

December 1, 2021

Lloyd J. Austin III  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Re: Defense Department Civilian Harm Policies and Practices

Dear Secretary Austin,

We write to express our grave concerns about the Department of Defense's civilian harm policies and practices and their impact, as evidenced most recently by the August 29 drone strike in Kabul, Afghanistan that killed 10 civilians, including an aid worker and seven children; the Air Force Inspector General's investigation into that strike; and a *New York Times* report in November that the U.S. military hid the effects of a 2019 airstrike in Baghuz, Syria that killed dozens of civilians and was flagged as a possible war crime by at least one Defense Department lawyer.<sup>1</sup> These strikes, and the Defense Department's record of civilian harm over the past twenty years, illustrate an unacceptable failure to prioritize civilian protection in the use of lethal force; meaningfully investigate, acknowledge, and provide amends when harm occurs; and provide accountability in the event of wrongdoing. For too long, the United States has failed to live up to its legal and moral commitments to the protection of civilians, as well as its own stated policies. This needs to change.

### **Twenty Years of Civilian Harm**

The strikes in Kabul and Baghuz, and the devastating civilian harm that resulted from them, were emblematic of twenty years of U.S. operations that have killed tens of thousands of civilians in multiple countries.<sup>2,3</sup> Contrary to the Defense Department's assertions that strikes like those in Kabul and Baghuz are unfortunate anomalies, the experiences of our organizations, many of which work directly with conflict-affected civilians and survivors of U.S. lethal strikes, show that this is simply untrue. Instead, these strikes illustrate the Defense Department's own repeated failure to prioritize civilian protection when it plans to use force; investigate and acknowledge civilian harm when it does occur; learn from and apply lessons from past grave errors; and deliver accountability for civilian harm that has devastated families and communities.

Over twenty years, the Department of Defense has failed to adopt solutions well within its grasp; learn and implement identified lessons; exercise meaningful leadership on civilian protection issues; or assign

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<sup>1</sup> Dave Philipps and Eric Schmitt, "How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria," *The New York Times*, November 13, 2021. [[link](#)]

<sup>2</sup> Imogen Piper and Joe Dyke, "Tens of thousands of civilians likely killed by US in 'Forever Wars'," *Airwars*, September 6, 2021. [[link](#)]

<sup>3</sup> This letter is limited to civilian harm resulting from U.S. use of force in the 20 years following the September 11th attacks.

adequate resources to address civilian harm.<sup>4</sup> Indeed, the recommendations outlined in the Air Force Inspector General’s public summary of his investigation into the Kabul strike -- to address confirmation bias, improve situational awareness, and review pre-strike procedures to assess the presence of civilians -- have been issued countless times by civil society groups and in the U.S. military’s own studies, yet never implemented. A 2013 Joint Staff study, for example, identified misidentification of a target as the “primary cause of [civilian casualties] in Afghanistan,” particularly due to “perceived hostile intent” from individuals who were later revealed to be civilians.<sup>5</sup> Understood in this context, the airstrikes in Kabul and Baghuz are not unique tragedies, but the latest in a long pattern of apparent negligence and consistent disregard for civilians’ lives, predominantly those in countries where the populations are majority Muslim, Brown, and/or Black.

### **Failures of Response and Accountability**

The Kabul and Baghuz strikes also illustrate long-standing problems with the U.S. military’s interpretations of its international humanitarian law obligations and its response to civilian harm, including failures to investigate, publicly acknowledge, and offer amends for harm, and ensure accountability in the event of wrongdoing.

For example, *The New York Times* reported a series of secretive Special Operations strikes that apparently circumvented legal and policy civilian protection safeguards and raised alarm among Defense Department and CIA personnel, as well as U.S. military officials’ attempts to conceal a possible war crime at Baghuz.<sup>6</sup> If true, this report raises grave concerns about the U.S. military’s commitment to accountability and adherence to international humanitarian law, including the duty to investigate potential war crimes and hold responsible individuals to account.<sup>7</sup>

Further, the U.S. military has consistently failed to ensure that in case of doubt about the status of a target, a person is presumed to be a civilian, as set out in Additional Protocol I and customary international humanitarian law. This appears to be the case with the Baghuz strikes<sup>8</sup> as well as other civilian deaths over the last twenty years, including: justifying targeting of individuals based on demographics through so-called “signature strikes”; refusing to admit credible civilian casualties due to the vague possibility that

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<sup>4</sup> See Larry Lewis, “Hidden Negligence: Aug. 29 Drone Strike is Just the Tip of the Iceberg,” *Just Security*, November 9, 2021. [[link](#)]

<sup>5</sup> Joint and Coalition Operational Analysis (JCOA), “Reducing and Mitigating Civilian Casualties: Enduring Lessons,” April 12, 2013. [[link](#)]

<sup>6</sup> According to the *Times*, U.S. military officials falsified strike log entries to conceal the facts of the Baghuz strike, destroyed evidence by bulldozing the blast site, and stalled efforts to investigate the possible war crime.

<sup>7</sup> While the Defense Department’s recent announcement of a high-level investigation into these strikes is a step towards potential accountability, the investigation will have to meet standards of thoroughness and transparency we have yet to see from prior efforts.

<sup>8</sup> *The New York Times* article reports that the Special Operations Task Force made the opposite presumption, based on what appears to be mere speculation. U.S. Central Command later justified the strike by stating that the many women and children killed could potentially have been combatants because “women and children in the Islamic State sometimes took up arms.” This does not comport with international law.

women or children could be combatants;<sup>9</sup> and most recently, the killing of civilian aid worker Zemari Ahmadi, along with his family members, based apparently on supposition and confirmation bias.<sup>10</sup>

The Defense Department's response to the Kabul and Baghuz strikes also underscores the Department's repeated failure to adequately investigate alleged civilian harm -- including possible war crimes, as required under international law -- and provide compensation or amends. For example, in an email obtained by *The New York Times*, an official from the Air Force Office of Special Investigations suggested that the Office's agents would likely not investigate the possible war crime committed during the Baghuz strike because the office typically investigated civilian casualty reports only when there was "potential for high media attention, concern with outcry from local community/government, concern sensitive images may get out." Our groups' experience has shown that this unwillingness to thoroughly investigate and acknowledge civilian harm is often the reality across the Department of Defense. The Pentagon's acknowledgment of civilian deaths and apology for the August 29 strike in Kabul was welcome, but unfortunately an anomaly, and came only after high-profile media reporting and investigation of the drone strike. For twenty years before that strike, independent rights groups, family members, and others have documented and submitted numerous credible reports of civilian harm from U.S. operations around the world; the vast majority have been under-investigated, unacknowledged, and without compensation or amends.<sup>11,12</sup>

**We urge you to robustly account for and reckon with the civilian harm of the last twenty years, and commit to finally implementing structural changes to prioritize civilian protection and accountability for civilian harm.** These efforts need to incorporate civil society, and, wherever possible, communities impacted by U.S. military operations and lethal strikes.<sup>13</sup> We specifically urge you to:

- Ensure the full and transparent investigation of civilian casualties in the Baghuz strike and August 29 Kabul strike, including an assessment of possible violations of international humanitarian law; publicly release all investigations into and relevant reports on these strikes (with minimal redactions only for legitimately classified information); provide amends for confirmed civilian casualties in accordance with survivors' preferences and needs, including evacuation and compensation as requested by civilian survivors of the Kabul strike;<sup>14</sup> and ensure appropriate accountability for any wrongdoing that resulted in these strikes;

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<sup>9</sup> See, for example, Mwatana for Human Rights, "Death Falling from the Sky," March 2021, and response letter from Staff Judge Advocate Thomas F. Leary in April 2021. [\[link\]](#)

<sup>10</sup> Matthieu Aikins, et al., "Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb," *The New York Times*, September 10, 2021. [\[link\]](#)

<sup>11</sup> For example, the Baghuz strike was part of the U.S.-led campaign in Deir Ezzor, Syria; in the final six months of that campaign, analysis shows that local civil society alleged as many as 1,780 civilian deaths from U.S.-led actions. Yet, U.S. Central Command admitted just 23 civilian fatalities. This points to profound systemic failure.

<sup>12</sup> For example, despite repeated authorizations from Congress and the large number of officially confirmed civilian casualty cases in which survivors' identities are known and they are reachable, *ex gratia* payments have been rare; in 2020, the Department made zero *ex gratia* payments despite \$3 million in authorized funding.

<sup>13</sup> Many of our organizations have also called for the Biden administration to end the program of lethal strikes outside areas of recognized armed conflict in recognition of the appalling toll of such lethal strikes on civilian communities around the world. [\[link\]](#)

<sup>14</sup> American Civil Liberties Union, "Food Aid Organization Asks Pentagon to Help Family Members, Staff, and Survivors of Kabul Drone Strike," October 15, 2021. [\[link\]](#)

- Commit to transparency around U.S. use of force and civilian harm by, as a start, publicly releasing relevant Department of Defense Inspector General reports<sup>15</sup> and RAND Corporation studies<sup>16</sup>; publishing daily strike data<sup>17</sup>; and publishing all civilian harm assessments and investigations, including relevant AR 15-6s.
- Revise the Department of Defense Law of War Manual to reflect the presumption of civilian status, as reflected in Additional Protocol I and customary international law;
- Review the forthcoming Department of Defense Instruction on Civilian Harm, in consultation with civil society groups, to ensure that the new policy adequately addresses longstanding failures in civilian harm prevention, investigation, and amends; and
- Publicly commit to a plan, with detailed steps, to direct the Defense Department to respond to the systemic concerns raised by civil society groups in this letter and over the last two decades.

Sincerely,

Airwars  
 American Civil Liberties Union  
 Amnesty International USA  
 Center for Civilians in Conflict (CIVIC)  
 Center for Victims of Torture  
 Columbia Law School Human Rights Institute  
 Friends Committee on National Legislation (FCNL)  
 Government Information Watch  
 Humanity & Inclusion  
 Human Rights First  
 Human Rights Watch  
 InterAction  
 Life for Relief and Development  
 Norwegian Refugee Council USA  
 PAX  
 Quincy Institute for Responsible Statecraft  
 Reprieve  
 Saferworld (Washington Office)  
 September 11th Families for Peaceful Tomorrows  
 Syria Justice and Accountability Center (SJAC)  
 Win Without War

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<sup>15</sup> Department of Defense Inspector General reports on Evaluation of Targeting Operations and Civilian Casualties in OIR (DODIG-2019-074) and Kinetic Targeting in the USCENTCOM Area of Responsibility (DODIG-2021-084)

<sup>16</sup> RAND Corporation study on civilian harm practices broadly, required by Section 1721 of the 2020 National Defense Authorization Act; and on civilian casualties in Raqqa, Syria.

<sup>17</sup> Including, as a start, publishing daily strike data, locations, targets, and outcomes for all U.S. and coalition actions in Afghanistan, Iraq and Syria since 2017, a commitment that was rescinded by the Trump administration.