

Congress of the United States

Washington, DC 20515

December 19, 2022

The Honorable Lloyd J. Austin III
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin:

We write to you in regard to the Department of Defense's (DoD or "the Department") September 2022 report to Congress on civilian casualties resulting from U.S. military action and regarding DoD implementation of new procedures to address civilian casualties. We are troubled by the fact that this annual report, required by Senator Warren's amendment to the fiscal year (FY) 2018 National Defense Authorization Act (NDAA),¹ appears to undercount civilian casualties.²

In this year's report, the Department reported that approximately 12 civilians were killed and five were injured in Afghanistan and Somalia as a result of U.S. military operations during 2021.³ However, the report did not admit to any civilian deaths in Syria,⁴ despite credible civilian casualty monitors documenting at least 15 civilian deaths and 17 civilian injuries in Syria in 2021.⁵ The report also appeared to undercount additional civilian casualties from Combined Joint Task Force-Operation Inherent Resolve (CJTF-OIR) that occurred prior to 2021.⁶ For example, the report (and a separate review that you ordered)⁷ only disclosed four civilians killed and 15 civilians injured as a result of the March 18, 2019 strike in Baghuz, Syria.⁸ But the *New*

¹ Pub. L. 115-91, "National Defense Authorization Act for Fiscal Year 2018," Sec. 1057, <https://www.congress.gov/115/plaws/publ91/PLAW-115publ91.pdf>.

² Letter from Senator Elizabeth Warren and Representative Ro Khanna to Secretary of Defense Lloyd J. Austin III, Department of Defense, June 30, 2021, <https://www.warren.senate.gov/imo/media/doc/2021.06.30%20Letter%20to%20Secretary%20Austin%20on%20Civilian%20Casualties.pdf>.

³ Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, pp. 6; 9-10, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>.

⁴ *Id.*, p. 7.

⁵ Airwars, "Pentagon annual report admits 12 deaths resulting from US actions in 2021," September 29, 2022, <https://airwars.org/news-and-investigations/pentagon-annual-report-admits-12-deaths-resulting-from-us-actions-in-2021/>.

⁶ *Id.*

⁷ New York Times, "Pentagon Chief Orders New Inquiry Into U.S. Airstrike That Killed Dozens in Syria," November 29, 2021, <https://www.nytimes.com/2021/11/29/us/politics/pentagon-airstrike-syria.html>.

⁸ Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, p. 8, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>; Washington Post, "Pentagon inquiry rejects claims U.S. covered up civilian deaths in Syria," May 17, 2022, <https://www.washingtonpost.com/national-security/2022/05/17/pentagon-civilian-deaths-baghuz-syria/>.

York Times investigated this strike in 2021, finding evidence that military concealed the extent of the civilian casualties,⁹ and according to Airwars, local sources alleged that the strike resulted in at least 160 civilian deaths, including up to 45 children.¹⁰ This vast difference between independent reporting and the DoD investigation raises concerns and undermines DoD credibility on civilian casualty reporting.

We are also concerned about the report's investigation of six additional reports of civilian casualties under CJTF-OIR: three were dismissed as non-credible and three are listed as being under assessment, but the report provides no explanation of why these cases are still being examined and no timeline for completing the assessment.¹¹ The report also fails to detail which cases were dismissed as non-credible and the reasoning behind their dismissal.¹² For example, six reports of civilian casualties in Afghanistan were assessed as duplicates or not credible, but no explanation was provided as to which incidents were deemed not credible and the specific reasoning that each case was dismissed.¹³ In another instance, a joint Somali-U.S. military operation from 2018 was reopened after USAFRICOM received new information on the case in 2021, but no explanation was provided as to why DoD subsequently maintained its original conclusion that the report of civilian casualties was still not credible.¹⁴ Transparency is essential to increasing trust in DoD reporting, something which is undermined by the failure to clarify these dismissals of cases or when pending cases will be resolved.

One reason for this underreporting appears to be that DoD is not giving appropriate weight to outside sources when investigating casualty reports. A 2021 DoD-sponsored RAND Corporation assessment on DoD civilian casualty policies found that "officials did not sufficiently engage external sources for information before concluding that reports of civilian casualties were not credible."¹⁵ Furthermore, the report found that the standard that DoD uses to evaluate the credibility of casualties was higher than advertised. To deem a civilian casualty report credible, DoD requires proof that it is "more likely than not" that civilian casualties occurred.¹⁶ However, the RAND report found that this standard was higher than advertised because it "often required having positive proof indicating civilian harm in military information."¹⁷ If military sources did not show evidence of civilian casualties, then that was often used to justify the conclusion that

⁹ New York Times, "How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria," November 15, 2021, <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>.

¹⁰ Airwars, "Pentagon annual report admits 12 deaths resulting from US actions in 2021," September 29, 2022, <https://airwars.org/news-and-investigations/pentagon-annual-report-admits-12-deaths-resulting-from-us-actions-in-2021/>.

¹¹ Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, p. 7, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>.

¹² *Id.*

¹³ *Id.*, p. 9.

¹⁴ *Id.*, pp. 9-10.

¹⁵ RAND Corporation, "U.S. Department of Defense Civilian Casualty Policies and Procedures," Michael J. McNerney, Garbielle Tarini, Karen M. Sudkamp, Larry Lewis, Michell Grisè, and Pauline Moore, 2021, p. 23, https://www.rand.org/pubs/research_reports/RRA418-1.html.

¹⁶ Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, p. 6, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>;

reports were not credible.¹⁸ This fails to put proper weight on outside source reporting and puts more trust in military sources, which is concerning due to military sources' "observed propensity to miss civilian casualties in strikes on structures."¹⁹ The significant discrepancies between DoD and outside reporting suggests outside sources are still not being sufficiently incorporated into DoD assessments.

Finally, we are concerned that this year's report revealed that DoD made only one total *ex gratia* payment in 2021,²⁰ despite an annual \$3 million authorization from Congress for *ex gratia* payments²¹ and despite the large number of cases that DoD has confirmed as credible, both in 2021 and prior years.²² The purpose of these payments is to express condolence to civilian victims and survivors and to "advance the U.S. mission on the ground, build rapport with local communities, and reinforce the U.S. relationship with the host-nation government."²³ The report does not specify the amount paid nor provide information on why DoD failed, as in past years, to make meaningful use of the *ex gratia* authority. Additionally, an attorney contacted the Department on behalf of harmed civilians for multiple cases seeking *ex gratia* payments during 2021 for cases in prior years and was denied without a clear explanation.²⁴ For these requests, the email response stated that, "Offers of *ex gratia* payments for condolence and sympathy are time-sensitive and not normally made after 90 days of the relevant incident,"²⁵ an extremely limiting and arbitrary deadline that is not reflected in public policies.²⁶

In August 2022, a month before the civilian casualty report was released, you announced the Civilian Harm Mitigation and Response Action Plan (CHMR-AP) and committed to improving

¹⁷ RAND Corporation, "U.S. Department of Defense Civilian Casualty Policies and Procedures," Michael J. McNerney, Garbielle Tarini, Karen M. Sudkamp, Larry Lewis, Michell Grisè, and Pauline Moore, 2021, p. 23, https://www.rand.org/pubs/research_reports/RRA418-1.html.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, p. 13, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>

²¹ Pub. L. 116-92, "National Defense Authorization Act for Fiscal Year 2020," Sec. 1213, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

²² Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021," September 2022, p. 6, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>; Department of Defense, "Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020," June 2021, p. 6, <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>.

²³ RAND Corporation, "U.S. Department of Defense Civilian Casualty Policies and Procedures," Michael J. McNerney, Gabrielle Tarini, Karen M. Sudkamp, Larry Lewis, Michelle Grisè, and Pauline Moore, 2021, p. vi, https://www.rand.org/pubs/research_reports/RRA418-1.html.

²⁴ Information provided by attorney to Senator Elizabeth Warren, pp. 82-89 [On File with the Office of Senator Elizabeth Warren].

²⁵ *Id.*

²⁶ Department of Defense, Memorandum on "Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That Is Incident to Military Operations," June 22, 2020, <https://media.defense.gov/2020/Jun/23/2002320314/-1/-1/1/INTERIM-REGULATIONS-FOR-CONDOLENCE-OR-SYMPATHY-PAYMENTS-TO-FRIENDLY-CIVILIANS-FOR-INJURY-OR-LOSS-THAT-IS-INCIDENT-TO-MILITARY-OPERATIONS.PDF>.

how the United States prevents, mitigates, and responds to civilian harm caused by our operations and those of our partners.²⁷ We support this plan, but we remain concerned by recent media reports that the CHMR-AP implementation will not include reinvestigations of past incidents that may have been dismissed due to faulty investigation procedures.²⁸ This is particularly puzzling given that the CHMR-AP itself rightly recognizes and seeks to remedy shortcomings in DoD reporting and data management procedures, including through the standardization of operational reporting and data management to improve how DoD collects and learns from civilian harm data.²⁹ The action plan recognizes that data and knowledge management on incidents “is critical to understanding the root causes of civilian harm, characterizing harm, and identifying measures to mitigate civilian harm in future operations while preserving mission-effectiveness and force protection.”³⁰ Learning from past civilian casualty incidents is critical to mitigating future harm, and we remain disappointed by this decision to disregard the past incidents that may have been incorrectly dismissed.

Moving forward it is also essential that the Department improve mechanisms for civilians to report civilian harm. The current primary mechanism, an online webpage with relevant email addresses, is inaccessible to many affected civilians due to language limitations, Internet access restraints, and lack of awareness or transparency around how reports are used.³¹ Low tech alternative options such as dedicated phone hotlines for reporting casualties would enhance DoD’s ability to access information about civilian casualty incidents.³² Furthermore, traditional media like radio can assist with spreading awareness of reporting mechanisms for local populations.³³ At minimum, the civilian casualty reporting website should include translations into local languages for any country where the U.S. military undertakes military operations.³⁴

The FY 2023 National Defense Authorization Act (NDAA) includes key provisions to assist in strengthening civilian harm protection, such as the creation of the Civilian Protection Center of Excellence to focus on these matters,³⁵ dedicating resources to CHMR-AP implementation,³⁶

²⁷ Department of Defense, “Civilian Harm Mitigation and Response Action Plan (CHMR-AP),” August 25, 2022, pp. I-II, <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>.

²⁸ POLITICO, “Pentagon’s new civilian casualty plan won’t include reopening past cases,” Lara Seligman, October 20, 2022, <https://www.politico.com/news/2022/10/20/pentagon-wont-reopen-past-cases-of-civilian-deaths-00062737>.

²⁹ Department of Defense, “Civilian Harm Mitigation and Response Action Plan (CHMR-AP),” August 25, 2022, p. 17, <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>.

³⁰ *Id.*

³¹ Just Security, “DoD Needs to Rethink its Civilian Casualty Reporting Mechanism,” Erin Bijl and Archibald Henry, May 9, 2022, <https://www.justsecurity.org/81428/dod-needs-to-rethink-its-civilian-casualty-reporting-mechanism/>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Sec. 1082, <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR7776EAS-RCP117-70.pdf>.

³⁶ *Id.*, Sec. 4301, Operation and Maintenance, Office of the Secretary of Defense, Admin & Srvwide Activities, Line 440.

expanding reporting requirements,³⁷ and extending the authority of *ex gratia* payments.³⁸ We urge DoD to swiftly implement these provisions as part of its monitoring and prevention of civilian harm. As you noted, mitigating and responding to civilian harm “is a strategic and a moral imperative.”³⁹ It is a continued betrayal of our values to continually undercount and refuse to acknowledge or take proper steps to address the civilian casualties that result from U.S. military action.

To better understand how the DoD plans to address these ongoing concerns, we request answers to the following questions no later than January 16, 2023:

1. What accounts for the discrepancy between the reporting of 15 civilian deaths and 17 injuries from civilian casualty monitors in Syria in 2021⁴⁰ and the DoD’s admission to zero civilian casualties to date during the same time period?⁴¹
2. The DoD 2021 civilian casualties report states that three civilian casualty incidents received by CJTF-OIR remain under assessment from 2021 and three were dismissed as non-credible.⁴² Why have three of these incidents failed to have been addressed and what is the anticipated timeline for these incidents to be resolved? Please also provide information on the reasons that three of these CJTF-OIR cases were considered non-credible, that the six cases in Operation FREEDOM SENTINEL in 2021 were dismissed as duplicates or non-credible,⁴³ and that the civilian casualty report regarding the May 9, 2018 Somali-U.S. military operation was again dismissed as non-credible.⁴⁴
3. What is the average length of time for an investigation of civilian casualty reporting? What are the standards for determining that a report is credible, and for closing a case?
4. What steps is DoD taking to proactively seek out and incorporate information from external sources, such as NGOs, in its assessments and investigations?
5. What is DoD’s plan to accurately apply the “more likely than not” standard of credibility rather than applying a standard that is “higher than advertised”⁴⁵ and “often required having

³⁷ *Id.*, Sec. 1056.

³⁸ *Id.*, Sec. 1221.

³⁹ Department of Defense, Memorandum on “Improving Civilian Harm Mitigation and Response,” January 27, 2022, <https://media.defense.gov/2022/Jan/27/2002928875/-1/-1/1/DEPARTMENT%20OF%20DEFENSE%20RELEASES%20MEMORANDUM%20ON%20IMPROVING%20CIVILIAN%20HARM%20MITIGATION%20AND%20RESPONSE.PDF>.

⁴⁰ Airwars, “Pentagon annual report admits 12 deaths resulting from US actions in 2021,” September 29, 2022, <https://airwars.org/news-and-investigations/pentagon-annual-report-admits-12-deaths-resulting-from-us-actions-in-2021/>.

⁴¹ Department of Defense, “Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021,” September 2022, p. 7, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>.

⁴² *Id.*

⁴³ *Id.*, p. 9.

⁴⁴ *Id.*, p. 10.

⁴⁵ RAND Corporation, “U.S. Department of Defense Civilian Casualty Policies and Procedures,” Michael J. McNerney, Gabrielle Tarini, Karen M. Sudkamp, Larry Lewis, Michelle Gris , and Pauline Moore, 2021, p. 22,

positive proof indicating civilian harm in military information?”⁴⁶ How does it plan to give proper weight to reports from outside sources?

6. Why did DoD only provide one *ex gratia* payment in 2021⁴⁷ despite the authorization of funds by Congress for this purpose⁴⁸ and DoD’s acknowledgement of credible civilian casualty incidents, both in the 2021 civilian casualties report and past reports?⁴⁹
7. Will the Department commit to using the authorized *ex gratia* funds in their entirety in line with the CHMR-AP’s commitment to improve how the U.S. military responds to civilian harm?⁵⁰
8. Please clarify DoD’s statement that offers of *ex gratia* payments are not normally made after 90 days of the relevant incident,⁵¹ which appears inconsistent with the published interim guidelines.⁵²
9. What is the current process by which the Defense Department receives and considers requests for monetary and non-monetary amends, including *ex gratia* payments, as required by Section 1331 of the FY 2022 NDAA?⁵³
10. In light of the new, heightened standards the CHMR-AP requires for assessing and investigating civilian harm,⁵⁴ as well as for responding to civilian harm with

https://www.rand.org/pubs/research_reports/RRA418-1.html.

⁴⁶ *Id.*, p. 23.

⁴⁷ Department of Defense, “Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021,” September 2022, pg. 13, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>

⁴⁸ Pub. L. 116-92, “National Defense Authorization Act for Fiscal Year 2020,” Sec. 1213, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.

⁴⁹ Department of Defense, “Annual Report on Civilian Casualties in Connection with United States Military Operations in 2021,” September 2022, p. 6, <https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2021.PDF>; Department of Defense, “Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020,” June 2021, p. 6, <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>.

⁵⁰ Department of Defense, “Civilian Harm Mitigation and Response Action Plan (CHMR-AP),” August 25, 2022, pp. I-II, <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>.

⁵¹ Information provided by attorney to Senator Elizabeth Warren, pp. 82-89. [On File with the Office of Senator Elizabeth Warren].

⁵² Department of Defense, Memorandum on “Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That Is Incident to Military Operations,” June 22, 2020, <https://media.defense.gov/2020/Jun/23/2002320314/-1/-1/1/INTERIM-REGULATIONS-FOR-CONDOLENCE-OR-SYMPATHY-PAYMENTS-TO-FRIENDLY-CIVILIANS-FOR-INJURY-OR-LOSS-THAT-IS-INCIDENT-TO-MILITARY-OPERATIONS.PDF>.

⁵³ Pub. L. 117-81, “National Defense Authorization Act for Fiscal Year 2022,” Sec. 1331, <https://www.congress.gov/117/plaws/publ81/PLAW-117publ81.pdf>.


⁵⁴ Department of Defense, “Civilian Harm Mitigation and Response Action Plan (CHMR-AP),” August 25, 2022, pp. 20-23, <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>.

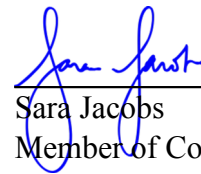
acknowledgements and condolences,⁵⁵ how will the DoD address the many past cases in which these standards were not applied?⁵⁶

11. What steps is DoD taking to improve the accessibility of civilian harm reporting mechanisms in U.S. areas of operations?

Thank you for your attention to this matter.

Sincerely,


Elizabeth Warren
United States Senator


Sara Jacobs
Member of Congress

⁵⁵ *Id.*, p. 24-26.

⁵⁶ POLITICO, “Pentagon's new civilian casualty plan won't include reopening past cases,” Lara Seligman, October 20, 2022, <https://www.politico.com/news/2022/10/20/pentagon-wont-reopen-past-cases-of-civilian-deaths-00062737>.