

AFGHANISTAN

PROTECTION OF CIVILIANS IN ARMED CONFLICT

SPECIAL REPORT:
AIRSTRIKES ON ALLEGED DRUG-PROCESSING FACILITIES
FARAH, 5 MAY 2019



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Photo on Front Cover: Photograph provided to UNAMA by a witness of the 5 May 2019 airstrikes carried out in Bakwa District, Farah Province.

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EXECUTIVE SUMMARY

This report, issued jointly by United Nations Assistance Mission to Afghanistan (UNAMA)¹ and the Office of the United Nations High Commissioner for Human Rights (OHCHR),² examines the scope of civilian harm resulting from the United States Forces – Afghanistan (USFOR-A)³ airstrikes on alleged drug facilities located in Bakwa district, Farah province, and parts of the bordering Delaram district, Nimroz province on 5 May 2019. The report sets out that drug facilities and associated workers may not be lawfully made the target of attack based on their possible economic or financial contribution to the war effort of a party to a conflict.

On 5 May 2019, USFOR-A carried out a series of airstrikes targeting more than 60 sites that they had identified as drug production facilities, often referred to as “drug labs”,⁴ across multiple areas in Bakwa district, Farah province, and parts of the bordering Delaram district, Nimroz province. Credible allegations soon emerged of significant civilian harm caused. Although airstrikes on reported drug labs had taken place before, this was the first time that UNAMA had received reports of a high number of civilian casualties resulting from such an operation.

UNAMA conducted extensive fact-finding into the 5 May incident in Bakwa district over a period of four months. After weeks of careful preparation, on 26 June, UNAMA undertook a fact-finding mission, together with the Afghanistan Independent Human Rights Commission (AIHRC), to Bakwa district, which is under Taliban control. Given the remoteness of the location and the lack of a permanent United Nations, governmental or military presence in the area, UNAMA considered the mission to be of significant value to the fact-finding process. The delegation conducted face-to-face interviews with individuals who were impacted by the airstrikes and saw some of the impact sites. The Government of Afghanistan, the Taliban, and NATO Resolute Support Mission all provided various means of support to the mission.

As of 15 September 2019, UNAMA had verified 39 civilian casualties (30 deaths, five injured and four undetermined⁵), including 14 children and one woman, due to the 5 May airstrikes. Of these verified civilian casualties, UNAMA determined that 17 of them were working in the drug labs. UNAMA has received reliable and credible information to substantiate at least a further 37 additional civilian casualties (30 deaths and seven injured), the majority of whom were women and children. It is working to further verify these civilian casualties.⁶

¹ This report was prepared by the Human Rights Service of UNAMA pursuant to the UNAMA mandate under United Nations Security Council Resolution 2489 (2019) “to monitor the situation of civilians, to coordinate efforts to ensure their protection, [...] to promote accountability, [...] and to assist in the full implementation of the fundamental freedoms and human rights provisions of the Afghan Constitution and international treaties to which Afghanistan is a State party, in particular those regarding the full enjoyment by women of their human rights.” S/RES/2489 (2019).

² OHCHR is represented in Afghanistan by the Human Rights Service of UNAMA, reporting jointly to the Special Representative to the Secretary-General for Afghanistan and the High Commissioner for Human Rights.

³ For a description of the mandate of United States forces in Afghanistan, see the *UNAMA 2018 Annual Protection of Civilians Report, Annex II: Main Parties to the Conflict* at 58 and *Annex III: Glossary* at 63-64 available at: <https://unama.unmissions.org/protection-of-civilians-reports> (last accessed 28 September 2019).

⁴ Drug labs have been described as consisting of “mud compounds containing basic equipment such as barrels, makeshift presses, buckets and bowls”. See David Mansfield, *Denying Revenue or Wasting Money? Assessing the Impact of the Air Campaign Against ‘Drug Labs’ in Afghanistan*, London School of Economics International Drug Policy Unit (April 2019) p. 23, available at: www.lse.ac.uk/united-states/Assets/Documents/mansfield-april-update.pdf (last accessed 21 August 2019).

⁵ While UNAMA verified these four civilian casualties, it is still seeking to determine their current status as injured or killed as information about their condition was received from sources at different periods in time.

⁶ UNAMA expects the final civilian casualty figures from this operation to be included in its Protection of Civilians 2019 Annual report, due for public release in February 2020. For more detailed information, please see the Findings section below.

USFOR-A states that the airstrikes targeted methamphetamine production facilities, which they claim were controlled and operated exclusively by the Taliban and used to directly fund the Taliban's war-fighting efforts.⁷ According to longstanding United States (US) policy, economic objects that contribute to the war effort of a party to a conflict are considered to be legitimate military objectives.⁸ In this case, USFOR-A has set out that, "comprehensive intelligence confirmed that all personnel inside of the laboratories were Taliban combatants."⁹ In further outlining its position, USFOR-A indicated, nevertheless, that this did not mean they were performing a combat function at the time of the operation. USFOR-A contends that those working in the drug labs were legitimate military targets even if they are not involved in directly participating in hostilities. USFOR-A assessed that there were no civilian casualties resulting from the airstrikes and no women and children were killed or injured during the operation.¹⁰

It is well documented that the Taliban financially benefits from the drug industry in Afghanistan. In this case the findings of UNAMA indicate, however, that the drug production facilities in Bakwa district were not controlled and operated exclusively by the Taliban, but rather they were owned and operated by criminal groups with connections to international drug trafficking networks. While some of the sites may have been associated with illicit activity, they did not meet the definition of legitimate military objectives under international law.¹¹ Moreover, UNAMA received credible information that several of the sites that were hit were not associated with drug production activities, including residential homes.

Based on the information gathered, UNAMA has assessed that the personnel working inside the drug production facilities were not performing combat functions. They were therefore entitled to protection from attack, and could only have lost this protection if, and for such time, as they had been directly participating in hostilities;¹² involvement in illicit drug activity does not qualify as direct participation. Furthermore, UNAMA found that while some of the civilians killed or injured in the airstrikes were working in the drug labs, others – including women and children – were not.

While the report fully acknowledges that the illicit drug industry in Afghanistan causes extensive harm to the civilian population in the country and beyond, it concludes that the appropriate – and legal – response to illicit drug activity is through law enforcement, not military, operations.

Therefore, UNAMA and OHCHR urge USFOR-A to:

- Conduct an independent and transparent investigation to examine the impact on civilians from the 5 May operation and to make public the findings as well as measures taken to ensure accountability, including the appropriate redress provided to victims and their family members;¹³

⁷ USFOR-A, "Response to United Nations Mission in Afghanistan's (UNAMA) Objections to U.S. Strikes on Taliban Methamphetamine Laboratories", Prepared by the Office of the Staff Judge Advocate, 15 July 2019, on file with UNAMA.

⁸ Ibid.

⁹ Ibid. According to the US Department of Defense Law of War Manual (June 2015, Updated December 2016), "Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent" (section 5.7.3).

¹⁰ Email communications with USFOR-A on 20 August 2019 and 13 September, on file with UNAMA. See Findings section below.

¹¹ See Legal Framework section below.

¹² See Legal Framework section below.

¹³ At minimum, UNAMA and OHCHR urge USFOR-A to conduct an investigation under US Army Regulation 15-6 to determine the facts of the incident and review compliance with international humanitarian law and key operational procedures.

- Cease all airstrikes and other military operations that target drug facilities and associated workers in Afghanistan;
- Review its targeting policies towards objects and individuals associated with “war-sustaining” activities to ensure that they are aligned with international humanitarian law;
- Strengthen the exchange of information and, as appropriate, drug-related criminal intelligence with Afghan law enforcement agencies as a means of maximizing the effectiveness of law enforcement responses to illicit drug activity; and
- Work with the Government of Afghanistan to ensure that sufficient resources are allocated to Afghan law enforcement agencies to strengthen their ability to conduct such counterdrug operations more effectively.

METHODOLOGY

The report examines the impact on civilians of USFOR-A airstrikes carried out on alleged drug facilities located in Bakwa district, Farah province, and parts of the bordering Delaram district, Nimroz province on 5 May 2019.

UNAMA conducted extensive fact-finding into the 5 May incident in Bakwa district over a period of four months. It conducted more than 50 interviews in person and over the phone with a wide range of sources from Farah and Nimroz provinces, including victims and their relatives, community elders, health care professionals, Government officials, and members of the Afghan national security forces. Additionally, UNAMA had discussions with the Taliban outside of the country. It also held multiple meetings with USFOR-A in Kabul, including with their legal advisers.

On 26 June, UNAMA and a fact-finding team from the AIHRC carried out a joint mission to the area impacted by the airstrikes in Bakwa district, Farah province, extending into Delaram district, Nimroz province. Considering the remoteness of the location and the lack of a permanent United Nations, governmental or military field presence in the area, UNAMA considered the mission to be of significant value in helping to establish facts on the ground.

During the mission, the delegation was able to conduct 21 face-to-face interviews with individuals and community members who were affected by the airstrikes. These included people who were previously unable or unwilling to provide information, particularly due to extreme sensitivities associated with discussing details of civilian casualties related to drug production activities.

The fact-finding team collected lists of victims provided by community elders and health professionals as well as videos and photographs, which were taken by witnesses, victims and local residents in the direct aftermath of the airstrikes on 5 May. The fact-finding team visited and saw some of the impact sites.

According to UNAMA methodology for verifying civilian casualties, a minimum of three different and independent source types is required.¹⁴ For the purposes of this report, information was considered to be reliable and credible, but not yet verified, when confirmed by at least two strong and independent sources. As part of its regular dialogue with USFOR-A concerning civilian

¹⁴ For more information on UNAMA methodology, please see UNAMA, *Protection of Civilians in Armed Conflict: Annual Report 2018*, (23 February 2019), available online at <https://unama.unmissions.org/protection-of-civilians-reports>.

casualties, UNAMA shared its initial concerns, preliminary findings following the mission to Bakwa district, and specific information concerning civilian casualties.¹⁵

For a number of reasons, UNAMA encountered significant challenges in verifying civilian casualties from the 5 May airstrikes. The airstrikes covered a wide geographical and remote area crossing a provincial boundary, involving dozens of impact sites, where telecommunication networks were frequently cut off for days at a time. There was also heightened sensitivity in discussing civilian casualties resulting from these airstrikes with interlocutors due to the involvement of some victims with illegal drug activity, particularly considering the possibility of further airstrikes in the area on remaining drug production facilities. Additionally, several civilian casualties reported to UNAMA concerned migrant workers who had travelled from other provinces to Bakwa district for work, including in the illicit drug industry; following the airstrikes, some of the surviving family members of these victims left the area to unknown parts of the country, which made it difficult for UNAMA to follow up with verification.

This report focuses on the legal analysis surrounding the civilian status of the drug facilities that were targeted and associated workers, and on the scope of harm to the civilian population as a result of the airstrikes. Given the challenges UNAMA faced with verifying civilian casualties according its methodology, civilian casualty figures presented in this report are considered to be the minimum verified civilian casualties, but not representative of the entirety of casualties caused.

BACKGROUND

Airstrikes on drug labs

Military operations by international military forces on drug production facilities or “drug labs”¹⁶ began in Afghanistan in 2008, with a change to the operational plan for the International Security Assistance Force (ISAF), authorizing it to act “with the Afghans against facilities and facilitators supporting the insurgency, in the context of counternarcotics, subject to authorization of respective nations.”¹⁷ In December 2008, the US rules of engagement were expanded to provide its forces similar authority to target drug traffickers in military operations.¹⁸ Approximately 50 alleged drug traffickers were deemed to contribute funds to the insurgency and were put on the joint integrated prioritized target list, referred to as the “kill list”.¹⁹ The change in the ISAF operational plan was opposed by some NATO Member States, with questions raised as to whether

¹⁵ UNAMA shares information about civilian casualty incidents with parties to the conflict to ensure accuracy in its reporting, to assist the parties to take preventative and mitigating measures, and to promote accountability, including providing compensation to victims.

¹⁶ “[T]he term ‘drugs labs’ is a misnomer in the context of drug production in Afghanistan. To many, the word ‘lab’ suggests a sterile and orderly environment, staffed by people in white coats and equipped with equipment... In reality, drug labs in Afghanistan are local buildings in which drugs [...] are processed.” Mansfield, *Denying Revenue or Wasting Money?* p. 23 (see fn 4).

¹⁷ Special Inspector General for Afghanistan Reconstruction (SIGAR), *Counternarcotics: Lessons from the U.S. Experience in Afghanistan* (June 2018) p. 68, available online at <https://www.sigarmil/pdf/lessonslearned/SIGAR-18-52-LL.pdf>; NATO Secretary-General Jaap de Hoop Scheffer quoted in NATO, “NATO steps up counter-narcotics efforts in Afghanistan” (October 10, 2008), available online at: https://www.nato.int/cps/en/natohq/news_50120.htm? (last accessed 24 August 2019); and Deutsche Welle, “NATO Clinches Deal for Tougher Afghan Drug Action” (10 October 2008), available online at: <https://www.dw.com/en/nato-clinches-deal-for-tougher-afghan-drug-action/a-3704305-0> (last accessed 17 September 2019).

¹⁸ United States Department of Defense, “Progress toward Security and Stability in Afghanistan: Report to Congress in accordance with the 2008 National Defense Authorization Act” (June 2019) at 7, available online at: https://dod.defense.gov/Portals/1/Documents/pubs/1230_June-2009Final.pdf.

¹⁹ “Afghanistan’s Narco War: Breaking the Link Between Drug Traffickers and Insurgents: A Report to the Committee on Foreign Relations United States Senate” (10 August 2009) pp. 15-16, available online at: https://fas.org/irp/congress/2009_rpt/afghan.pdf.

targeting traffickers and drug facilities through military action complied with international law.²⁰ In a Congressional Research Service report to US Congress, it was noted that there “appeared to be ongoing objections by some nations that their laws do not permit their soldiers to engage in counter-narcotics operations.”²¹ By the end of 2009, US policy appeared to shift away from a focus on airstrikes targeting drug facilities and traffickers.

According to 2017 Annual Opium Survey by the United Nations Office on Drugs and Crime (UNODC), opium poppy cultivation in Afghanistan steadily increased after 2009, reaching a record high in 2017.²² In November 2017, USFOR-A launched a campaign targeting “Taliban financial networks and revenue streams”, using expanded targeting authorities provided under President Trump’s new South Asia strategy.²³ This campaign started with airstrikes against reported Taliban narcotics production facilities in Helmand province. Afghan security forces also launched similar strikes.²⁴ Regarding this campaign, the Special Inspector General for Afghanistan Reconstruction (SIGAR) noted that “[w]hile U.S. and Afghan forces had targeted heroin laboratories in prior years, the level of attention from senior military commanders and use of aerial bombardment were unprecedented.”²⁵

By April 2018, USFOR-A had conducted 75 airstrikes against narcotics production facilities in Afghanistan since the start of the campaign in November 2017.²⁶ In April 2018 alone, the Afghan and US forces reportedly destroyed a record 29 “Taliban narcotics labs”²⁷ as the aerial campaign expanded into Nimroz and Farah provinces in the west of the country.²⁸ By the end of June 2018, USFOR-A announced having destroyed 154 Taliban targets, including “narcotics production,

²⁰ Ibid. p. 16. See also Susanne Koelbl, “NATO High Commander Issues Illegitimate Order to Kill”, Spiegel Online (28 January 2009), available online at: <https://www.spiegel.de/international/world/battling-afghan-drug-dealers-nato-high-commander-issues-illegitimate-order-to-kill-a-604183.html> (referring to “guidance” issued by US General John Craddock, the NATO Supreme Allied Commander Europe, indicating that it was “no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective”); Matthias Gebauer & Susanne Koelbl, “Order to Kill Angers German Politicians”, Spiegel Online (29 January 2009), available online at: <https://www.spiegel.de/international/world/battling-drugs-in-afghanistan-order-to-kill-angers-german-politicians-a-604430.html> (last accessed 17 September 2019); Judy Dempsey, “Afghan drug fight will follow law’s letter, NATO says” (1 November 2009), available at: <https://www.nytimes.com/2009/02/11/world/asia/11iht-nato.4.20119005.html> (indicating controversy with the proposal for NATO troops in Afghanistan to “fire on individuals responsible for supplying heroin-refining laboratories with opium without need for evidence”, and the objections by some member states that this would violate international law).

²¹ Congressional Research Service, “NATO in Afghanistan: A Test of the Transatlantic Alliance” (3 December 2009) p. 15, available online at: <https://fas.org/sgp/crs/row/RL33627.pdf>.

²² UNODC, “Afghanistan opium survey 2017: Challenges to sustainable development, peace and security” (May 2018) p.4, available online at: <https://www.unodc.org/documents/crop-monitoring/Opium-survey-peace-security-web.pdf>.

²³ SIGAR, “Quarterly Report to the United States Congress” (30 January 2018), p. 60, available online at: <https://www.sigar.mil/pdf/quarterlyreports/2018-01-30qr.pdf> (last accessed 20 September 2019); US Congressional Research Service, “Afghanistan: Background and U.S. Policy in Brief” (1 August 2019), available online at: <https://fas.org/sgp/crs/row/R45122.pdf> (last accessed 20 September 2019).

²⁴ SIGAR reported in its quarterly report published on 30 July 2018 that the Afghan Airforce had destroyed 19 narcotics production facilities since January of that year. See, SIGAR, “Quarterly Report to the United States Congress”, p. 180, <https://www.sigar.mil/pdf/quarterlyreports/2018-07-30qr.pdf>.

²⁵ SIGAR, *Counternarcotics: Lessons from the U.S. experience in Afghanistan*, June 2018, p. xii, <https://www.sigar.mil/pdf/lessonslearned/SIGAR-18-52-LL.pdf>.

²⁶ USFOR-A, “US airstrikes against Taliban revenue expand to western Afghanistan” (7 April 2018), available at: <https://rs.nato.int/news-center/press-releases/2018-press-releases/us-airstrikes-against-taliban-revenue-expand-to-western-afghanistan.aspx> (last accessed 17 September 2019).

²⁷ USFOR-A, “Airstrikes to Destroy Taliban Illicit Revenue Sources” (8 May 2018), available at: <https://rs.nato.int/news-center/press-releases/2018-press-releases/record-month-for-airstrikes-to-destroy-taliban-illicit-revenue-sources.aspx> (last accessed 17 September 2019).

²⁸ SIGAR, *Counternarcotics* at 57 (see fn 25).

storage and trafficking locations, as well as weapons and explosive caches, headquarters and staging areas”.²⁹

UNAMA documented a number of airstrikes by both USFOR-A and the Afghan Air Force on reported drug labs, from November 2017 onwards, often conducted at night, and mainly on empty buildings. In some incidents, UNAMA verified civilian casualties. One such incident occurred on 19 November 2017, when at 11 pm, USFOR-A conducted airstrikes on buildings in the area of a bazaar in Musa Qala district, Helmand province, where opium was reportedly being traded. The home of an alleged drug smuggler was hit by an airstrike, killing him and members of his family. UNAMA verified the death of 10 civilians: one man, three women and six children.³⁰ UNAMA provided its findings on this incident in writing to Resolute Support/USFOR-A and discussed it with the NATO Resolute Support Civilian Casualty Mitigation Team in Kabul on 10 December 2017. While the airstrike was publicly acknowledged by USFOR-A, the Civilian Casualty Mitigation Team denied civilian casualties. In the 2017 US Department of Defense Civilian Casualty report, it explained that Resolute Support investigations “disproved the allegation as surveillance of the house over a significant period of time showed no sign of the presence of a family.”³¹

Towards the end of May 2018, a Taliban commander in Helmand, Mullah Manan, had reportedly ordered all drug labs to move out of urban areas in territory he controlled due to concerns about a rising number of civilians killed from US airstrikes targeting these labs. He reportedly stated in his message that “[w]e must strictly explain to people that if they do not stop drugs factories in public houses they will go to jail” and any Taliban who permitted such facilities would be punished.³²

In its June 2018 report, which focused on “lessons learned” from the US experience in Afghanistan, SIGAR expressed concerns over the aerial campaign and its potential impact on civilians:

[T]he longer-term impact of the air interdiction campaign on drug production, insurgent financing, government corruption, and a host of other drug-related challenges remains uncertain. There is also the risk that expanded air strikes by Afghan and international forces could result in civilian deaths, alienate rural populations, and strengthen the insurgency. Civilian casualties - or public perceptions that the bombings were targeting rural communities with few viable income sources - could result in a greater long-term cost to the coalition than the

²⁹ US Department of Defense, “Press Briefing by Brig. Gen. Lance R. Bunch via Teleconference on the U.S. Counter-threat Finance Campaign and U.S. Air Operations (27 June 2018), available at: <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1562148/departement-of-defense-press-briefing-by-brig-gen-lance-r-bunch-via-teleconferen/> (last accessed 15 September 2019).

³⁰ See Resolute Support, “Afghan, U.S. forces launch new campaign to destroy Taliban funding networks” (20 November 2018), available at <https://rs.nato.int/news-center/press-releases/2017/afghan-us-forces-launch-new-campaign-tbnetworks.aspx> (last accessed 30 September 2019); see also David Mansfield, *Bombing Heroin Labs in Afghanistan: The Latest Act in the Theatre of Counternarcotics*, LSE International Drug Policy Unit (January 2018), available at: <http://www.lse.ac.uk/united-states/Assets/Documents/Heroin-Labs-in-Afghanistan-Mansfield.pdf>; and “Air and ground strikes against Taliban economic base continue” (30 November 2017), available at: <https://rs.nato.int/news-center/feature-stories/2017/air-and-ground-strikes-t-economic-continue.aspx> (last accessed 17 September 2019).

³¹ US Department of Defense, *Annual Report on Civilian Casualties in Connection with United States Military Operations in 2017*, available online at: <https://fas.org/man/eprint/civcas2018.pdf> at 10 (last accessed 29 September 2019).

³² Memphis Barker and Sami Yousafzai, “Taliban commander orders closure of opium labs in towns and cities” *The Guardian*, 28 May 2018, available at: <https://www.theguardian.com/world/2018/may/28/taliban-commander-orders-closure-of-opium-labs-in-towns-and-cities> (last accessed 17 September 2019).

short-term benefit of temporarily disrupting drug production and insurgent financing.³³

SIGAR also raised questions about the extent to which the US Department of Defense, USFOR-A and others were able to effectively calculate financial losses to the Taliban as a result of US aerial operations, emphasizing that “insurgents are funded through a wide array of activities beyond taxing the drug trade”.³⁴ SIGAR cautioned that “[o]verestimating the Taliban’s reliance on the narcotics trade could produce inaccurate assessments of how badly Taliban finances may suffer due to the destruction of labs.”³⁵ In its fourth quarter report of 2018, SIGAR stated that USFOR-A had ended its campaign against “Taliban narcotics sites”.³⁶

The 5 May 2019 airstrike operation in Bakwa district was the first time that UNAMA had received allegations of civilian casualties of such a scale, raising concerns about unprecedented levels of civilian harm resulting from such a type of operation. It indicated a worrying shift in USFOR-A’s targeting policy and practice, with this operation being conducted during the day on buildings that were occupied at the time of the airstrikes.

Methamphetamine production in Afghanistan

While data and information on methamphetamine production in Afghanistan remain relatively scarce, there are indications that methamphetamine is becoming an emerging problem. Methamphetamine, often referred to locally as “crystal”, “sheesha” or “nakh/yakh”, was initially encountered in the western region along the border with the Islamic Republic of Iran, with the first seizures recorded in 2008.³⁷ According to UNODC, methamphetamine seizures have since increased exponentially across Afghanistan.³⁸

Until recently, methamphetamine producers used large amounts of decongestants (pseudoephedrine and ephedrine), which are widely available in Afghanistan, as the precursor chemicals for making methamphetamine.³⁹ Due to the rising costs of these products, they started

³³ SIGAR, *Counternarcotics* at 57 (see fn 25). See also Kyle Rempfer, “Doubts rise over effectiveness of bombing Afghan drug labs”, *Military Times* (5 February 2018), available at: <https://www.militarytimes.com/flashpoints/2018/02/05/doubts-rise-over-effectiveness-of-bombing-afghan-drug-labs/> (last accessed 24 August 2019).

³⁴ SIGAR, *Counternarcotics*, pp. 76-77 (see fn 26).

³⁵ *Ibid.* See also Mansfield, *Denying Revenue or Wasting Money?* at 44-47 (see fn 4) and Mansfield, *Bombing Heroin Labs in Afghanistan*, p. 12 (see fn 30) (“Claims of Taliban control of processing are overstated”).

³⁶ SIGAR, *Operation Freedom’s Sentinel*, 1 October 2018 – 31 December 2019, available at: https://media.defense.gov/2019/Feb/20/2002091191/-1/-1/1/FY2019_LIG_OCOREPORT.PDF at 24 (last accessed on 30 September 2019).

³⁷ UNODC, *Afghanistan Synthetic Drugs Situation Assessment* (January 2017), pp. 8 and 15, available at: https://www.unodc.org/documents/Reports/2017_Afghanistan_Synthetic_Drugs_Assessment_report.pdf.

³⁸ Mark Colhoun, Director of UNODC in Afghanistan, quoted in Ben Farmer, “Afghanistan sees boom in meth production as seizures of illegal drug more than double”, *The Telegraph* (19 August 2019), available at: <https://www.telegraph.co.uk/global-health/terror-and-security/afghanistan-sees-boom-meth-production-seizures-illegal-drug/> (last accessed 21 August 2019). Also see *The Economist*, “Afghan drug barons are branching out into methamphetamines” (5 September 2019), available online at: <https://www.economist.com/asia/2019/09/05/afghan-drug-barons-are-branching-out-into-methamphetamines> (last accessed 12 September 2019). In 2012, the Ministry of Counter-Narcotics identified methamphetamine as “possible an emerging substance” after reporting increasing methamphetamine seizure samples in the Counter Narcotics Police lab, including from Herat, Farah, Faryab, Kandahar, Balkh and Kabul provinces. See the Ministry’s *Afghanistan Drug Report (2012)*, published November 2013, available at: www.mcn.gov.af (last accessed 21 August 2019).

³⁹ According to UNODC, Afghanistan legally imports up to 0.3 tons of pseudoephedrine and 0.05 tons of ephedrine annually, although larger quantities may be illegally brought into the country. For more information, see UNODC, *Afghanistan Synthetic Drugs* (see fn 37). See also David Mansfield and Alex Soderholm, “Long Read: The unknown unknowns of Afghanistan’s new wave of methamphetamine production” (30 September 2019), available online at:

using a locally harvested ephedra plant called “Oman” or “Omani”.⁴⁰ The use of the plant is reported to have reduced methamphetamine production costs by half.⁴¹ The plant is reportedly harvested in Ghor and sold to traders from Bakwa and Gulistan in Farah, as well as Delaram in Nimroz.⁴²

Bakwa district, which borders Helmand and Nimroz provinces, is reported to have a large concentration of drug labs, including methamphetamine labs. Most of the labs are “largely owner-operated, ‘mom and pop’-style businesses located in an old compound or in a building abandoned by a tenant farmer or sharecropper”.⁴³ This is in contrast to the drug labs elsewhere in the country, which are reported to be larger and more specialized or “professional”.⁴⁴ The costs and scale of drug production in Bakwa is reported to be “considerably lower” than in other known locations for processing drugs, namely Gandam Raiz and Musa Qala districts in Helmand province.⁴⁵

Law enforcement responses to illicit drug activities in Afghanistan

The Afghan Government has in the past primarily targeted drug labs using law enforcement responses. Between 2003 and 2008,⁴⁶ the Afghan Special Narcotics Force (Commando Force 333) under the Ministry of Interior Affairs carried out drug interdiction missions, including in remote areas under Taliban control, with military providing only a supporting role. The goal of these operations was to “deliver a legal outcome and to strengthen the capacity of the Afghan government to enforce the law”, including through the seizure of evidence and the arrest of individuals engaged in criminal activities where possible.⁴⁷

Currently, the Counter-Narcotics Police of Afghanistan, with the support of the Special Mission Wing,⁴⁸ leads counter-narcotics efforts by law enforcement personnel in Afghanistan.⁴⁹ This includes specialized units including the National Interdiction Unit (NIU), which conducts interdiction operations and seizures, conducts arrests and executes search warrants in “high-threat environments”.⁵⁰ Between 2009 and 2019, more than 3,500 interdiction operations have been conducted, over 4,000 individuals detained, and more than 2.7 million kg of illicit drugs and precursor chemicals seized.⁵¹

Until recently, methamphetamine production and use did not receive much attention from law enforcement actors in comparison to the production of heroin, opium or other drugs. The total amount of methamphetamine reported to have been seized in Afghanistan between March 2011

<https://blogs.lse.ac.uk/usappblog/2019/09/30/long-read-the-unknown-unknowns-of-afghanistans-new-wave-of-methamphetamine-production/> (last accessed 1 October 2019).

⁴⁰ Farmer, “Afghanistan sees boom in meth production” (see fn 38); Mansfield, *Denying Revenue or Wasting Money?* p. 23 (see fn 4); Mansfield and Soderholm, “New wave of methamphetamine production”, *Ibid*.

⁴¹ Mansfield, *Ibid*; Mansfield and Soderholm, *Ibid*.

⁴² Mansfield and Soderholm, *Ibid*.

⁴³ Mansfield, *Denying Revenue or Wasting Money?*, pp. 26-27 (see fn 4).

⁴⁴ For example, drug labs in Gandam Raiz, Helmand province have been reported to be operating on a larger scale of production. See *ibid*. pp. 23-27.

⁴⁵ *Ibid*. p. 27.

⁴⁶ This Commando Force was repurposed towards counterterrorism operations in 2009.

⁴⁷ Mansfield, *Bombing Heroin Labs in Afghanistan*, pp. 6-7 (see fn 30).

⁴⁸ The Special Mission Wing is Afghanistan’s special operations aviation force supporting the Afghan National Army Special Operations Command and General command of Police Special Units.

⁴⁹ The Counter Narcotics Police of Afghanistan was created in 2003 as a specialist force under the Ministry of Interior Affairs.

⁵⁰ SIGAR, “Quarterly Report to the United States Congress” (30 January 2019), p. 187, available at: <https://www.sigar.mil/pdf/quarterlyreports/2019-01-30qr-section3-counternarcotics.pdf> (last accessed 1 October 2019).

⁵¹ *Ibid*, p. 189; SIGAR, “Quarterly Report to the United States Congress” (30 July 2019), p. 174, available at: <https://www.sigar.mil/pdf/quarterlyreports/2019-07-30qr.pdf> (last accessed 1 October 2019).

and March 2015 was just over 20 kg.⁵² By 2017, UNODC indicated that “increases in the number of methamphetamine seizures, together with reports of methamphetamine manufacture and increases in treatment registrations in certain parts of the country, suggest that synthetic drugs are of growing concern in Afghanistan.”⁵³

Between 15 February and 15 May 2019, law enforcement authorities conducted 1,130 counter-narcotic operations, leading to the seizure of a wide variety of illegal drugs and precursor chemicals, including 351 kg of methamphetamine and 27,419 tablets of 3,4-methylenedioxymethamphetamine (MDMA). Authorities were able to dismantle 11 heroin manufacturing laboratories, arrest 1,338 suspects and seize 170 vehicles, 224 weapons and five radios during this period.⁵⁴ On 5 July 2019, Afghan authorities seized 49 kg of methamphetamine in a single seizure from the fuel tank of a truck as traffickers were attempting to transport the drugs from Farah to Nangarhar province.⁵⁵

FINDINGS

Initial Information

On 5 May 2019, from approximately 11am to 1 pm, USFOR-A carried out a series of airstrikes across multiple areas in Bakwa district, Farah province, which crossed over into Delaram district, Nimroz province. USFOR-A indicated that the airstrikes targeted methamphetamine production facilities, commonly referred to as drug “labs”, that were “controlled and operated exclusively by the Taliban”.⁵⁶

Soon after the incident, allegations of civilian casualties were publicly reported in the media.⁵⁷ Sources reported to UNAMA allegations ranging from 40 to 200 civilian casualties. The Ministry of Interior of Afghanistan reported that coalition airstrikes had destroyed 68 “Taliban drug labs”, killed 150 Taliban members and wounded 40 others, destroying thousands of kilograms of drugs, including methamphetamine, in Ashkin, Spin Karez and Paloshai areas of Bakwa district.⁵⁸ In the media, the district governor of Bakwa stated that 45 civilians were killed in the operation, many of whom were working in the labs, along with 18 Taliban fighters.⁵⁹ Taliban, through its Voice of Jihad website, “categorically reject[ed]” reports that the structures hit in the 5 May operation were Taliban narcotics factories and those killed were Taliban members. Taliban claimed that none of its members were involved in any “work or trade of narcotics” and that all those killed were local farmers and civilians.⁶⁰

UNAMA raised initial concerns during the course of multiple meetings in May with USFOR-A about the reports it had received of civilian casualties resulting from the 5 May airstrikes. According

⁵² UNODC, *Afghanistan Synthetic Drugs* (see fn 37).

⁵³ *Ibid.* p. 33.

⁵⁴ A/73/902; S/2019/493.

⁵⁵ UNODC Afghanistan, “Methamphetamine seizure by MDT in Kabul” (5 July 2019), available from: <https://www.unodc.org/afghanistan/en/methamphetamine-seizure-by-mdt-in-kabul.html> (last accessed 17 September 2019).

⁵⁶ USFOR-A, “Response to UNAMA’s Objections” (see fn 7).

⁵⁷ Pajhwok Afghan News, “Dozens of civilians, forces killed and wounded in Farah” (7 May 2019), available online at: <https://www.pajhwok.com/en/2019/05/06/dozens-civilians-forces-killed-and-wounded-farah> (last accessed 12 September 2019); “Afghan civilians killed in air strikes on Taliban drug labs, local officials say”, Reuters (7 May 2019), available at: <https://www.reuters.com/article/us-afghanistan-airstrike/afghan-civilians-killed-in-air-strikes-on-taliban-drug-labs-local-officials-say-idUSKCN1SD11Z?il=0> (last accessed 21 August 2019).

⁵⁸ Ministry of Interior Statement of 6 May 2019, available at: <https://moi.gov.af/dr/-کارخانه-تولید-و-پرو-س-س-مواد-مخدر-در-فراده-و-نیمروز> (in Dari).

⁵⁹ See Reuters, “Afghan civilians killed in air strikes”, see fn 57.

⁶⁰ Voice of Jihad, “Cultivation and production of narcotics has no relations with the Islamic Emirate” (8 May 2019), available at: <https://alemarahenglish.com/?p=45570> (last accessed 12 September 2019).

to USFOR-A, “all practicable measures were taken to prevent civilian casualties” and its initial assessments determined that there were no civilian casualties resulting from the airstrikes. It indicated that a number of suspected labs had not been hit specifically due to concerns about civilian casualties.⁶¹ USFOR-A had assessed that all individuals inside the targeted structures were Taliban members and could be legally targeted without having to prove that they were directly participating in hostilities.⁶² USFOR-A stated that some of the individuals targeted were working as chemists and logisticians while others were said to be armed guards.⁶³

Fact-finding mission and follow up

On 26 June 2019, UNAMA visited specific airstrike impact sites in Bakwa district that were identified by local sources as having functioned as drug labs. In addition, local sources identified a number of impact sites that had been residential homes in which drug processing had not taken place.⁶⁴ UNAMA reviewed videos and photos, which were taken by witnesses, victims and local residents in the direct aftermath of the 5 May airstrikes, showing that they also hit a marketplace with shops, a fuel station, and vehicles. UNAMA visited these sites during the mission to Bakwa district and corroborated the information displayed in the videos and photos.

Since the incident, UNAMA has not been able to corroborate the USFOR-A position that the drug labs targeted during the airstrikes were controlled and operated exclusively by the Taliban. Information received and assessed by UNAMA from multiple credible sources from the area, as well as from the Afghan authorities, including intelligence officials and members of the Afghan national security forces, has indicated that the drug labs were owned and operated by criminal groups with connections to international drug trafficking networks. The owners of the labs and the workers themselves were identified as operating separately from the Taliban. The Taliban does, however, reportedly extract “taxes” from the farmers and the lab owners involved in methamphetamine production, as it does with other businesses in territories where they exert control or influence, including other forms of drug production such as opium and heroin.⁶⁵ The Taliban also reportedly provide security for the transport of drugs out of the country.⁶⁶ In relation to methamphetamine production, the Taliban reportedly tax the Oman plant in Ghor province on a certain rate per kilogram where it is harvested, before being loaded on to trucks and transported to Bakwa district.⁶⁷

⁶¹ USFOR-A, “Response to UNAMA’s Objections” (see fn 7).

⁶² Email communications with a USFOR-A Legal Advisor on 20 August 2019, on file with UNAMA.

⁶³ Email communications with a USFOR-A Legal Advisor on 24 August 2019, on file with UNAMA.

⁶⁴ According to David Mansfield, a Senior Fellow at the London School of Economics who has conducted more than two decades of research on the drug industry in Afghanistan, it is unlikely that individuals would be living inside the same building where the drugs were being processed (telephone interview, 21 August 2019). However, as Mansfield and Soderholm point out, some shopkeepers in Abdul Wadood bazaar in Bakwa who have serviced the methamphetamine and heroin labs in the district have “all but shut their premises in the bazaar and now conduct any residual trade from their homes”, suggesting that the Oman plant and other precursor materials might have been kept in residential homes. Mansfield and Soderholm, “New wave of methamphetamine production” (see fn 39).

⁶⁵ See also Farmer, “Afghanistan sees boom in meth production” (see fn 38) (“Taliban insurgents who are already estimated to make tens of millions a year from opium are now taxing criminal gangs making meth in Western Afghanistan.”); and David Mansfield, cited in Mike Power, “Behind the U.S.’s Bogus War on Taliban Drug Labs” VICE (18 September 2019) (“Few labs are owned and operated by Taliban fighters personally; they instead they (sic) levy taxes on owners. Taliban commanders extract a \$6/kilo tax on any “powder” drug produced at labs in its territory, whether that is heroin or morphine or meth, said Mansfield”).

⁶⁶ Based on interviews conducted by UNAMA during its mission to Farah province in June 2019.

⁶⁷ According to David Mansfield and Alex Soderholm, Afghan authorities also levy a “tax” as the Oman crop is transported to the drug labs, ranging from US\$100 to US\$150 per truck, including in Delaram district in Nimroz. Mansfield and Soderholm, “New wave of methamphetamine production” (see fn 39).

Through its fact-finding into the impact on civilians of the incident, UNAMA received specific and detailed information of 145 civilians (89 killed, 52 injured and four undetermined) affected by the airstrikes in Bakwa and Delaram districts of Farah and Nimroz provinces respectively, including 80 children and nine women. Thirty of these alleged civilian casualties were identified as drug lab workers (including four children between the ages of 15 and 17). UNAMA is still in the process of verifying many of these reports. Of the 145 individuals reportedly killed or injured, UNAMA has verified 39 civilian casualties (30 deaths, five injured and four whose status of killed or injured remains undetermined), including 14 children and one woman. Amongst the verified civilian deaths, UNAMA determined that 17 of them – all adult males - were working in the drug labs.

UNAMA received reliable and credible information to substantiate at least a further 37 more civilian casualties (30 deaths and seven injured), including 30 children and two women. It is working to further verify these civilian casualties. UNAMA has not been able to corroborate information concerning the additional 69 persons reported killed or injured.

In one incident on 5 May in Shagai village of Bakwa district, multiple reliable and credible sources reported that three children were killed when an airstrike impacted their home. After one strike hit close to the house, the father shouted to his family members to run away from the house before a second bomb was dropped on the house. Three young boys, aged between one and a half to seven years old, were unable to escape in time. UNAMA has verified the death of one of the boys, as well as the injury of another boy around 12 years old who was in a neighbouring house. UNAMA also received specific information about the injury of a girl around four to five years old and a boy around two years old, relating to the same incident, and is seeking to verify the case.

In another incident in the same area, multiple reliable and credible sources reported that 12 members of the same extended family were killed and injured when an airstrike hit their house. UNAMA verified seven civilian deaths (including five children) and three injured civilians (including two children). For two of the children, UNAMA has not yet been able to determine whether their current status is injured or killed as information was received from sources at different points in time.

During the mission to Bakwa district, the fact-finding team visited an impact site where an airstrike on a house resulted in five civilian casualties (three deaths, including two children, and two injured), according to multiple reliable and credible sources. According to witnesses, two aerial strikes were conducted. The first one reportedly damaged the house. A few minutes later when people from the surrounding area gathered to see what had occurred, a second airstrike hit the same location, causing the civilian casualties. In addition to interviewing elders from the area and a victim of that incident, UNAMA visually documented the impact of the strike during the visit to the site. It has verified four of the five civilian casualties reported from that specific incident (three deaths and one injured).

UNAMA also verified the deaths of 17 men due to an airstrike on a drug lab located in Delaram district of Nimroz province. Another man who was nearby was injured.

Individuals interviewed by UNAMA and AIHRC reported that many of the workers inside the drug labs in Bakwa district had travelled from other provinces in Afghanistan, including Helmand and Ghor provinces, looking for work and were involved in the drug industry for financial reasons. Multiple sources reported that due to the absence of legal means of work, the only realistic option to make a living in Bakwa district was to work in the labs, with women reportedly earning half the daily wage (around 300 AFN/3.80 USD) of that earned by men (around 600 AFN/7.60 USD).⁶⁸

⁶⁸ According to David Mansfield (see fn 64 for reference), it is unlikely that women would have been directly involved in working in drug labs, particularly in that area; rather, they may have been employed in preparing food or providing other supporting work to the lab workers in an adjacent property (telephone interview, 21 August 2019).

Elders from Bakwa district did not deny the presence of drug production facilities in their region. They emphasized the suffering of individuals and families in their communities, many of whom had started working in the drug facilities as a means of economic survival. They blamed the drug lab owners for placing them at risk, rather than the parties to the conflict.

Following the mission to Bakwa district, UNAMA shared its preliminary findings with USFOR-A in June and July and then shared information on multiple occasions concerning civilian casualties as UNAMA progressed through its verification process through to September. USFOR-A maintained its position that no civilian casualties resulted from the 5 May operation and no women or children were present or in the vicinity of the structures that were targeted; according to USFOR-A, all personnel working inside the labs were men.⁶⁹ According to USFOR-A, its original assessment of zero civilian casualties was based on “security pillar responses, post-strike open source reporting, and a CIVCAS investigation.”⁷⁰ USFOR-A stated that as of 13 September, it was “not privy to any security pillar responses or open source reporting alleging CIVCAS”. However, it further stated that, “based on the kinetic nature of the operation and UNAMA's allegation, it is possible there was a CIVCAS. Even with extensive pre-strike pattern of life assessments to mitigate CIVCAS, CIVCAS is conceivable.”⁷¹

LEGAL FRAMEWORK

The situation in Afghanistan is characterized by a number of non-international armed conflicts between the Afghan national security forces and international military forces supporting the Government of Afghanistan and various non-State armed opposition groups, as well as between non-State armed opposition groups.

In a non-international armed conflict, article 3 common to the Geneva Conventions establishes minimum standards that parties to a conflict shall respect. Additionally, where applicable, the provisions of Additional Protocol II of 1977, to which Afghanistan is a party, also form part of the governing legal framework. The United States has signed, but not ratified, Additional Protocol II.⁷² The rules of customary international law relevant to non-international armed conflicts are also applicable and are binding on all states without the need for formal adherence. The customary rules regulating armed conflicts between states and armed opposition groups are applicable to all parties to the conflict, whether a state or an armed opposition group.

Under international humanitarian law, parties to a conflict are obligated to respect principles of distinction, precaution and proportionality in the conduct of hostilities, including when planning military operations. In addition, to international humanitarian law, international human rights law also forms part of the legal framework. As such states must respect their obligations under international human rights law with respect to individuals within their territory or subject to their jurisdiction. In addition, non-state actors that have effective control of a territory and exercise government-like functions must respect human rights norms.

Direct attacks against civilians or civilian objects are prohibited by international humanitarian law and may amount to war crimes.⁷³ The principle of distinction states that parties to the conflict

⁶⁹ Email communications with USFOR-A on 24 September 2019, on file with UNAMA.

⁷⁰ Email communications with USFOR-A on 13 September, on file with UNAMA.

⁷¹ Ibid.

⁷² The United States is nevertheless bound by norms of customary international law, which are reflected in provisions of Additional Protocol II.

⁷³ ICRC Customary International Humanitarian Law Study, Rules 1 and 7; Rome Statute of the International Criminal Court, Article 8(2)(e)(i).

must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants and military objectives and must not be directed against civilians or civilian objects.⁷⁴ Moreover, children in armed conflict are entitled to special respect and protection.⁷⁵

Civilians are entitled to protection from attack unless, and for such time, as they directly participate in hostilities.⁷⁶ State practice establishes this as a norm of customary international law applicable in both international and non-international armed conflicts.⁷⁷ Persons are considered to be directly participating in hostilities when they carry out hostile acts in support of a party to the conflict by directly causing harm to another party. These acts must be likely to adversely affect the military operations or military capacity of the adversary. In cases of doubt, the person in question must be presumed to be protected against direct attack.⁷⁸

Attacks that may be expected to cause incidental loss of civilian life and injury to civilians, which would be excessive in relation to the concrete and military advantage anticipated, are prohibited under international humanitarian law and may amount to war crimes.⁷⁹ Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁸⁰

Legality of airstrikes targeting drug labs

Under international humanitarian law, objects that contribute economically or financially to the war effort of a party to a conflict may not be lawfully made the target of attack on that basis alone as they do not fulfil the definition of a military objective under international humanitarian law.

International humanitarian law sets out that military objectives are limited to “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.”⁸¹ The definition requires that the advantage to be gained must be a military one, rather than an economic or financial one, and it must be concrete. An object that financially contributes to a group that engages in hostilities represents an insufficient nexus to the fighting for it to be classified as a legitimate military target. While economic support may be indispensable for the overall war effort, it is inherently indirect in nature and does not constitute an integral part of the hostilities.

The US has long held the position that economic objects that contribute to “war-supporting” or “war-sustaining” industries are legitimate military targets.⁸² The US Department of Defense Law

⁷⁴ 1977 Additional Protocol II to the Geneva Conventions, Article 13(2); ICRC Customary International Humanitarian Law Study, Rules 1 and 7.

⁷⁵ 1977 Additional Protocol II to the Geneva Conventions, Article 4(3); 1989 Convention on the Rights of the Child, Article 38; and ICRC Customary International Humanitarian Law Study, Rule 135.

⁷⁶ ICRC Customary International Humanitarian Law Study, Rule 6.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ ICRC Customary International Humanitarian Law Study, Rules 14 and 156.

⁸⁰ See Rule 15, ICRC Customary International Law Study and Article 13, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁸¹ Article 52(2) of the 1977 First Additional Protocol to the Geneva Conventions; State practice has enshrined the same definition of military objectives in a customary international law norm applicable to both international and non-international armed conflicts. See ICRC, Customary International Humanitarian Law Study, Rule 8.

⁸² USFOR-A, “Response to UNAMA’s Objections” (see fn 7); see also US Department of Defense Law of War Manual, p. 214: “Although terms such as ‘war-fighting,’ ‘war-supporting,’ and ‘war-sustaining’ are not explicitly reflected in the treaty definitions of military object, the United States has interpreted the military objective definition to include these concepts”.

of War Manual states that it may be “imperatively demanded by the necessities of war to seize or destroy enemy property in order to diminish the enemy’s ability to conduct or sustain operations”.⁸³ Previous ISAF operations against narcotics labs and narcotics are cited as an example of such operations.⁸⁴

According to USFOR-A, and in line with US policy, the 5 May airstrikes targeted methamphetamine labs that were “directly used to fund the Taliban’s warfighting efforts”.⁸⁵

The position that treats “war sustaining” industries as legitimate military targets is not supported by international humanitarian law. In particular, it is not in accordance with the principle of distinction, a fundamental principle of the conduct of hostilities, and undermines it by ultimately denying protection from attack substantial parts of the economic and finance infrastructure, located in the territory of, or controlled by, a party to a conflict.

Legality of airstrikes targeting persons working in drug labs

International humanitarian law prohibits direct attacks against civilians. For the purposes of the principle of distinction, civilians are defined as persons who are not members of the armed forces or of organized armed groups. In the context of non-international armed conflicts, the term ‘organized armed groups’ refers exclusively to the armed or military wing of non-state parties as opposed to other activities and forms of support.⁸⁶ Based on the interpretative guidance of the International Committee of the Red Cross on the notion of direct participation in hostilities under international humanitarian law, which has been followed by a number of United Nations human rights mechanisms and monitoring missions, “the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities”.⁸⁷ Individuals who are supporting an armed opposition group – politically, financially or otherwise - but who do not have a continuous combat function in the organized armed group, are therefore not considered to be members of the armed group. As civilians they are protected from attack, unless and for such time as they directly participate in the hostilities.⁸⁸

For conduct to amount to direct participation in hostilities that would warrant a loss of protection from attack, there must be a direct, causal link between the acts in question and the resulting harm; they must be an integral part of combat operations.⁸⁹ This requirement excludes indirect acts that may contribute to the general war effort of a party, but that do not directly cause harm. This would include, for example, financial or political support to a party to a conflict.⁹⁰ In cases of doubt, the individuals must be presumed to be civilian and protected from attack.⁹¹

The act of manufacturing or processing drugs and the corresponding revenue generated that may be used to finance the war effort of a party to the conflict has only an indirect impact on the military capacity of that party.

UNAMA notes that according to USFOR-A, “comprehensive intelligence confirmed that all personnel inside of the laboratories were Taliban combatants.”⁹² However, USFOR-A also

⁸³ US Department of Defense Law of War Manual, pp. 287-288.

⁸⁴ Ibid.

⁸⁵ USFOR-A, “Response to UNAMA’s Objections” (see fn 7).

⁸⁶ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, p. 32.

⁸⁷ Ibid. pp. 33-35.

⁸⁸ ICRC Customary International Humanitarian Law Study, Rule 6.

⁸⁹ Ibid. pp. 51-52.

⁹⁰ Ibid.

⁹¹ ICRC Customary International Law Study, Rule 6.

⁹² USFOR-A, “Response to UNAMA’s Objections” (see fn 7).

indicated that this did not mean that these individuals were performing a combat function at the time of the operation.⁹³ USFOR-A clarified that the US imputes the “hostile intent” of a non-state organized armed group to all of its members, regardless if that member is performing a combat function. USFOR-A considered all personnel inside the labs to be targetable on the basis of their purported membership. According to USFOR-A, indications that someone is a member of a non-state organized armed group include “following directions issued by the group's leaders, performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role.”⁹⁴ USFOR-A does not consider it necessary to prove that individuals are directly participating in hostilities in order to consider them to be legitimate targets, nor do they need to have a combat function to be targetable according to US policy.⁹⁵

International humanitarian law does not support a position that considers individuals members of an organized armed group solely based on their engagement in activities that support the general war effort of the armed group, including when this involves following directions from the armed group.⁹⁶ Such individuals are civilians entitled to protection from attack. Any other interpretation would erode the principle of distinction between civilians and combatants, fundamental to international humanitarian law and the protection of civilians in Afghanistan and beyond.

CONCLUSION

Based on its fact-finding and legal analysis, UNAMA and OHCHR have determined that both the sites and individuals targeted in the USFOR-A airstrikes on 5 May 2019 in Bakwa district of Farah province and Delaram district of Nimroz province were civilian and, as such, should have been protected from attack.

UNAMA is extremely concerned about the high levels of harm caused by the USFOR-A airstrikes of 5 May to the civilian population in Bakwa, including workers in drug labs, their families and people living in the vicinity of the labs.

UNAMA was not able to corroborate the position of USFOR-A that the locations targeted by the airstrikes constituted legitimate military targets. UNAMA found that the civilian structures that were allegedly used as drug labs and were hit during the airstrikes did not have a sufficient nexus to the Taliban’s war-fighting operations to warrant their classification as military objectives. The targeting of the drug labs did not offer a definite military advantage to USFOR-A as the damage

⁹³ Email communications with a USFOR-A Legal Adviser on 20 August 2019, on file with UNAMA.

⁹⁴ Email communications with a USFOR-A Legal Adviser on 5 August 2019, on file with UNAMA; these mirror the indications set out in the US Department of Defense Law of War Manual for individuals who are deemed by the US to be “functionally (i.e. constructively)” part of a non-state armed group, even if not formally a member of the group. See section 5.7.3.2.

⁹⁵ Email communications with a USFOR-A Legal Adviser on 20 August 2019, on file with UNAMA; US Department of Defense Law of War Manual, section 5.7.1 (“the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.”)

⁹⁶ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, May 2009 at p. 32 “The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under [international humanitarian law], the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”

caused was mainly financial in nature. Moreover, some of the targeted structures did not appear to have any connections to drug-processing activities, including residential homes.

The civilian status of the individuals affected by the 5 May airstrikes is not in question. Based on information gathered by UNAMA, the personnel working inside the labs were not performing combat functions, and were therefore entitled to protection from attack;⁹⁷ involvement in illicit drug activity would not qualify as direct participation in hostilities. Furthermore, UNAMA found that while some of the civilians killed or injured in the airstrikes were working in the drug labs, others – including women and children – were not.

Beyond the impact of the 5 May operation alone, UNAMA is gravely concerned about the possible wider implications of the US position on targeting war-sustaining objects. To consider that objects lose their protection from attack on the basis of their financial contribution to the enemy's war effort is a violation of the fundamental principle of distinction, placing broader civilian infrastructure at risk. Similarly, individuals who are neither performing a continuous combat function for the armed group, nor directly participating in hostilities, cannot be targeted on the basis of a perceived affiliation with an armed opposition group. Such a position may amount to a loss of protection for an important segment of the civilian population.

The extreme and wide-ranging harm to the population in Afghanistan and the broader region caused by the illicit drug industry is well documented, and in particular the growing threat posed by the methamphetamine industry, including adverse health, environmental and societal impacts. However, the appropriate – and legal – response to illicit drug activity is through law enforcement, rather than through military operations. UNAMA notes that United Nations Security Council resolutions on Afghanistan address the illicit drug industry through trade embargoes and asset freezes, rather than through the military targeting of revenue-generating objects.⁹⁸

UNAMA highlights that under the international drug conventions,⁹⁹ as well as in the outcome document of the thirtieth special session of the United Nations General Assembly on the World Drug Problem, all United Nations Member States committed to effective drug-related crime prevention and law enforcement measures.¹⁰⁰ States also committed to respecting, protecting and promoting all human rights and fundamental freedoms and the rule of law in the development and implementation of drug policies.¹⁰¹ In a report submitted to the Human Rights Council in September 2018, the United Nations High Commissioner for Human Rights noted “some alarming tendencies towards a deeper militarization of the responses by States to counter drug-related crimes”. She cautioned that “excessive use of force is more likely to occur when military or special security forces are involved in drug operations” and that “such approaches have disproportionately affected vulnerable groups and has repeatedly resulted in serious human rights violations.”¹⁰²

UNAMA recognizes the challenges inherent in conducting law enforcement operations in areas under Taliban-control or where the Taliban has significant influence. It notes that such operations

⁹⁷ ICRC Customary International Humanitarian Law Study, Rule 6.

⁹⁸ See for example Security Council Resolution 2255 (2015), paras. 1-16.

⁹⁹ The Single Convention on Narcotic Drugs of 1954 as amended by the 1972 Protocol (UNTS vol. 976, No. 14152); the Convention on Psychotropic Substances of 1971 (UNTS, vol. 1019, No. 14956); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (UNTS, vol. 1582, No. 27627).

¹⁰⁰ *Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem, Thirtieth Special Session* (19-21 April 2016), pp. 10 and 17. Additionally, the outcome document includes a commitment to “enhance the capacity of law enforcement agencies to detect and identify new psychoactive substances and amphetamine-type stimulants, including methamphetamine” (at p. 18).

¹⁰¹ *Ibid.* p. 14.

¹⁰² A/HRC/39/39, para. 27.

have been, and continue to be, carried out by the Counter-Narcotics Police, leading to seizures, arrests and judicial proceedings.¹⁰³

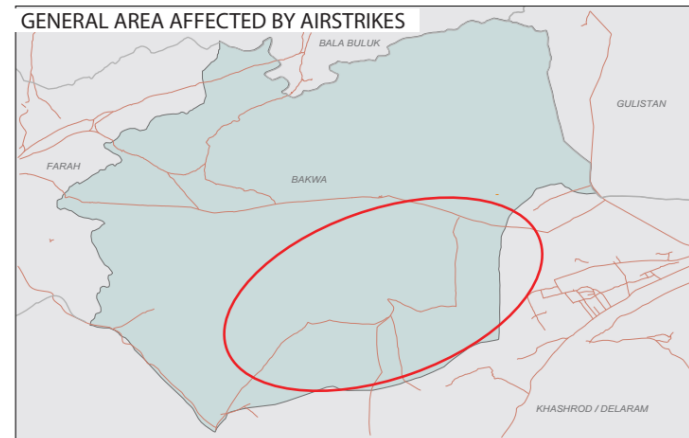
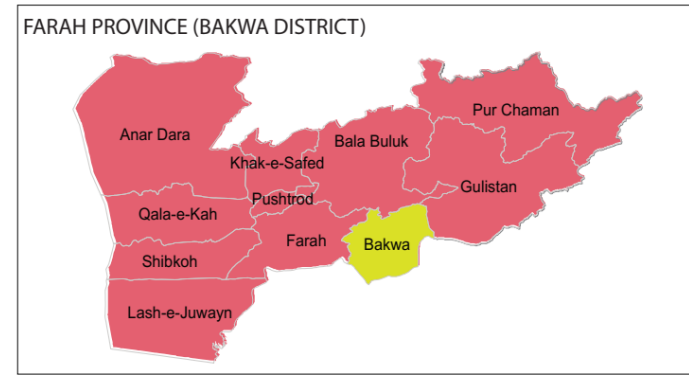
RECOMMENDATIONS

In the light of UNAMA findings and of its assessment of the civilian status of the drug labs and workers, as well as the scope of civilian harm caused by the 5 May 2019 airstrikes in Bakwa district, Farah province and Delaram district, Nimroz province, which extended beyond the labs, UNAMA urges USFOR-A to:

- Conduct an independent and transparent investigation to examine the impact on civilians from the 5 May operation and to make public the findings as well as measures taken to ensure accountability, including the appropriate redress provided to victims and their family members;
- Cease aerial bombardments and other military operations targeting drug production facilities and associated workers;
- Review its targeting policies towards objects and individuals associated with “war-sustaining” activities to ensure that they are aligned with international humanitarian law;
- Strengthen the exchange of information and, as appropriate, drug-related criminal intelligence with Afghan law enforcement agencies as a means of maximizing the effectiveness of law enforcement responses to illicit drug activity; and
- Work with the Government of Afghanistan to ensure that sufficient resources are allocated to Afghan law enforcement agencies to strengthen their ability to conduct such counterdrug operations more effectively.

¹⁰³ For example, see Ministry of Interior Affairs of Afghanistan, “Afghan Counter-Narcotics Special Operation Police Destroy Heroin Labs in Nangarhar Province” (26 January 2019), available at: <https://moi.gov.af/en/afghan-counter-narcotics-special-operation-police-destroy-heroin-labs-nangarhar-province> (last accessed 23 September 2019). ; and “CNPA Seized 170kg of Illicit Drugs in Nangarhar” (23 July 2019), available at: <https://moi.gov.af/en/cnпа-seized-170kg-illicit-drugs-nangarhar> (last accessed 23 September 2019).

ANNEX I: Map of General Area Affected by Airstrikes



Sources: OHCHR / UNAMA
The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.