seem so apparent from the outside were hardly problematised – ultimately because they were not treated as being relevant to the task at hand. This same phenomenon is also visible in the Predator crew and the ODA's negotiations of the direction, character and destination of vehicles' movements, which will be the subject of this report's final section of analysis.

## THE ACHIEVEMENT OF COMPLIANCE III: NEGOTIATIONS REGARDING THE DIRECTION, CHARACTER, AND DESTINATION OF THE VEHICLES' MOVEMENTS

Over the course of the operation, descriptions of the direction, character and destination of the vehicles' movements were fundamental to the designation of hostile intent. As noted previously, the US Forces' ROEs for the war in Afghanistan defined hostile intent as "the threat of the imminent use of force against the United States, US forces, or other designated persons or property",<sup>44</sup> and the identification of hostile intent was a direct requirement for instances of the use of force in anticipatory self-defence. In principle, the ascription of hostile intent to a potential target requires PID, though the regular misuse of PID during the incident makes it difficult to identify the extent to which such a conception of the identification of hostile intent was operative. In this section, consideration will be paid towards the expanded definition of the concept of imminence which was available to the Predator crew and the ODA over the course of the operation. As the following paragraphs will demonstrate, the ROE's assertion that imminent "does not necessarily mean immediate or instantaneous"<sup>45</sup> allowed the Predator crew and the ODA to maintain the vehicles' apparent 'hostile intent' over a considerably longer period than would have been possible with a less permissive interpretation of imminence. Even so, the excerpts below will illustrate the extent to which the concept of imminence had to be stretched to its logical extreme in order ensure the legitimacy of the strike.

The first method by which the vehicles' status as an imminent threat was produced and maintained by the ODA and the Predator crew was through the identification of 'tactical manoeuvring' and 'tactical movement'. These terms are not present in ROEs, though they are of strong significance with regards to the designation of hostile intent insofar as they are used to

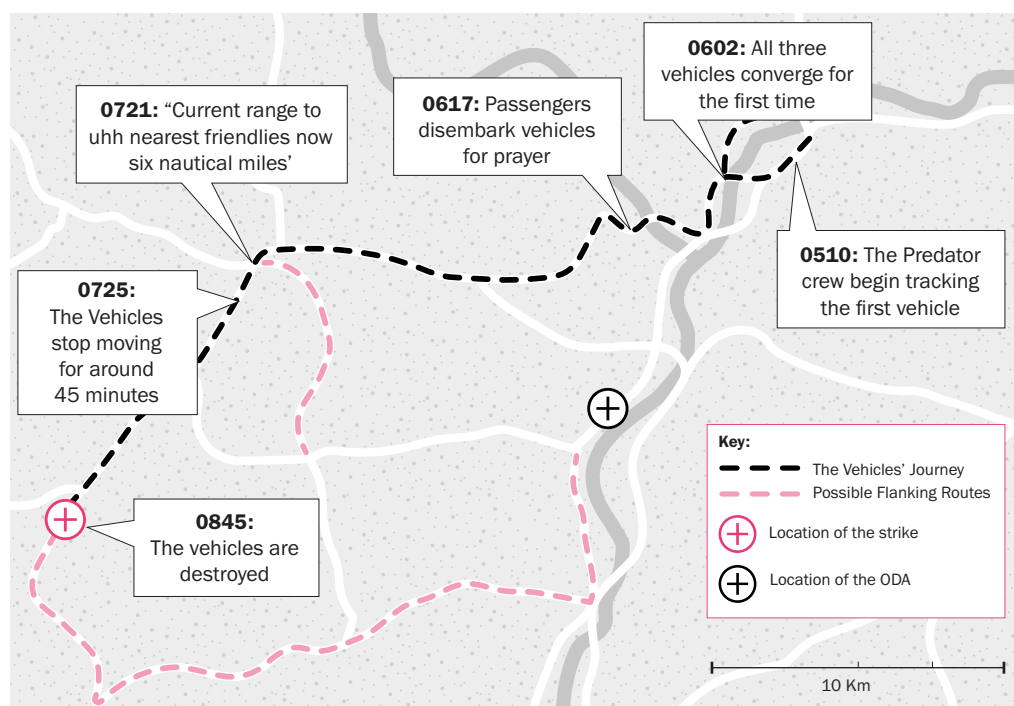


Figure 2: Simplified Map of the Vehicles' Journey



describe potential targets who are believed to be positioning themselves in such a way as to attack US or friendly forces. Tactical manoeuvring is first referenced before the Predator crew's arrival during the period where the JTAC initially sought clearance for the AC-130 to release munitions between the ODA and the vehicles. The JTAC's assessment of the situation during this period was as follows:

NO.	TIME: GMT +4:30	SPEAKER	TALK
1. 2. 3. 4. 5. 6.	05:03	JAG25	JAG25, roger, thinking about the situation, I'm pretty sure we are covered *CLASSIFIED* demonstration of hostile intent, tactical manoeuvring in conjunction with [intercepted communications] chatter it would appear that they are manoeuvring on our location and setting themselves up for an attack... <sup>46</sup>

The first observation to be made about this passage is that the utterance at lines 1-2, "I'm pretty sure we're covered" demonstrates an *explicitly legal orientation* to the descriptions of the vehicles' movements. In outlining his belief that the vehicles' 'tactical manoeuvring' – in conjunction with intercepted communications – constituted a demonstration of hostile intent on the part of the vehicles, the JTAC is making claims regarding the compliant-status of a potential strike. That the strike is desirable is not at issue here, the justificatory work is directed solely towards ensuring the strike's legality. As it happened, the AC-130 expressed some uncertainty regarding this course of action and requested that the Predator crew be tasked with confirming that the passengers of the vehicles were carrying weapons – something the AC-130's cameras lacked the fidelity to do.

Upon arriving at the scene and beginning to track the vehicles around ten minutes later, the Predator pilot – who had overheard the previous discussion between the JTAC and the AC-130 – immediately characterised the vehicles' movements in similar terms:

NO.	TIME: GMT +4:30	SPEAKER	TALK
1. 2. 3.	05:12	K97PILOT	JAG25, Slasher03, Kirk97 we are eyes on a vehicle, personnel in the open, definite tactical movement cannot PID weapons at this time. How copy?

Leaving to one side the matter of how the Predator pilot could have possibly determined that there was 'definite tactical movement' in the couple of minutes he had been on the scene, it is significant that this characterisation is present in the very first description of the vehicles that the Predator crew pass to the ODA JTAC, and that it is presented alongside reference to the identification of weapons. At this early point in the operation, the Predator and the image analysts were yet to identify weapons, and their absence constituted the primary obstacle to a compliant strike. Nevertheless, even at this early stage it should be evident that the expanded definition of imminence was proving to be a useful resource. Were the ODA working with a more conservative definition of imminence, even if the vehicles were "manoeuvring on [the ODA's] location and setting themselves up for an attack", they would not constitute a legitimate target because they did not

constitute an *immediate* threat to US or friendly forces. With that being said, this only constitutes the very beginnings of the work that the expanded definition of imminence would come to serve as the operation went on.

At around 06:20 two significant changes occurred in quick succession. First, weapons were identified by the Predator crew and the image analysts during the prayer stop. Second, when the passengers re-embarked the vehicles following their prayer, they began to travel northwest (see Figure 1). The most straightforward implication of the vehicles’ change of direction is that they were no longer moving towards the ODA. For obvious reasons, this fact placed some amount of strain on the characterisation that the vehicles were tactically manoeuvring into a position from which to attack the US forces. The Predator crew’s concern for maintaining the vehicle’s status as an imminent threat is well evidenced by their attempts to explain the vehicles’ turn to the west by reference to factors outside of the passengers’ control:

Excerpt 6

NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	06:40	K97PILOT	Which way are they heading?
2.		K97SENSOR	Kinda west. Just kinda the way the road makes them go but relatively west. We'll see if it turns south here again.
3.			
4.			
5.		K97PILOT	Jag25, Kirk97, looks like all of our pax have mounted back up and continue their way. Currently following a ridgeline to the west. CLASSIFIED. <sup>47</sup>
6.			
7.			
8.			

In this excerpt, the vehicles’ turn to the west was characterised as being the product of a) “the way the road makes them go” (line 3), and b) their “following a ridgeline to the west” (line 7). In both cases, these descriptions interpret the vehicles’ change of direction as being the product of something other than the interests of the passengers themselves, pointing to the external constraints posed by the road – which “made” them go west – and the ridgeline – which they were “following” – respectively.<sup>48</sup> These descriptions have a significant effect. In placing the reason for the vehicles’ change of direction *outside* of the passengers themselves, the apparent contradiction between demonstrating hostile intent towards the ODA whilst also driving away from the ODA is negated, and the crew’s assertion of the passengers’ hostility goes, at least for a short while, unchallenged.

As the operation went on, however, and the vehicles moved further and further away from the ODA, the Predator crew and JTAC were increasingly motivated to provide an account for the vehicles’ direction of travel. This pre-occupation would eventually develop into the assertion that the vehicles were ‘flanking’ the ODA, i.e., moving around the village of Kohd in order to gain an offensive advantage. At 07:10 the following exchange took place between the JTAC and the Predator pilot:



NO.	TIME: GMT +4:30	SPEAKER	TALK
1.	07:08	JAG25	Roger. If you could let us know if those vehicles turn south *Garbled*. It appears that they are either trying to flank us or they're continuing west to avoid contact, and uh, we definitely want to, want to know where they're headed.
2.			
3.			
4.			
5.		K97PILOT	Kay, Kirk97, good copy on that, we'll let you know. Seems to be trending primarily to the South and West at this time, can't tell yet if they're flanking or just trying to get out of the area. I'll let you know.
6.			
7.			
8.			
9.		K97SENSOR	Think they'd go back home if they were trying to get out. Just buying time.
10.			
11.			
12.			
13.		K97PILOT	Yeah, I think they're trying to go around this ridge.
14.			
15.		K97SENSOR	Certainly.
16.			

As a first point regarding this excerpt, it is important to acknowledge that both the ODA JTAC and the Predator pilot communicated an awareness that they could not yet confirm whether the vehicles were flanking or trying to escape the area. Note carefully, however, that in neither case does this uncertainty develop into a consideration of the fact that the vehicles could be anything other than a hostile force. In fact, both the claim that they could be travelling west to “avoid contact” (line 2-4) and the claim that they could be trying to “get out of the area” (lines 8-9) rest on the assumption that the opposite is true. That is to say, even on those occasions where the Predator crew and the ODA acknowledged that they may not have a full sense of the intentions exhibited in the vehicles’ movements, they failed entirely to entertain the notion that the passengers might be non-combatants. They are only ever considered to be combatants who are flanking, or combatants who are trying to evade the area.

With that point made, let us return to the operational significance of characterisations of the vehicles’ movements as constituting ‘flanking’. In the hours prior to the strike, flanking would prove to be an immensely powerful descriptor for the ODA and the Predator crew, particularly in the context of the expanded definition of imminence that was available during the operation. Ultimately, its utility is simple. So long as the ODA and the Predator crew could maintain that the vehicles were planning to turn back to Kohd, their direction of travel remained a perpetually open concern, one which allowed for the seemingly never-ending assertion of their status as an “imminent threat” to the ODA.

Figure 2 displays two routes which were identified in the AR 15-6 report as being possible routes for a flanking manoeuvre. It is entirely unclear why these two routes in particular were highlighted. Just by looking at the roads depicted on the map, however, it appears that there were at least three routes to Kohd that vehicles could have taken to flank the ODA which they did not take. Indeed, the road to the east situated directly between the two highlighted roads was specifically identified as possible route back to the

village by one of the Predator's crew, who said at 07:28: "About a mile or so they might have a chance to turn East. I think there's a road that cuts through these ridges and goes over the open fight area, we'll see if that happens". Nevertheless, even in considering the two highlighted routes, we can see that they powerfully illustrate the extent to which the concept of imminence was affording the Predator crew and the ODA a strengthened capacity to identify the vehicles as an imminent threat. Altered as it was, the US interpretation of the concept's lack of an outside temporal limit means that, once the characterisation of flanking was in place, the vehicle's status as an imminent threat could be maintained without contradiction more or less indefinitely.

## THE ACHIEVEMENT OF COMPLIANCE AS A PRACTICAL CONCERN FOR MILITARY PERSONNEL

Up to this point, it has been the intention of this report to demonstrate that the law is not a straightforward mechanism for governing the conduct of military personnel, and that IHL compliance is not simply the product of external assessments of the legality of some instance of military activity. Quite to the contrary, this report has extensively illustrated the practical, collaborative and localised *achievement* of compliance by military personnel who are co-oriented towards the law as a phenomenon which both establishes restrictions on legitimate military conduct whilst also providing the means by which the use of force can legitimately take place. For military personnel, therefore, the law is both the wall and the ladder. In the book *Plausible Legality*, Sanders has argued that the 'war on terror' enabled a legal paradigm in which international law functions as a 'permissive constraint' on military conduct, constituting a paradoxical "force that can be marshalled to serve cynical state interests, but that also deeply structures the boundaries of legitimacy".<sup>49</sup> The Uruzgan incident demonstrates that such a conception of international law can be found at a fundamentally local level, emerging as an oriented-to feature of the work of military personnel engaged in targeting and the use of force.

As demonstrated, the Predator crew and the ODA's assertion that the three vehicles were demonstrating hostile intent was founded largely upon three requirements: the presence of weapons, the absence of non-combatants, and evidence of tactical manoeuvring. Though it has remained implicit up until this point, in concluding it is important to stress that the three vehicles failed to constitute a legitimate military target on *all three counts*. The weapons calls proved to be inaccurate; all of the passengers proved to be non-combatants; and the vehicles were, at the time of the strike, 12km from the ODA and had been driving away from Kohd for more than three hours. And yet, following four hours of surveillance, the vehicles were deemed to constitute a legitimate military target. More than that, subsequent investigations into the incident would not refute their status as such. The strike, which killed sixteen civilians and injured many more, was deemed legally compliant by the US military both at the point at which munitions were released and at the conclusions of several months of investigative procedures.

Having elaborated on the methods by which those involved in the Uruzgan incident ensured the compliance of that strike, there are two central conclusions that will bear heavily upon the compliance argument as it was articulated at the outset of this report:

1. In their pre-occupation with compliance, the individuals involved in the Uruzgan incident proved incapable of a serious engagement with the possibility that their targets could be anything other than a hostile force. As such, there was no point during the operation at which either the Predator crew or the ODA were visibly oriented to the possibility of civilian harm emerging from their actions.
2. In their explicit orientation towards IHL compliance as their central objective, the individuals involved in the Uruzgan incident demonstrated the tremendous capacity of military personnel to ensure the compliance, and thus perceived legitimacy, of instances of the use of force which cause huge amounts of civilian harm.

Having established these conclusions, the final section of this report will return to the compliance argument in order to illuminate the ways in which the pre-suppositions of that stance are misaligned with the realities of compliance.

---



## CONCLUSIONS: IMPLICATIONS FOR THE PROTECTION OF CIVILIANS

In the first section of this report, it was proposed that the compliance argument – which broadly states that there is no reason to develop further mechanisms to ensure the protection of civilians on the grounds that IHL already has the capacity to do so – rests upon two key pre-suppositions about the relationship between IHL and the protection of civilians. These can be formulated as follows:

1. *The key to ensuring the adequate protection of civilians in armed conflict lies in a reduction of the number of instances of non-compliance with IHL.*
2. *Provided an instance of the use of force is compliant with IHL, any and all resultant civilian harm is acceptable.*

It has been the intention of this report to provide a re-orientation to these pre-suppositions in light of what has been called the ‘achievement of compliance’, and in concluding it will interrogate whether these pre-suppositions are tenable in light of the ways in which the individuals involved in the Uruzgan incident ensured that strike was compliant with the ROEs, and by extension IHL.

In the first instance, it can be said that a drive to reduce the number of instances of non-compliance with IHL would not have prevented the Uruzgan incident, nor would it prevent similar incidents in the future. By virtue of its recourse to international law, the compliance argument betrays a lack of concern for instances of civilian harm which occur in cases where the requirements of compliance have been met. Whilst such a view might appear to be uncontroversial if one maintains a conception of compliance wherein legality is established through objective, external assessments of the facts of any given case, the Uruzgan incident demonstrates that such assessments can be secondary to the situated achievement of legality as it occurs in the course of targeting and the use of force. As the Predator crew and the ODA’s JTAC demonstrate with painful clarity, the compliance of any given instance of the use of force is not granted via objective, external assessment; it is the product of the professional, concerted efforts of the individuals concerned with ensuring the legality of their activities whilst achieving their mission objective.

In seeking to maintain a status quo in which states’ military freedom is un-restricted by further political or legal mechanisms, the compliance argument is a constitutive feature of a regime which seeks to prioritise compliance over a broader goal of the avoidance of civilian harm. Within such a regime, military personnel are incentivised to become proficient at ensuring that their conduct is compliant with IHL. Counter-intuitively, rather than pre-

venting civilian harm, conflating IHL compliance and the protection of civilians in this way, produces military personnel who are capable of legitimately engaging practices which can cause huge amounts of harm to civilians.

This arrangement places considerable strain on the second pre-supposition within the compliance argument, particularly in light of the overwhelming lack of interest that the Predator crew and the ODA's focus on compliance received in the subsequent investigations into the incident. Throughout the incident itself, as well as in the subsequent investigations, the methodic practices they engaged in as part of achieving compliance were treated as being entirely unremarkable. That is, they were rarely treated as if they were out of the ordinary. The AR 15-6 report's discussion of the JTAC and the Predator crew's negotiation of the presence of children is particularly revelatory in this regard. Whilst, as we have seen, the AR 15-6 report strongly condemned the Predator pilot's inaccurate passing of the image analysts' call that there were children onboard the vehicles, no serious consideration is given to the JTAC's subsequent efforts to re-negotiate whether the children could be considered combatants. In this regard, it is notable that whilst the Predator crew are often the subject of criticism for their deficiencies, the JTAC – who initiated that re-negotiation – is described in the AR 15-6 as being “the most mature voice on the radio”.<sup>50</sup>

The second pre-supposition to the compliance argument is placed under further strain insofar as it entails that the Uruzgan incident constituted an ethically sanctionable instance of civilian harm. The proposal that harm to civilians is permissible insofar as it is the result of the compliant use of force is, at least in part, dependent on the notion that such harms are an unavoidable by-product of legitimate war-making. In light of the actions of those involved in the Uruzgan incident, the suggestion that the deaths of the civilians who were killed on that day were unavoidable is extremely difficult to accept. For four hours, three vehicles that were occupied by men, women and children, none of whom were carrying weapons, drove away from the individuals they were supposedly preparing to attack. Throughout that period a justification for killing those individuals was stitched together by military personnel who were absolutely convinced of their hostile status. In this regard, the lack of scrutiny that was directed towards the ODA and the Predator crew's all-encompassing pre-occupation with compliance is troubling for two reasons. First, it allows us to conclude that their pre-occupation with compliance at the expense of considerations regarding civilian harm was treated as being an appropriate and unremarkable way to approach targeting and the use of force. Second, if such practices were entirely unremarkable in the course of the Uruzgan incident, then the concern emerges that the analysis of similar operations would likely reveal that such an approach is commonplace.

Of course, the analysis of other operations is an opportunity scarcely afforded to those interested in the realities of targeting and the use of force, and this report's conclusions are very much limited by our inability to say authoritatively that the achievement of compliance is commonplace, or that the Uruzgan incident is representative of military conduct more generally. In this capacity, the author can only implore that states take seriously the characterisation of the achievement of compliance that has been elaborated in this report, and to interrogate whether it is recognisable as general practice. Furthermore, if states were to make available documents which made visible the details of how the use of force unfolds operationally, the public accountability of military activities would be much improved. Such transparency need not demonstrate any evidence of wrongdoing – indeed the *avoidance* of wrongdoing is precisely the phenomenon of interest here – nor would the disclosure need to put operations or personnel at risk. The publication of documents such as incident transcripts, cockpit audio recordings, video footage and other forms of data which are commonly associated with military operations would constitute a vital step forward in developing greater understanding and public accountability of contemporary military practices. This, in turn, would aid in the development of policy that would more effectively protect civilians living through armed conflict.

---

## NOTES

- 1 Following the strike, elders from the victims' villages identified 23 individuals who had been killed, though subsequent US investigating procedures only identified between 15-16 casualties. See Cloud, D. S. (2010) Anatomy of an Afghan War Tragedy. Los Angeles Times. 10th April. Available at: <https://www.latimes.com/archives/la-xpm-2011-apr-10-la-fg-afghanistan-drone-20110410-story.html>. Also, US Central Command. (2010) 'AR 15-6 investigation 1 February 2010 CIVCAS incident in Uruzgan Province'. Kabul: United States Forces Headquarters—Afghanistan. Available at: <https://www.aclu.org/drone-foia-department-defense-uruzgan-investigation-documents>
- 2 See part II of this report, and notes 18-22, for further discussion on considerations in analysing a single case incident
- 3 For recent research investigating the capacity of the compliant use of force to cause civilian harm see for example Gaston, E. L. (2017) When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent. Berlin: Global Public Policy Institute. See also Jones, C. (2020) The War Lawyers: The United States, Israel, and Juridical Warfare. Oxford: Oxford University Press
- 4 Article 36, (2010) Explosive Weapons: Protecting Civilians from the Use of Explosive Weapons in Populated Areas. Available at: <http://www.article36.org/wp-content/uploads/2018/09/EWIPA-report-2018-A36.pdf>
- 5 The Action on Armed Violence (AOAV) explosive violence monitor tracks the impact of explosive weapon use worldwide as reported in English-Language media. See Action on Armed Violence, (2019) 'Eight years of global explosive violence reviewed: 2011-2018,'. Available at: <https://aoav.org.uk/2019/8-year-overview/>.
- 6 For the latest information on the current process see Department of Foreign Affairs and Trade of Ireland (n.d.) 'Protecting Civilians in Urban Warfare: Towards a political declaration to address the humanitarian harm arising from the use of explosive weapons in populated areas,' <https://www.dfa.ie/our-role/policies/international-priorities/peace-and-security/ewipa-consultations/> and International Network on Explosive Weapons (n.d.) 'Declaration Negotiations'. Available at: <http://www.inew.org/declaration-negotiations/>
- 7 Belgium Statement to the 2019 Meeting of High Contracting Parties of the Convention on Certain Conventional Weapons, Agenda item 7, 13th November 2019. Available at: [http://149.202.215.129:8080/s2t/UNOG/CCW\\_MSP\\_13-11-2019\\_P\\_M\\_\\_mp3.html](http://149.202.215.129:8080/s2t/UNOG/CCW_MSP_13-11-2019_P_M__mp3.html)
- 8 Russian Federation, (2007) 'Application and implementation of existing international humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimizing the humanitarian impact of the use of these munitions'. Position Paper submitted by The Russia Federation to the Group of Governmental Experts of the States Parties to the CCW, Geneva, 19th-22nd June 2007, §13-15, available at: <https://digitallibrary.un.org/record/604263?ln=en>
- 9 The Russian Federation Statement to the 2019 Meeting of High Contracting Parties of the Convention on Certain Conventional Weapons, Agenda item 7, 13th November 2019. Available at: [http://149.202.215.129:8080/s2t/UNOG/CCW\\_MSP\\_13-11-2019\\_P\\_M\\_\\_mp3.html](http://149.202.215.129:8080/s2t/UNOG/CCW_MSP_13-11-2019_P_M__mp3.html)
- 10 Bittner, E., (1965) The Concept of Organisation, in Social Research. Vol. 32, No. 3., p. 239-255.
- 11 US Department of the Air Force, (2010) 'Uruzgan Province CIVCAS incident 21 February 2010 Commander Directed Investigation. Creech Airforce Base, Nevada. p. 100.
- 12 US Department of the Air Force, (n. 9), p. 79.
- 13 US Department of the Air Force, (n. 9), p. 83.
- 14 See Cloud, D.S., (no. 1); US Central Command, (no. 1).
- 15 US Central Command (n. 1), p 33.
- 16 McChrystal, S., Tactical Directive, 2009. Available online: [https://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf). McChrystal's 2009 Tactical Directive emerged from a counterinsurgency operation that had been ongoing for almost eight years and redoubled on NATO forces' efforts to minimise civilian casualties in the war in Afghanistan. The tactical directive imposed some of the strongest restrictions that US forces had ever witnessed. In the publicly available aspects of the directive, McChrystal characterises the conflict as a "struggle for the support and will of the population". For more information see Open Society Foundation, That Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts. Available online: [https://www.opensocietyfoundations.org/publications/strategic-costs-civilian-harm#publications\\_download](https://www.opensocietyfoundations.org/publications/strategic-costs-civilian-harm#publications_download)



- 17 Schegloff, E. (2010) 'Reflections on Quantification in the Study of Interaction', in *Research on Language and Social Interaction*. Vol. 26, No. 1., p. 99-128.
  - 18 See *Der Spiegel*, (2010) Germany to Pay \$500,000 for Civilian Bombing Victims. Available online: <https://www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html>. For analysis of the incident see also Kolanoski, M. (2017) Undoing the Legal Capacities of a Military Object: A Case Study on the (In)Visibility of Civilians. In *Law and Social Inquiry*. Vol. 42, No. 2. p. 377-397 & Wilke, C. (2017) Seeing and Unmaking Civilians in Afghanistan: Visual Technologies and Contested Professional Visions. In *Science, Technology & Human Values*. Vol 42, No. 6. p. 1-30.
  - 19 Wikileaks, Collateral Murder. Available online: <https://collateralmurder.wikileaks.org/>. For analysis see Mair, M. Elsey, C. & Kolanoski, M. (2018) Violence as Work: Ethnomethodological Insights into Military Combat Operations. In *Psychology of Violence*. Vol. 8, No. 3. p. 316-328.
  - 20 Weider, L. (1974) *Language and Social Reality: The Case of Telling the Convict Code*. The Hague: Mouton.
  - 21 Ewick, P., Silbey, S. (1998) *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press.
  - 22 Zimmerman, D. (1970) The Practicalities of Rule Use. In Douglas, J. (ed.) *Understanding Everyday Life*. Chicago: Aldine.
  - 23 Bittner, E. (1967) Police on Skid Row: A Study of Peace Keeping. In *American Sociological Review*. Vol 32, No. 5. Pp. 699-715
  - 24 Garfinkel, H. (2002) *Ethnomethodology's Program: Working Out Durkheim's Aphorism*. Lanham, MD: Rowman and Littlefield.
  - 25 Solis, G. D. (2010) 'The Law of Armed Conflict: International Humanitarian Law in War'. Cambridge University Press: Cambridge, p.25
  - 26 Chairman of the Joint Chief of Staff (2005) Standing Rules of Engagement/Standing Rules of Engagement for the use of force for US forces. Online. Available at: [https://www.loc.gov/rr/frd/Military\\_Law/pdf/OLH\\_2015\\_Ch5.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf) [Accessed 09/09/2021].
  - 27 Chairman of the Joint Chief of Staff, (no. 25), p. 83.
  - 28 Chairman of the Joint Chief of Staff, (no. 25), p. 84.
  - 29 Webster, D. (1841) Letter from Daniel Webster, US Secretary of State, to Henry S. Fox, esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (APR. 24, 1841), reprinted in *British and Foreign State Papers, 1840-1841*. London: British Foreign Office. Online. Available at: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015019751299&view=1up&seq=7> [Accessed 12/09/21].
  - 30 The Judge Advocate General's Legal Centre and School, International and Operational Law Department (n.9), p. 106.
  - 31 US Department of the Air Force, (n. 9), p. 58.
  - 32 US Department of the Air Force, (n. 9), p. 60.
  - 33 US Department of the Air Force, (n. 9), p. 61.
  - 34 US Department of the Air Force (n. 9), p. 68.
  - 35 US Department of the Air Force (n. 9), p. 85.
  - 36 The use of the term 'military aged male' is problematic in itself and is specifically condemned in the AR 15-6 as being an inadequate descriptor. For further discussion of the role of gender in drone operations see Reaching Critical Will and Article 36 (2014), *Sex and Drone Strikes: Gender Identity in Targeting and Casualty Analysis*. Available online: <https://www.reachingcriticalwill.org/images/documents/Publications/sex-and-drone-strikes.pdf>. See also Turse, N. (2013) America's Lethal Profiling of Afghan Men. *The Nation*, 18 September 2013. Online. Available at: <https://www.thenation.com/article/archive/americas-lethal-profiling-afghan-men/> [Accessed 16/09/21]
  - 37 Deveraux, R. (2015) Manhunting in the Hindu Kush. *The Intercept*, 18th October 2015. Online. Available at: <https://theintercept.com/drone-papers/manhunting-in-the-hindu-kush/>. [Accessed 16/09/21]
  - 38 US Department of the Air Force, (n. 9), p. 71.
  - 39 The discussion of the presence of women and children, which is in turn used as a proxy the identification of (non-) combatants, is very often littered with references to the height of the people being surveilled. This is presumably a product of the poor quality of the images, which render height the easiest way to distinguish between different demographics.
  - 40 International Committee of the Red Cross (1977). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Art. 51. Para. 3.
  - 41 UN General Assembly Security Council (2007) *Children and Armed Conflict: Report of the Secretary-General*. Geneva: United Nations. Online. Available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/ACB155BBA8E36696852573DF00773AB4-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/ACB155BBA8E36696852573DF00773AB4-Full_Report.pdf). [Accessed 16/09/21].
  - 42 Department of the Air Force, (n. 9), p. 99
-

- 43 US Central Command (n. 1), p 61.
  - 44 The Judge Advocate General's Legal Centre and School, International and Operational Law Department, (n. 9), p. 79.
  - 45 The Judge Advocate General's Legal Centre and School, International and Operational Law Department, (n. 9), p. 79.
  - 46 Department of the Air Force, (n. 9), p. 59.
  - 47 US Department of the Air Force, (n. 9), p. 87.
  - 48 Many of the annotative features of Figure 1 are poorly explicated in the AR 15-6 report, and as such the authors are reluctant to make strong claims about its features. Nevertheless, it is worth noting that the map appears to show that when the vehicles were travelling to the south they were on a road that led directly to Kohd, and that, in turning to the west, the vehicles turned off of that road and on to a new one. Given that, the claim that the vehicles were travelling "just kinda the way the road makes them go" (line 3) appears even less tenable.
  - 49 Sanders, R. *Plausible Legality: Legal Culture and the Political Imperative in the War on Terror*. Oxford: Oxford University Press.
  - 50 US Central Command (n. 1), p 33
-

www.article36.org  
info@article36.org  
@article36

Article 36 is a specialist non-profit organisation focused on reducing harm from weapons. We take our name from article 36 of the 1977 Additional Protocol I to the Geneva Conventions, which calls for scrutiny of new weapons and methods of warfare. Together with civil society partners and governments, we develop new policies and legal standards to prevent civilian harm from existing and emerging weapons.

Alexander Holder is a PhD student at the University of Liverpool. This report was produced as part of a Economic and Social Research Council (ESRC) North West Social Science Doctoral Training Partnership (NWSSDTP) studentship collaboration between Article 36 and the Department of Sociology, Social Policy and Criminology at the University of Liverpool, on "Law in War: Targeting, Legal Reasoning and the Use of Force in Armed Conflict". For more about this project, see <https://article36.org/university-of-liverpool-collaboration/>. Article 36 would like to thank Alexander for his work on this project, and Dr Michael Mair for his collaboration on it and review of this report.

Front cover photograph:

View from a CH-47 helicopter over the mountains of Uruzgan province, Afghanistan, 2013.

Photo: U.S. Army/Sgt. Jessi Ann McCormick <https://flic.kr/p/en62NG>

Back cover photograph:

View from an MI-17 tactical helicopter, Southern Afghanistan, 2010.

Photo: Kenny Holston <https://flic.kr/p/7PE7pj>

Design: [bb-studio.co.uk](http://bb-studio.co.uk)

