

Congress of the United States
Washington, DC 20515

February 14, 2023

Caroline Krass
General Counsel
Office of the General Counsel
U.S Department of Defense

Dear Ms. Krass:

We are writing regarding the ongoing review of the Department of Defense (DoD) Law of War Manual and the Manual's characterization of several issues related to the law of armed conflict. We are concerned that certain aspects of the Manual undermine U.S. compliance with the law of armed conflict, put us out of step with many of our key allies, and increase the risk of civilian harm by not accurately informing the judge advocates who advise commanders on the ground.

The protection of civilians is an enduring moral, legal, and strategic imperative. The United States government has repeatedly emphasized its commitment to minimizing civilian casualties and complying with its obligations under the law of armed conflict—commitments that are critical to upholding our nation's core values and advancing our interests overseas.

As DoD's leading interpretation of international humanitarian law (IHL), the Law of War Manual's text has significant consequences for civilians in conflict. Ambiguities, omissions, or errors in the Manual can endanger civilians, with devastating results for impacted communities around the world. The urgency of protecting civilians in conflict is all too clear, as demonstrated by tragic accounts of civilian harm in Iraq, Syria, Afghanistan, and elsewhere.¹ Addressing problematic aspects of the Law of War Manual that contribute to civilian harm is a critical part of this task.

We are concerned that aspects of the Law of War Manual may hamper DoD's ongoing civilian protection efforts and mischaracterize our international legal obligations — leading to unnecessary, and potentially unlawful, civilian deaths. We appreciated the commitment you made nearly a year ago, in a March 2022 House Foreign Affairs Committee hearing, to review the DoD Law of War Manual, particularly with respect to its treatment of the presumption of civilian status. We are encouraged to hear that this review is underway. We are also pleased with

¹ See, e.g., *The Civilian Casualty Files*, N.Y. TIMES, <https://www.nytimes.com/spotlight/the-civilian-casualty-files-pentagon-reports>.

the release of the Civilian Harm Mitigation and Response Action Plan, and we look forward to further discussions about how Congress can assist in its implementation.²

As you review the Law of War Manual, we suggest the establishment of an external advisory panel to facilitate and formalize meaningful consultation with civil society, legal experts, and academics on the Law of War Manual review process. We also recommend that the process include the substantial involvement of other U.S. government agencies, particularly the Department of State, whose equities are impacted by DoD interpretations and applications of international law.

During the review, we urge you to address the following areas of concern with the Manual:

Presumption of Civilian Status: Under customary international law, it is well established that when there is doubt as to whether a person is a civilian or a combatant, the person shall be considered a civilian. Despite the well-established presumption of civilian status under the laws of war, the DoD Law of War Manual currently states, based on questionable support,³ that “no legal presumption of civilian status exists for persons or objects.”⁴ We are concerned that the failure to apply a presumption of civilian status will only increase the risk of civilians being mistakenly targeted. As the Defense Department’s laudable Civilian Harm Mitigation and Response Action Plan acknowledges, misidentification is a frequent cause of civilian harm,⁵ a risk that is exacerbated when the U.S. military undertakes strikes without clear evidence that the targeted individuals are combatants. Misidentification has resulted in countless deaths of civilians who were erroneously targeted, such as the deaths of Afghan aid worker Zemari Ahmadi and nine others, including seven children, in a U.S. drone strike in Kabul on August 29, 2021.⁶

Correcting the Law of War Manual to not only clarify but to emphasize the importance of the presumption of civilian status as a matter of U.S. obligations under IHL will help prevent similar tragedies in the future. We urge your office to revise the Law of War Manual to include a clear statement of the legally required presumption of civilian status. Such a revision will assist service members in ensuring that future operations comply with international law, help prevent misidentification, and assist the Department of Defense in fulfilling its commitment to establish

² See U.S. DEPARTMENT OF DEFENSE, CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN FACT SHEET (Aug. 25, 2022), <https://www.defense.gov/News/Releases/Release/Article/3140007/civilian-harm-mitigation-and-response-action-plan-fact-sheet/>.

³ See Ryan Goodman, *Clear Error in the Defense Department’s Law of War Manual: On Presumptions of Civilian Status*, JUST SECURITY (Feb. 9, 2022), <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/>

⁴ See U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 229 n.240 (Dec. 2016) (hereinafter LAW OF WAR MANUAL).

⁵ See U.S. DEPARTMENT OF DEFENSE, CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN 15, <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>.

⁶ See Charlie Savage, Eric Schmitt, Azmat Khan, Evan Hill & Christoph Koettl, *Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html>.

high standards of civilian protection.

Direct Participation in Hostilities: According to the International Committee of the Red Cross and U.S. interpretations of IHL,⁷ civilians may lose protection against direct attack only for the duration of each specific act amounting to direct participation in hostilities. “Indirect” participation in hostilities, on the other hand, which includes activities such as the production and shipment of weapons, does not constitute direct participation in hostilities and therefore does not lead to a loss of protection against direct attack.⁸ However, contrary to these principles, the Law of War Manual suggests that civilians working on “war-sustaining activities” – such as an oil refinery that generates revenue – may be directly participating in hostilities and are therefore targetable under IHL. The Law of War Manual’s position is not only a global outlier but relies solely upon a book justifying the targeting of children, who acted under duress as porters and in other support roles, in the Vietnam War.⁹ This position is a stain on the United States and undermines U.S. efforts to encourage allies and partners to comply with IHL.

Determining whether someone is directly participating in hostilities can be a matter of life or death. Such a determination reportedly factored into the decision to bomb a camp of women, children, captives, and wounded individuals in Baghuz, Syria in 2019, killing dozens.¹⁰ In Afghanistan, United Nations investigators found that U.S. airstrikes on alleged drug production facilities killed thirty civilians—mostly women and children—and injured seven others.¹¹ The United Nations investigation contradicted a U.S. military probe that classified victims as direct participants in hostilities due to their alleged economic activity, and, therefore, legitimate military targets.¹² We ask that your review clarify what constitutes direct participation in hostilities and ensure that the Manual definitions align with IHL and prior expressions of U.S. government positions on the law.

Civilians’ Assumption of Risk Near Military Objectives: As legal experts have noted, the Law of War Manual currently risks leaving the false impression that civilians in or near military objectives can be heavily discounted or counted as less than other civilians in pre-strike collateral damage estimates and post-strike investigations.¹³ Especially in environments where civilians

⁷ See U.S. DEPARTMENT OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.2.2 (Mar. 2022). See also *Practice relating to Rule 6. Civilians’ Loss of Protection from Attack*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule6> (quoting US Air Force Pamphlet (1976) and US Naval Handbook (2007), both of which make clear that civilians directly participating in hostilities lose protection against attack only for the duration of their participation).

⁸ See *Direct participation in hostilities: questions & answers*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2009), <https://www.icrc.org/en/doc/resources/documents/faq/direct-participation-ihl-faq-020609.htm>.

⁹ See LAW OF WAR MANUAL ¶ 5.8.3 n.240.

¹⁰ See Eric Schmitt and Dave Philipps, *Pentagon Faults Review of Deadly Airstrike but Finds No Wrongdoing*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/politics/us-airstrike-civilian-deaths.html>.

¹¹ See *Afghanistan probe: ‘at least 60 civilians’ killed after US military airstrikes on alleged drug labs*, U.N. NEWS (Oct. 9, 2019), <https://news.un.org/en/story/2019/10/1048851>.

¹² See *id.*

¹³ See Ryan Goodman and Gordon Dunbar, *Defense Dept Law of War Manual and Its Unintended Readings: On Civilians Assuming Risk of Harm*, JUST SECURITY (May 13, 2022), <https://www.justsecurity.org/81476/defense-dept-law-of-war-manual-and-its-unintended-readings-on-civilians-assuming-risk-of-harm/>.

reside or work near or on purported or actual military facilities or cannot safely distance themselves from military targets in conflict zones, the Law of War Manual’s current text could encourage disproportionate strikes that pose enormous risks to civilians. We encourage you to revise the Manual to clearly communicate that all civilians must be protected, as required under IHL, regardless of their location.

Treatment of Precautions: The Law of War Manual troublingly discards the accepted requirement under IHL to take *all* feasible precautions to prevent civilian harm in favor of a requirement to merely take feasible precautions.¹⁴ This lowering of the standard dangerously understates the extent to which IHL requires parties to a conflict to take all of the precautions that are reasonable under the circumstances to safeguard civilian lives. The requirement to take all feasible precautions does not, as the Manual incorrectly suggests, impose an unreasonable burden to take every feasible precaution imaginable.¹⁵ Rather, “all feasible precautions” requires commanders in the field to take all steps that are practical under the circumstances to prevent civilian harm. The Manual’s lowering of the requirement to “feasible precautions” incorrectly suggests, for example, that IHL permits a commander to take just one precaution even when additional precautions would be feasible under the circumstances. This disavowal of the accepted “all feasible precautions” standard is inconsistent with previous U.S. government positions¹⁶ and with the IHL interpretations of many U.S. partners.¹⁷ We encourage you to address this inconsistency and ensure that the Manual clearly states that all feasible precautions must be taken to protect civilians.

Use of Human Shields: The 2016 revision to the Law of War Manual improved upon previous language in the Manual regarding human shields. However, troubling ambiguities remain.¹⁸

¹⁴ See LAW OF WAR MANUAL ¶¶ 5.2.3–5.2.3.2.

¹⁵ See LAW OF WAR MANUAL ¶ 5.2.3.1.

¹⁶ See LAW OF WAR MANUAL ¶ 5.2.3.1 n.40 (Michael J. Matheson, Deputy Legal Adviser, Department of State, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426-27 (1987) (“We support the principle that *all practicable precautions*, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects, and that effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit.”) (emphasis added)); *id.* at ¶ 5.2.3.1 n.41 (1956 FM 27-10 (Change No. 1 1976) ¶ 41 (“Those who plan or decide upon an attack, therefore, *must take all reasonable steps* to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”)) (emphasis added); *id.* at ¶ 5.11 n.336 (Harold Koh, Legal Adviser, Department of State, Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland’s Position on the U.S. Reservation to Protocol III of the Convention on Certain Conventional Weapons, Dec. 30, 2009 (“In particular, the U.S. reservation is consistent with article 57(2)(ii) and article 57(4) of the 1977 Additional Protocol I to the Geneva Conventions. Article 57(4) provides that governments shall ‘take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.’ Although the United States is not a party to Additional Protocol I, we believe these provisions are an accurate statement of the fundamental law of war principle of discrimination.”)).

¹⁷ *Practice relating to Rule 15. Principle of Precautions in Attack*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule15>.

¹⁸ See Adil Ahmad Haque, *Human Shields in the (Updated) Dept of Defense’s Law of War Manual*, JUST SECURITY (Dec. 15, 2016), <https://www.justsecurity.org/35589/human-shields-updated-dept-defenses-law-war-manual/>.

First, it is unclear how DoD determines whether a human shield is voluntary or involuntary. Second, the Manual's text on the protections afforded to involuntary human shields is unclear,¹⁹ inexplicably fails to cite or adopt clearly stated positions in other Department of Defense manuals,²⁰ and invites perilous misunderstandings by judge advocates. Third, the Manual indicates that DoD operators may not have to consider the harm to civilians acting as voluntary human shields who are not directly participating in hostilities in pre-strike proportionality assessments.²¹ Fourth, the Manual states that a civilian acting as a voluntary human shield may in some circumstances be considered to be directly participating in hostilities, but does not provide guidance on how to make such a determination. The lack of clarity on these issues is especially consequential in light of the Manual's failure to adopt the presumption of civilian status. Taken together, these positions put civilians at greater risk and can lead to undercounting of civilian harm in pre- and post-strike assessments. We ask that your review clarify and expand upon the Manual's discussion of the rules regarding human shields.

Prohibition on Indiscriminate Attacks: The United States has repeatedly recognized that customary international law prohibits attacks not directed at a specific military objective and that indiscriminate attacks constitute war crimes.²² The Law of War Manual, however, unlike other U.S. government interpretations of international humanitarian law, is silent on the legality of indiscriminate attacks with weapons that could be used in a discriminate manner.²³ The Manual is out of step with other U.S. sources on this issue and at odds with recent U.S. government condemnations of indiscriminate attacks by Russia in Ukraine. We ask that revisions of the Law of War Manual state in no uncertain terms that indiscriminate attacks with weapons that could target military objectives are both illegal and criminal.

Application of International Human Rights Law: The Law of War Manual asserts that international human rights treaties do not apply extraterritorially but never informs its readers that the DoD and U.S. government have long taken the position that *customary* international human rights law does apply extraterritorially. Clarifying the applicability of customary international human rights law would help correct misunderstandings of the human rights obligations of U.S. personnel overseas.

Use of Sources: After revising the Manual in 2016, DoD disavowed the Manual's footnotes as a source for interpreting or understanding the law.²⁴ But military personnel may nevertheless be

¹⁹ See LAW OF WAR MANUAL ¶ 5.12.3.4.

²⁰ See U.S. DEPARTMENT OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.3.2 (July 2007) ("Deliberate use of civilians to shield military objectives from enemy attack is prohibited . . . [T]he principle of proportionality underlying the concept of collateral damage continues to apply in such cases."); U.S. DEPARTMENT OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.3.2 (Mar. 2022) (verbatim).

²¹ See *id.*

²² See Brian Finucane, *The Prohibition on Indiscriminate Attacks: The US Position vs. the DoD Law of War Manual*, JUST SECURITY (May 3, 2022), <https://www.justsecurity.org/81351/the-prohibition-on-indiscriminate-attacks-the-us-position-vs-the-dod-law-of-war-manual/>.

²³ See *id.*

²⁴ LAW OF WAR MANUAL ¶ 1.2.2.1 ("Citation to a particular source should not be interpreted to mean that the cited source represents an official DoD position."). See also Ryan Goodman, *How to Read the Department of Defense's Revised Law of War Manual*, JUST SECURITY (Dec. 22, 2016), <https://www.justsecurity.org/35786/read-department->

led astray by the Manual's continued reliance on faulty sources. We urge that the Law of War Manual revision process include a review of all cited sources. Unreliable sources should be removed to better serve DoD legal practitioners, and the text relying on problematic sources should be revised accordingly.

We request an update on the timeline, the scope of the review, and your plans to consult with civil society and legal experts, as well as how this review will address the above concerns.

Thank you for your consideration. We look forward to your response and to working with you on these issues.

Sincerely,



Sara Jacobs
Member of Congress



Richard J. Durbin
U.S. Senator