## Congress of the United States

Washington, DC 20510

October 7, 2021

The Honorable Lloyd J. Austin III Secretary of Defense 1000 Defense Pentagon Washington, D.C. 20301-1000

Dear Secretary Austin,

We are writing to you regarding the August 29th unmanned airstrike that killed multiple civilians in Afghanistan, including an aid worker and seven children. Those killed included Zemari Ahmadi and three of his children, Zamir (age 20), Faisal (age 16), and Farzad (age 10); Mr. Ahmadi's cousin Naser (age 30); and children Arwin (age 7), Benyamin (age 6), Hayat (age 2), Malika (age 3), and Somaya (age 3).<sup>1</sup> After weeks of maintaining the mission had been successful, the Pentagon recently admitted that this retaliatory strike, meant to target ISIS-K for the August 26th attack on the Kabul airport that killed 13 U.S. service members and at least 170 Afghans, was a "tragic mistake."<sup>2</sup> The Department of Defense's (DoD, or the Department) tendency to wrongly target innocent civilians and significantly under-investigate and undercount civilian casualties must end. We strongly urge you to take a more thoughtful look at both of these issues.

## Failure to Prevent Civilian Harm

In a press conference September 1st, chairman of the Joint Chiefs of Staff Gen. Mark Milley called the Kabul Hellfire missile strike a "righteous" strike that correctly followed procedures. On September 17th after reporting by media outlets stated that civilians had been killed, Gen. Milley said, "This is a horrible tragedy of war and it's heart wrenching...We are committed to being fully transparent about this incident. In a dynamic high-threat environment, the commanders on the ground had appropriate authority and had reasonable certainty that the target was valid, but after deeper post-strike analysis our conclusion is that innocent civilians were killed."<sup>3</sup>

<sup>&</sup>lt;sup>1</sup> Just Security, "Questions to Investigate U.S. Drone Strike in Kabul: An Alleged Killing of 10 Civilians," Ryan Goodman, Sarah Butterfield, Siven Watt, and Heather Zimmerman, September 13, 2021, <u>https://www.justsecurity.org/78198/we-drafted-questions-to-investigate-u-s-august-29-drone-strike-in-kabul-an-alleged-killing-of-10-civilians/.</u>

<sup>&</sup>lt;sup>2</sup> National Public Radio (NPR), "Pentagon Reverses Itself And Now Says A Deadly Kabul Drone Strike Was An Error," Vanessa Romo, September 17, 2021, <u>https://www.npr.org/2021/09/17/1038381206/drone-attack-afghanistan-civilians-pentagon.</u>

<sup>&</sup>lt;sup>3</sup> The Military Times, "'It was a mistake.' CENTCOM admits Aug. 29 drone strike killed civilians, not ISIS," Meghann Myers and Robert Burns, September 17, 2021, <u>https://www.militarytimes.com/breaking-news/2021/09/17/pentagon-reverses-itself-calls-deadly-kabul-strike-an-error/.</u>

The Kabul strike followed a now-familiar pattern in which DoD's stated commitment to the protection of civilians does not reflect reality. For example, in Iraq and Syria, while claiming this campaign to be "the most precise in history," credible monitors estimate that U.S.-led Coalition operations killed between 8,309–13,176 civilians.<sup>4</sup> And despite the Obama and Trump administrations' claims of safeguards against civilian harm from U.S. lethal strikes outside recognized war zones,<sup>5</sup> civilian harm has also been a persistent result of these strikes. Estimates from the Bureau of Investigative Journalism found that U.S. drone strikes have killed between 910 and 2,200 civilians.<sup>6</sup> According to Airwars, a total of at least 22,679, and potentially as many as 48,308 civilians have been likely killed by U.S. airstrikes in the last twenty years.<sup>7</sup>

We urge you to use this latest tragedy of civilian harm as an inflection point and an opportunity to change course. In particular, we request to know exactly what procedures govern U.S. strikes, the chains of command used to vet these procedures, and how these procedures relate to and inform the annual congressional requirement to report on civilian casualties "that were confirmed, or reasonably suspected, to have resulted in civilian casualties that the Department continues to defy."<sup>8</sup> We must do everything in our ability to ensure all future U.S. military operations prevent harm to civilians.

## **Responding to Civilian Harm**

We appreciate that DoD promptly investigated and publicly acknowledged immense civilian harm arising from the strike in Kabul and is conducting further investigations. We also appreciate your support mentioned during your testimony before the House Armed Services Committee on September 29<sup>th</sup> for evacuating the family members and Mr. Ahmadi's coworkers at the U.S.-registered California-based charity Nutrition and Education International.

Now, it is essential that those evacuations move forward swiftly before Mr. Ahmadi's family members and fellow aid workers are put at even greater risk for their now-public association with a U.S.-based charity as a result of this strike. It is also essential that the Department also move forward swiftly to offer *ex gratia* or condolence payments and other appropriate amends in accordance with the families' preferences. We look forward to your updates on when these offers of evacuations and condolence payments will be extended.

Additionally, prompt investigations, acknowledgement, and amends should not occur only in high-profile tragedies such as this one. Many credible reports of civilian harm have been

library/procedures\_for\_approving\_direct\_action\_against\_terrorist\_targets/download.

<sup>&</sup>lt;sup>4</sup> Airwars, "US-led Coalition in Iraq and Syria," September 23, 2021, <u>https://airwars.org/conflict/coalition-in-iraq-and-syria/.</u>

<sup>&</sup>lt;sup>5</sup> The Presidential Policy Guidance (PPG) and Principles, Standards, and Procedures (PSP), May 22, 2013, https://www.justice.gov/oip/foia-

<sup>&</sup>lt;sup>6</sup> The Bureau of Investigative Journalism, "Drone Warfare,", <u>https://www.thebureauinvestigates.com/projects/drone-war.</u>

<sup>&</sup>lt;sup>7</sup> Airwars, "Tens of thousands of civilians likely killed by US in 'Forever Wars'," Imogen Piper and Joe Dyke, September 6, 2021, <u>https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/</u>.

<sup>&</sup>lt;sup>8</sup> National Defense Authorization Act for Fiscal Year 2018, Public Law 115-91.

documented and brought to DoD's attention from multiple parts of the world, yet have been under-investigated and unacknowledged.<sup>9</sup> Just like the victims and survivors of the strike in Kabul, these families deserve to have their harm investigated and recognized. It is clear from your response to the Kabul strike that DoD has the ability to conduct investigations, sometimes without boots on the ground, with the help of credible information from the media and nongovernmental organizations. We urge you to now undertake rigorous investigations in all the other places and for all the other incidents in which U.S. operations have threatened civilians, including other strikes in Afghanistan as well as Yemen, Somalia, Iraq, Syria, and Libya and to recognize and amend harm when harm is confirmed.<sup>10</sup>

We wrote to you earlier this year about our concerns with the June 2021 annual report to Congress on civilian casualties in connection to U.S. military operations.<sup>11</sup> The Department reported 23 civilians killed and 10 civilians injured as a result of U.S. military operations last year, but estimates from credible civilian casualty monitors and the United Nations suggest that number is likely nearly five times higher.<sup>12</sup> We again strongly request that you review why these significant discrepancies in civilian casualty counts persist. We further ask you to take steps to ensure that assessments and investigations of civilian harm from U.S. military operations give greater consideration to reliable sources of external information, rather than relying solely on internal U.S. military records and sources. As we highlighted in our previous letter, internal records remain important when the military can confirm its role in an operation based on the location and time of an external report of civilian casualties, but internal reviews cannot independently confirm civilian death or injury without a more thorough investigation. Additionally, using the same sources of information used to plan the operation and verify its results without visiting the site of strikes or seeking information from witnesses and survivors, cannot give a clear and accurate account of the possible risks to civilian lives and the unfortunate result of civilian casualties.

Our previous letter also noted with alarm that the Department offered zero *ex gratia* payments to grieving families in 2020. This is despite repeated authorization and funding from Congress<sup>13</sup>, the congressionally mandated development of a new interim policy on *ex gratia*, and the large number of cases over many years where the Department has confirmed civilian casualties and has a means of contacting survivors. This was especially striking last year, given that the Department could have used its \$3 million in authorized funding to offer *ex gratia* to every single civilian that the Department confirmed harmed in 2020<sup>14</sup>, with significant funding to

<sup>&</sup>lt;sup>9</sup> Just Security, "Grading DOD's Annual Civilian Casualties Report: "Incomplete"," Daniel R. Mahanty and Rita Siemion, May 7, 2020, <u>https://www.justsecurity.org/70063/grading-dods-annual-civilian-casualties-report-incomplete/.</u>

 $<sup>^{10}</sup>$  *Id*.

<sup>&</sup>lt;sup>11</sup> U.S. Elizabeth Warren, "Warren, Khanna Urge Defense Secretary to Review DoD's Significant Undercounting of Civilian Casualties," press release, July 6, 2021, <u>https://www.warren.senate.gov/oversight/letters/warren-khanna-urge-defense-secretary-to-review-dods-significant-undercounting-of-civilian-casualties.</u>

<sup>&</sup>lt;sup>12</sup> Airwars, "Pentagon annual report declares 85 civilian deaths in recent US actions," June 2, 2021, https://airwars.org/news-and-investigations/pentagon-annual-report-declares-85-civilian-deaths-in-recent-us-actions/

<sup>&</sup>lt;sup>13</sup> Center for Civilians in Conflict, "Making Amends: A Guide to US Law and Policy on Post-Harm Amends," Madison Hunke, January 7, 2021, <u>https://civiliansinconflict.org/blog/making-amends-a-guide-to-us-law-and-policy-on-post-harm-amends/</u>.

<sup>&</sup>lt;sup>14</sup> Department of Defense, "Annual Report on Civilian Casualties In Connection With United

spare. We have yet to receive a response to our previous letter and again request that you explain why zero *ex gratia* payments were made last year despite these facts, as well as the steps you plan to take to improve the Department's use of *ex gratia* funding, and facilitate the receipt of *ex gratia* requests from civilians.

In June 2020, we introduced the Protection of Civilians in Military Operations Act, bicameral legislation that would enhance reporting on civilian casualties resulting from U.S. military operations, improve investigations into civilian casualties, and strengthen resources for the Department's policies and practices relating to civilian casualty prevention and responses.<sup>15</sup> You do not have to wait for this legislation to pass to impose these new requirements for DoD to uphold its responsibilities addressing civilian casualties. We continue to urge you to adopt all relevant provisions of this legislation, specifically: (1) to include a list of each advise, assist, accompany, and enable (A3E) mission during which civilian casualties or human rights abuses by foreign partner forces were observed or later reported in your annual civilian casualties report; (2) require U.S. military commanders to select an officer from outside their unit or chain of command to conduct an investigation into civilian casualties arising from that unit's or command's military operations; (3) require each commander of a geographic combatant command to establish an uninterrupted line of communication between his or her command and the Chief of Mission (or the Chief's designee) in any country in which a command is conducting military operations, in order to field and coordinate reports of civilian casualties resulting from U.S. military operations undertaken by a command in a given country; and (4) establish, and annually update, a central, searchable, and publicly accessible database for all DoD reports of investigations into the civilian casualties resulting from U.S. military operations, and the results of such investigations.

For too long, U.S. rhetorical commitments to civilian protection have not lived up to reality. The strike in Kabul was the latest example of that persistent fact, and we urge you to seize this moment to reckon with the civilian harm from U.S. operations and take significant steps to prevent and respond to harm. All the costs, benefits, and consequences of military action needs to be seriously taken into account, to include doing everything we can to prevent and respond to civilian harm. Strengthening investigations, accurately and transparently reporting on civilian harm, expressing condolences for harm when it occurs, and improving future operations with lessons learned from these incidents are all essential steps that reinforce the importance of protecting civilians.

States Military Operations in 2020," June 2, 2021, pp. 15, https://media.defense.gov/2021/Aug/05/2002823939/-1/-1/0/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2020-FINAL.PDF.

<sup>&</sup>lt;sup>15</sup> U.S. Elizabeth Warren, "Senator Warren and Rep. Khanna Introduce the Protection of Civilians in Military Operations Act," press release, June 10, 2020, <u>https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-khanna-introduce-the-protection-of-civilians-in-military-operations-act.</u>

Sincerely,

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Elizabeth Warren United States Senator

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