War Hazards Compensation for Civilians

Sarah Donilon, Oona A. Hathaway & Carter Squires[*]

Civilians around the world are increasingly under attack. Tens of thousands of civilians have been killed in recent years in wars in Gaza, Lebanon, Ukraine, and Sudan, and Iran. In recent decades, more than 400,000 civilians died as a direct result of the post-9/11 wars waged by the United States and its allies in Afghanistan, Pakistan, Iraq, Syria, and Yemen. And the danger is rising: civilian deaths in conflict surged forty percent globally in 2024, according to the United Nations.

What do states owe the innocent civilians they kill in war? In many cases, international law answers: nothing at all. States must compensate civilians for harm resulting from unlawful acts, but not from lawful ones. And even when a state has acted unlawfully, civilians often do not receive compensation. Domestic systems for providing civilian compensation in war, including the United States', are inconsistent, incomplete, and arbitrary. This means that civilians who are injured or lose loved ones or property are nearly always left to pick up the pieces on their own.

This Article proposes a novel approach: War Hazards Compensation for Civilians. The plan would be patterned on a U.S. World War II–era war hazards compensation program for another group of civilians in conflict: private military contractors. For eighty years, the U.S. Congress has required employers or the government to provide workers' compensation for harm to civilian contractors, including death and injury, caused by war risk hazards.

* Copyright © 2026 Sarah Donilon, Oona A. Hathaway & Carter Squires. J.D. candidate, Yale Law School; Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; J.D. candidate, Yale Law School, respectively. We thank Madeline Babin, Daniel Browning, Rebecca Crootof, Cindy Garay, Isabel Gensler, Samantha Kiernan, Gabriel Klapholz, Paloma O'Connor, Bryce Morales, Inbar Pe'er, Catherine Vera, Eli Scher-Zagier, John Witt, and Kevin Zhang for their helpful feedback.

By providing such compensation to any civilian harmed by their military operations, states can offer some measure of solace and support. Creating such a plan also renders visible the often-invisible harm done to civilians — and thus makes plain the true costs of war.

TABLE OF CONTENTS

INTRODUCTION 1842
I. CIVILIAN COMPENSATION UNDER INTERNATIONAL LAW 1849
A. Loss as a Result of Unlawful Acts 1850
1. Jus in Bello 1851
2. Jus ad Bellum 1856
B. Loss as a Result of Lawful Acts 1860
1. "Collateral Damage" 1860
2. Lawful "Mistakes" 1862
II. CIVILIAN COMPENSATION UNDER U.S. & FOREIGN LAW 1865
A. U.S. Civilian Compensation 1865
1. The Foreign Claims Act 1867
2. Ad Hoc Condolence Payments 1870
a. Solatia 1870
b. Ex Gratia 1871
c. Condolence Payments as Stopgaps 1875
3. Commander's Emergency Response Program 1877
B. International Comparisons 1879
1. Multinational 1879
2. Foreign Government Approaches 1880
C. Shared Traits of Existing Civilian Compensation 1888
1. Incomplete Compensation 1888
2. Arbitrary and Opaque Standards 1889
3. Contingent and Underinclusive Rationales 1889
4. Lack of International Coordination 1890
5. Barriers to Redress in Court 1891
III. REASONS FOR EXPANDING CIVILIAN COMPENSATION 1893
A. Moral 1893
1. Intentional and Lawful Harm 1893
2. Unintentional and Lawful Harm 1895
B. Prudential 1898
1. "Hearts and Minds" 1899

2. Security of the Troops 1900
3. Institutional Learning and Development 1902
4. Diplomatic and Reputational Benefits 1905
5. Strengthening International Humanitarian Law 1907
IV. WAR HAZARDS COMPENSATION FOR CIVILIANS 1908
A. Defense Base Act & War Hazards Compensation Act 1909
B. War Hazards Compensation for Civilians 1914
C. Challenges — and How to Address Them 1918
1. Who Is Covered — and For What? 1918
2. Who Pays When Harms Are Multicausal? 1921
3. How to Avoid Causing Harm? 1922
4. The Risk of Sanitizing War 1926
CONCLUSION 1929

* * *

INTRODUCTION

Civilians around the world are increasingly under attack. Tens of thousands of civilians have been killed in recent years in wars in Gaza, Lebanon, Ukraine, Sudan, and Iran.[1] In recent decades, more than 400,000 civilians died as a direct result of the post-9/11 wars waged by the United States and its allies in Afghanistan, Pakistan, Iraq, Syria, and Yemen.[2] And that danger is rising: Civilian deaths in conflict surged forty percent globally in 2024, according to the United Nations.[3] This is

[1] *See* Press Release, U.N. Off. of the High Comm'r for Hum. Rts., UN Human Rights Expert on Sudan Renews Calls for Dialogue, Accountability as Conflict Enters Fourth Year (Apr. 15, 2026), https://www.ohchr.org/en/press-releases/2026/04/un-human-rights-expert-sudan-renews-calls-dialogue-accountability-conflicts [https://perma.cc/5ZEM-DNWM] ("Tens of thousands of civilians have been killed over the three years of war, and many more remain missing"); U.N. Off. for the Coordination of Humanitarian Affs., Lebanon: Flash Update #18 — Escalation of Hostilities in Lebanon (as of 16 April 2026), at 1 (Apr. 16, 2026), https://www.unocha.org /publications/report/lebanon /lebanon-flash-update-18-escalation-hostilities-lebanon-16-april-2026 [https://perma.cc/V6ZM-8AK3] ("Since 2 March, 2,196 people have been killed and 7,185 others injured."); *IntelBrief: The Human Dimension of the Iran War: The Intolerable Plight of Civilians*, THE SOUFAN CTR. (Apr. 7, 2026), https://thesoufancenter.org/intelbrief-2026-april-7 [https://perma.cc/7JS3-ZW98] ("Thousands of civilians have been killed, and millions have been displaced since the start of the war in Iran."); Hum. Rts. Watch, *World Report 2026: Ukraine* (Feb. 2026), https://www.hrw.org/world-report/2026/country-chapters /ukraine [https://perma.cc/GP2G-ZEZS] ("From the start of Russia's full-scale invasion in February 2022 to December 2025, 14,999 Ukrainian civilians were killed and 40,601 injured, according to the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU)."); *Costs of Israel-Hezbollah Conflict on Lebanon, Israel*, REUTERS (Nov. 27, 2024), https://www.reuters.com/world/middle-east/costs-israel-hezbollah-conflict-lebanon-israel-2024-11-26 [https://perma.cc/UW2W-EZWW] (3,768 casualties in Lebanon in 2024); *Palestinian Casualties*, WORLD HEALTH ORG., https://app.powerbi.com/view?r=eyJrIjoiODAxNTYzMDYtMjQ3YS00OTMzLTkxMWQtOTU1NWEwMzE5NTMwIiwidCI6ImY2MTBjMGI3LWJkMjQtNGIzOS04MTBiLTNkYzI4MGFmYjU5MCIsImMiOjh9 (last updated Apr. 17, 2026) (72,549 fatalities in Gaza in as of December 31, 2025).

[2] *See Costs of War*, WATSON SCH. INT'L & PUB. AFFS., https://costsofwar.watson.brown.edu/costs/human (last visited Mar. 2, 2026, 10:24 AM) [https://perma.cc/WB3T-3VQG].

[3] *UN Data Shows Surge in Civilian Deaths in Conflict Globally, Highlights Pervasive Discrimination*, RELIEFWEB (June 18, 2025), https://reliefweb.int/report/world/un-data-shows-surge-civilian-deaths-conflict-globally-highlights-pervasive-discrimination [https://perma.cc/8WNV-TKCU]; *see also* Int'l Rescue Comm., *2025 Emergency Watchlist: A World out of Balance* 13 (2024) ("The number of attacks on civilians by state and

not a fluke: Beginning in 2014, battle-related deaths from cross-border conflicts have averaged more than 100,000 a year, a nearly seven-fold increase over the period from 1989 to 2014, when they averaged fewer than 15,000 a year.[4]

What do states owe to the innocent civilians they kill in war? In many cases, international law answers: nothing at all. If a civilian is killed in compliance with international law, then they are not entitled to compensation.[5] And even when a civilian is killed unlawfully and is therefore owed compensation, their survivors do not necessarily receive it, since there is often no effective way for them to seek or enforce payment. Sometimes, states elect to make payments for lawful killings — what are called, variously, ex gratia (literally "out of grace"), solatia, or condolence payments. Guided by international law, governments treat these payments as optional charity.

As a result, whether civilians receive compensation — and how much — varies widely. Take the case of Basim Razzo: anti-ISIS coalition airstrikes in Iraq killed his wife, daughter, brother, and nephew, none of

nonstate armed groups around the globe rose by 66% between 2013 and 2023 to reach almost 2,600 attacks . . . .").

[4] Oona A. Hathaway, Opinion, *The Great Unraveling Has Begun*, N.Y. TIMES (Jan. 6, 2026), https://www.nytimes.com/2026/01/06/opinion/peace-conflict-war.html [https://perma.cc/EG7C-2UWW].

[5] *See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/56/10 [hereinafter *ILC Draft Articles*]. The principles of international humanitarian law (IHL), which define unlawful harm, are reflected in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Common Article I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

whom was the intended target.[6] After public pressure, the United States offered Razzo $15,000; the Netherlands, meanwhile, offered him nearly €1 million — more than seventy times as much.[7] Or Loutfi Hassan Mesto: a U.S. airstrike killed the fifty-six-year-old father of ten as he was herding sheep.[8] A year later, the U.S. government acknowledged that it had mistaken Mesto for a senior member of al-Qaeda.[9] Yet the U.S. government offered Mesto's family no compensation — nor did it publicly announce a reason why.

Fixing the broken civilian-compensation system is especially pressing now. Civilian deaths are outpacing government efforts to prevent and respond to them. For a time, it seemed the United States might lead the way in reform. In 2022, under then-President Joe Biden, the Department of Defense (DoD) published a Civilian Harm Mitigation and Response Action Plan, outlining a comprehensive plan for addressing civilian harm, including by making payments for civilians injured or killed by the U.S. military.[10] Since President Donald Trump returned to office in

[6] Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html [https://perma.cc/G9Z2-SWBF].

[7] *See* Jane Arraf, *A Path of Forgiveness After Unimaginable Loss in Iraq*, N.Y. TIMES, https://www.nytimes.com/2021/06/11/world/middleeast/iraq-airstrike-loss-forgiveness.html (last updated June 12, 2021) [https://perma.cc/H76D-S7FB]; Daniel Boffey, *Mosul Civilian First to be Compensated for Mistaken Coalition Bombing*, GUARDIAN (Sept. 9, 2020), https://www.theguardian.com/world/2020/sep/09/mosul-civilian-first-to-be-compensated-for-mistaken-coalition-bombing [https://perma.cc/U33S-44HY].

[8] Omar Nezhat, Meg Kelly, Alex Horton & Imogen Piper, *U.S. Officials Walk Back Claim Drone Strike Killed Senior al-Qaeda Leader*, WASH. POST (May 18, 2023), https://www.washingtonpost.com/world/2023/05/18/pentagon-drone-strike-syria-civilian-al-qaeda [https://perma.cc/C4JP-EC22].

[9] Press Release, U.S. Cent. Command, May 3, 2023 Investigation Findings (May 2, 2024), https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3763291/may-3-2023-investigation-findings [https://perma.cc/7JR8-KCP2].

[10] *See* U.S. DEP'T OF DEF., CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN (CHMR-AP) 24 (2022), https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF [https://perma.cc/72BU-LKUX] [hereinafter CHMR-AP]. *See generally* U.S. DEP'T OF DEF., DOD INSTRUCTION 3000.17: CIVILIAN HARM MITIGATION AND RESPONSE (2023), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/300017p.pdf [https://perma.cc/PWR4-J72W] [hereinafter DOD INSTRUCTION] (providing additional guidance on implementing the previously released CHMR-AP).

2025, however, the United States has reversed most of these gains, including effectively shuttering the statutorily created Civilian Protection Center of Excellence and eliminating around ninety percent of the Civilian Harm Mitigation and Response mission.[11] This lack of commitment from the U.S. military necessitates, as we advocate in Part IV, greater leadership by Congress, as well as allied and partner countries, to protect civilians in harm's way.

Scholars have previously grappled with pieces of this problem. In 1997, W. Michael Reisman made the case for compensating the victims of war, whether the damage was inflicted lawfully or unlawfully.[12] Two decades later, Lesley Wexler and Jennifer Robbennolt likewise focused on the problem of lawful harm to civilians in conflict, arguing that existing systems were insufficient and proposing a new amends-making process.[13] In an important article in 2022, Rebecca Crootof expanded on these observations, arguing that lawful damage in war should be addressed through the creation of a new "war torts" regime that would allow the civilian victims of war to seek compensation even for lawful

[11] *See* 10 U.S.C. § 184 (requiring the establishment of the Civilian Protection Center for Excellence and mandating annual reports to Congress); Hannah Allam, *The Pentagon Built a Blueprint to Avoid Civilian War Casualties. Trump Officials Scrapped It*, PROPUBLICA (Mar. 18, 2026), https://www.propublica.org/article/trump-defense-department-iran-hegseth-civilian-casualties [https://perma.cc/GC9W-GZK9]; Steve Beynon, *Army Eliminates Office for Minimizing Civilian Deaths on Battlefields*, MILITARY.COM (June 13, 2025, 12:25 PM), https://www.military.com/daily-news/2025/06/13/army-eliminates-office-minimizing-civilian-deaths-battlefields.html [https://perma.cc/BD5W-MU7H]; Nick Turse, *Pete Hegseth Is Gutting Pentagon Programs that Reduce Civilian Casualties*, INTERCEPT (Apr. 15, 2025, 7:00AM), https://theintercept.com/2025/04/15/pete-hegseth-pentagon-civilian-casualties-harm [https://perma.cc/V423-Y4MD].

[12] *See* W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397-98 (1997) [hereinafter Reisman, *The Lessons of Qana*] ("[W]ithout regard to the question of violation of the law of war, belligerents must compensate injured noncombatants or their survivors promptly, in proportion to the degree to which each caused the injuries suffered."); *see also* W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. L. REV. 1, 10 (2013) [hereinafter Reisman, *Compensating Collateral Damage*] ("[W]here the community pursues lawful actions whose foreseeable consequence is injury to individuals, the injuries suffered should be compensated.").

[13] *See* Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT'L L. 121, 137 (2017).

harms — not only those caused by collateral damage but those caused accidentally as well.[14]

This Article builds upon earlier work to make several key contributions. It provides a comprehensive account of obligations (and their absence) under international law and domestic law for compensating civilians in war. It examines existing systems for civilian compensation — in the United States and abroad — and concludes that existing systems for compensation fall far short. With this diagnosis, and recognizing the widespread and growing civilian harm today, this Article offers a novel proposal for addressing the shortcomings of existing systems for compensating local civilians in war, one that takes inspiration from the more systematized and generous provisions that already exist in U.S. law for a different set of civilians injured or killed in conflict areas: private military contractors.

We show that the modest and unpredictable system for compensating civilians harmed as a result of U.S. military operations is entirely inconsistent with the robust compensation program the United States maintains for these contractors. Two World War II–era statutes, the Defense Base Act and the War Hazards Compensation Act, established a workers'-compensation scheme for civilians working for the U.S. military abroad — a recognition of the necessity of those employees,

[14] *See* Rebecca Crootof, *War Torts*, 97 N.Y.U. L. REV. 1063, 1101 (2022) [hereinafter Crootof, *War Torts*]; *see also* Rebecca Crootof, *Implementing War Torts*, 63 VA. J. INT'L L. 319, 324-25 (2023) [hereinafter Crootof, *Implementing War Torts*]. Other scholars have examined tort liability for civilian casualties. *See* HAIM ABRAHAM, TORT LIABILITY IN WARFARE 177 (2024) (analyzing liability under existing torts or a new tort under customary international law); Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXFORD J. LEGAL STUD. 808, 833 (2019) (arguing "there are belligerent wrongs for which liability in tort law arises"); Emily Gilbert, *The Gift of War: Cash, Counterinsurgency, and 'Collateral Damage*,*'* 45 SEC. DIALOGUE 403, 404 (2015) (critiquing the lack of legal liability attached to condolence payments); Yael Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 186-87 (2009) (analyzing the potential for a "quasi strict liability rule" for "incidental" harms to civilians); *see also* Adi Gal, *Human Remedies*, 65 HARV. INT'L L.J. 387, 439-55 (2024) (advocating a no-fault compensation scheme for human rights violations); Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 397-420 (2019) (contrasting the United States and Israel and providing guidelines for future state compensatory mechanisms in asymmetric conflicts); John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1460 (2008).

working in dangerous conditions, to the war effort.[15] Under this system, contractors or their dependents have received compensation for all manner of warzone incidents. When a U.S. military gunman in Iraq fatally shot a contracted truck driver in an unidentified vehicle;[16] when a government-contracted computer expert suffered fatal burns while working on an airplane refueling in Colombia;[17] and when one contractor drunkenly shot and killed another,[18] those harmed received prompt and generous compensation. We ask how compensation for military contractors in U.S. law can serve as a blueprint for compensating local civilians.

This Article proceeds as follows. Part I examines how international law addresses civilian harm in armed conflict, focusing on the vastly differing treatment of lawful and unlawful harm. Whether the harm was lawful or not may make little difference from the perspective of the civilian who is harmed, yet it makes all the difference when it comes to the legal obligation to provide compensation. Part II tries to make sense of the inconsistent patchwork of compensation schemes in the United States and abroad. It shows that even the best systems for civilian compensation fail to compensate most of the civilians who suffer major loss in war. And all are unpredictable and inconsistent, offering civilians little clarity about what harms caused by military operations might be compensated. Given the strict lawful-unlawful divide in compensation obligations, Part III considers reasons for providing compensation to civilians in war beyond law. It concludes that even for lawfully caused harm to civilians during war — where international law mandates no

[15] *See* Defense Base Act, ch. 357, 55 Stat. 622 (1941) (codified as amended at 42 U.S.C. §§ 1651–1654); War Hazards Compensation Act, ch. 668, 56 Stat. 1028 (1942) (codified as amended at 42 U.S.C. §§ 1701–1717). These statutes have been overlooked in the context of civilian harm compensation. Scholars and practitioners have, however, analyzed the statutes on their own terms or in relation to the role of private military contractors in U.S. wars. *See, e.g.*, Greta S. Milligan, *The Defense Base Act: An Outdated Law and Its Current Implications*, 86 U. DET. MERCY L. REV. 407 (2009) (analyzing the Defense Base Act); Jon B. Robinson, *The War Hazards Compensation Act: A Primer*, 14 LOY. MAR. L.J. 264, 269 (2015) (analyzing the War Hazards Compensation Act).

[16] *See* Martin v. Halliburton, 808 F. Supp. 2d 983, 986 (S.D. Tex. 2011).

[17] *See* Ross v. DynCorp, 362 F. Supp. 2d 344, 348 (D.D.C. 2005).

[18] *See* Pope v. Palmer, No. 10-13285, 2011 WL 4502859, at *2 (E.D. Mich. Sept. 28, 2011).

compensation — there are strong moral, tactical, and reputational reasons for states to provide greater and more consistent compensation, including upholding the integrity of international humanitarian law itself.

Finally, Part IV outlines a new plan for War Hazards Compensation for Civilians to make compensation in conflict more reliable, systematic, and fair. Our proposal is rooted in existing statutes, a pair of World War II–era laws that offer compensation to U.S. military contractors based on a simple premise: their work benefiting our military is hazardous and thus warrants "hazard pay." We recommend that the United States, through Congress, lead the way. But any state that uses military force abroad could adopt a similar model. We acknowledge that financial compensation is only one small part of addressing the harm done to civilians in war, and that no amount of money can make up for the loss of life or permanent injury that civilians may suffer, or for the loss of property of personal significance. We nonetheless argue that failure to compensate after causing harm adds further injury. We argue, too, that the War Hazards Compensation for Civilians plan can render visible the often-invisible harm done to civilians — and thus make plain the true costs of war.

I. CIVILIAN COMPENSATION UNDER INTERNATIONAL LAW

A civilian who loses a loved one, a home, a business, or a community may not particularly care whether the act that caused that loss was lawful or not. The result, after all, is the same whether the harm took place in an unlawful war or whether their loss was lawful "collateral damage" or a "mistake." And yet the source of loss is dispositive in determining whether they have a legal right to compensation.

International law mandates compensation for civilians harmed as a result of unlawful acts, but not for those harmed by lawful acts. Thus, what matters for compensation under international law is not whether or how badly a civilian was harmed, but how and in what context a state inflicted that harm. As Reisman lamented over a decade ago, when it comes to civilian compensation, "it is not the injury suffered by the victim that is the key prerequisite to a remedy."[19] To make matters

[19] Reisman, *Compensating Collateral Damage*, *supra* note 12, at 3.

worse, even where international law requires compensation, states often fail to meet these obligations.

In this Part, we examine civilian loss as a result of both unlawful and lawful harm. Throughout, we discuss specific losses suffered by individual civilians in war. Their experiences underscore that the gravity of harm they suffer often has little, if any, bearing on their legal right to compensation, much less to the likelihood of receiving it. By featuring these individual stories, we aim to put the civilians whose lives and property are the subject of this Article at the forefront, reminding ourselves and our readers of the human lives at stake. This Part reveals that unevenness in reparations is not only the result of states' failures to meet their legal obligations; it is also, in no small part, a product of the law itself.

A. Loss as a Result of Unlawful Acts

States are legally obligated to make reparations for their internationally wrongful acts, meaning acts that violate international law. The International Law Commission (ILC)'s Draft Articles on State Responsibility for Internationally Wrongful Acts provide: "the responsible State is under an obligation to make full reparation for the injury," whether material or moral damage, "caused by the internationally wrongful act."[20] The ILC Draft Articles address only state-to-state reparations (though they leave open the possibility of reparations to individuals).[21] A state can meet its obligation of "full reparation," according to the ILC, by providing one or more of three types of reparation: restitution, compensation, or satisfaction.[22] Restitution is the most complete form of reparation; it aspires to restore the circumstances of a person harmed to the status quo before the offense took place.[23] The 1928 Permanent Court of International Justice's decision in *Chorzow Factory* explains: "reparation must, as far

[20] *ILC Draft Articles*, *supra* note 5, art. 31.

[21] *Id.* art. 33 ("This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.").

[22] *Id.* art. 34.

[23] *Id.* art. 35.

as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[24] Where, as often is the case, restitution is not possible, states can turn to other forms of reparation, including *satisfaction*, which often means apologies or investigation into harm.[25] Meanwhile, *compensation* can "fill gaps so as to ensure full reparation for damage suffered," often through monetary payments.[26] In this Article, we use "compensation" in a broader sense; it refers to monetary payments, to individuals or communities, for not just harm resulting from unlawful acts (the subject of the ILC Draft Articles) but from lawful acts, too.

In war, there are two relevant bodies of law: the law that governs the conduct of war, known variously as international humanitarian law, the law of armed conflict, and jus in bello[27]; and the law governing the resort to armed force, also known as the jus ad bellum.[28] We discuss each in turn.

1. Jus in Bello

After Abu Aqlah Keikel left the Rapid Support Forces (RSF), the paramilitary group took revenge on his hometown.[29] Descending on Gezira province, soldiers executed villagers in the streets, forced others from their homes, and raped women and girls.[30] The RSF has punished civilians but it is not at war with them; the paramilitary group is fighting for control of the country against the government, the Sudanese Armed

[24] Factory at Chorzow (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, No. 13, at 47 (Sept. 13).

[25] *See ILC Draft Articles*, *supra* note 5, art. 37.

[26] *Id.* art. 36.

[27] *See* G.A. Res. 60/147, at 7 (Dec. 16, 2005).

[28] *See* Pietro Sullo & Julian Wyatt, *War Reparations*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶¶ 26–27 (Rüdiger Wolfrum ed., 2015).

[29] *See* Katharine Houreld & Hafiz Haroun, *A Commander Swapped Sides in Sudan's Civil War. His Community Paid in Blood*, WASH. POST (Nov. 1, 2024), https://www.washingtonpost.com/world/2024/11/01/gezira-sudan-war-rsf-paramilitary [https://perma.cc/5RGM-MDWE].

[30] *See* Andres Schipani, Hirofumi Yamamoto, Chris Campbell, Sam Joiner & Peter Andringa, *Fierce Fighting Has Gripped Sudan. Hospitals Are in the Line of Fire*, FIN. TIMES (Oct. 29, 2024), https://ig.ft.com/sudan-hospitals/ [https://perma.cc/TSC6-A6SB].

Forces (SAF). By the time of the Gezira rampage, just over a year into the war, up to 61,000 people had died in the conflict, mostly from starvation.[31] The United Nations has accused both the RSF and the SAF of violating international law, condemning the "indiscriminate use of artillery, airstrikes, and explosive weaponry by *all* parties."[32]

Indiscriminate targeting of civilians is a violation of international humanitarian law, or jus in bello. This body of law sets limits on parties' conduct in war. It accepts that, unlike in peacetime, some killing is legal, but rejects the notion that war is lawless. International humanitarian law establishes guardrails rooted in the principles of distinction (between combatants and civilians), proportionality (ensuring expected harm to civilians is proportional to anticipated military advantage), and precaution (minimizing civilian casualties and damage to civilian objects during attacks).[33] These principles, codified in the Geneva Conventions and its Additional Protocols,[34] translate to prohibitions on a range of acts in war, including intentional killing of civilians and destruction of civilian objects. The International Committee of the Red Cross has maintained that willful violations of international humanitarian law, including grave breaches like purposefully killing civilians, encompass both intentional acts and reckless conduct, but do

[31] *See* Kalkidan Yibeltal & Basillioh Rukanga, *Sudan Death Toll Far Higher than Previously Reported — Study*, BBC (Nov. 14, 2024), https://www.bbc.com/news/articles/crln9lk51dro [https://perma.cc/S663-XR4E].

[32] U.N. Hum. Rts. Off. of the High Comm'r, Press Release, Sudan: UN Experts Condemn Campaign of Violence Against Civilians Amid Rising Displacement (Nov. 5, 2024), https://www.ohchr.org/en/press-releases/2024/11/sudan-un-experts-condemn-campaign-violence-against-civilians-amid-rising [https://perma.cc/CQ5L-CHC5] (emphasis added).

[33] *See* NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 17-19 (2022) (describing international humanitarian law, including the principles of distinction, proportionality, and precaution).

[34] For the Geneva Conventions and Additional Protocols, see *supra* note 5 and accompanying text.

not include "mere negligence."[35] Serious violations of international humanitarian law are war crimes.[36]

Violations of international humanitarian law trigger reparations obligations for states.[37] This reparation obligation is codified in two international law instruments: the 1907 Hague Convention IV and the Additional Protocol I to the Geneva Conventions. The 1907 Hague Convention IV respecting the Laws and Customs of War states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[38] Additional Protocol I to the Geneva Convention reaffirms, "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation."[39] The Commentary of 1987 on Additional Protocol I limits payment to cases where the loss is "material or personal," and where "restitution in kind . . . or the restoration of the situation existing before the violation" are impossible. The compensation must then be either equal in value to the object damaged or destroyed, or proportional to the loss suffered.[40]

Nonbinding declarations echo the same. In 2005, the United Nations General Assembly passed a resolution adopting nonbinding principles and guidelines, under which remedies for "serious violations of international humanitarian law" include "[a]dequate, effective and

[35] Oona A. Hathaway & Azmat Khan, *"Mistakes" in War*, 173 U. PA. L. REV. 1, 13-14 (2024) (recounting examples of civilian harm that the U.S. military dubbed "mistakes") (quoting Int'l Comm. of the Red Cross, *Preparatory Commission for the International Criminal Court*, Doc. PCNICC/1999/WGEC/INF/2/Add.3, annex (Dec. 15, 1999) ("The notion 'wilful' in the following sections [on war crimes] includes 'intent' and 'recklessness' but excludes ordinary negligence.")).

[36] Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton & Zoe A. Y. Weinberg, *What Is a War Crime?*, 44 YALE J. INT'L L. 53, 70 (2019).

[37] *See* Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 530 (2003).

[38] Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art.3, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV].

[39] Additional Protocol I, *supra* note 5, art. 91.

[40] Commentary of 1987 on Additional Protocol I, *supra* note 5, art. 91.

prompt reparation for harm suffered."[41] In adopting the resolution, the General Assembly called for providing remedy and reparation "in a systematic and thorough way at the national and international levels."[42] The obligation to provide reparation to victims for violations of international humanitarian law has risen to a norm of customary international law.[43]

Even when international law clearly requires compensation for international humanitarian law violations and courts find such violations occurred, technical and procedural hurdles can prevent victims from obtaining meaningful remedies. The International Court of Justice (ICJ)'s 2007 decision in *Bosnia v. Serbia* illustrates this problem. Though the Court found Serbia had violated its obligation to prevent the genocide of more than 7,000 Bosnian Muslims by Serbian-backed forces in Srebrenica, it denied compensation because of an insufficient "causal nexus" implicating Serbia.[44] The Court reasoned Bosnia had failed to prove that, had Serbia complied with its legal obligations, it would have prevented the genocide — effectively requiring Bosnia to prove a negative.[45] This burden was particularly onerous given Serbia's refusal to provide unredacted records of its involvement.[46] Serbia has to date paid nothing in reparations for Srebrenica or for any other war crimes committed during the Bosnian War by the forces under its control.[47]

---

[41] G.A. Res. 60/147, *supra* note 27, art. VII(11)(b).

[42] *Id.*

[43] *See* Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 497, 502, 505-07 (2003).

[44] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 234 (Feb. 26).

[45] *Id.*

[46] *See* Christian Tomuschat, *Reparation in Cases of Genocide*, 2 HAGUE JUST. J. 37, 39 (2007).

[47] Ian Traynor, *Serbia Jails Death Squad Men for Srebrenica Killings*, GUARDIAN (Apr. 11, 2007, 6:56 PM), https://www.theguardian.com/world/2007/apr/11/balkans [https://perma.cc/Y59V-N5Y4] (noting that the ICJ's ruling did not require Serbia to pay reparations); *see also* COUNCIL OF THE E.U., COMMISSION STAFF WORKING DOCUMENT: SERBIA 2024 REPORT 30-31 (2024) (documenting the failure of Serbia's judiciary to pay compensation to victims of war crimes in any criminal proceedings).

In other cases, payment is ordered, but the responsible countries simply refuse. In 2000, for example, the United Nations established the Eritrea-Ethiopia Claims Commission (EECC), which required a showing of an international humanitarian law violation for applicants to make a claim.[48] Despite the EECC's order in 2009 that Ethiopia pay $161 million to Eritrea and that Eritrea pay $174 million to Ethiopia, neither country has honored their obligations, demonstrating once again the problem of noncompliance.[49]

Neither the Hague Convention (IV) nor the Additional Protocol I, both of which require compensation for violations of international humanitarian law, clarifies to whom the reparation should be paid — a state or the individual victims? The answer in practice is that a state will receive the money paid in reparation and will then be responsible for distributing it among its civilians who were harmed.[50] In rare cases, individuals, rather than the state, are responsible for paying reparations — and, in those cases, the reparations are generally paid directly to the individuals harmed. The International Criminal Court, for instance, may "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[51] Such cases, however, are rare.

---

[48] *See* Permanent Rep. of Algeria to the U.N., Identical letters dated Dec. 12, 2000 from the Permanent Rep. of Algeria to the United Nations addressed to the Secretary General and the President of the Security Council, U.N. Doc. A/55/686-S/2000/1183 (Dec. 13, 2000); *see also* Partial Award: Cent. Front – Eth.'s Claim 2, 26 R.I.A.A. 155, 164 (Eri.–Eth. Claims Comm'n 2004), https://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf [https://perma.cc/BZL3-82TE]. However, it did make a partial award for Eritrea's violation of jus ad bellum. *See* Partial Award: *Jus Ad Bellum*, Eth.'s Claims 1-8, 26 R.I.A.A. 457, 468-69 (Eri.–Eth. Claims Comm'n 2005), https://legal.un.org/riaa/cases/vol_XXVI/457-469.pdf [https://perma.cc/UB4Z-MZNB].

[49] Namira Negm, *The Eritrea-Ethiopia Claims Commission*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CLAIMS COMMISSIONS 140, 141, 144 (Chiara Giorgetti, Patrick W. Pearsall & Hélène Ruiz-Fabri eds., 2023).

[50] *See* Int'l L. Comm'n, Rep. on the Work of its Seventy-First Session, U.N. Doc. A/74/10, at 361 (2019) ("[I]n many peace treaties, the injured State receives a lump sum payment from the wrongdoing State for the purpose of distributing it among those of its nationals affected by violations of IHL or other areas of law.").

[51] Rome Statute of the International Criminal Court art. 75(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. Jus ad Bellum

Maria Troyanivska, a fourteen-year-old in Kyiv, was alone in her bedroom when it burst into flames.[52] That night in October 2024, a Russian drone had flown through the window of her family's apartment, killing her instantly. Troyanivska became one of more than 15,000 Ukrainian civilians, 784 of them children, killed and more than 43,000 injured in Russia's invasion.[53] Those civilians suffered in varied horrific circumstances: missile strikes on a packed theatre, a printing house, a recreation center, a café, and apartment complexes;[54] antipersonnel mines on tracts of farmland;[55] on-the-ground crossfire.[56] What unites them is each loss happened as the result of an unlawful war.

Russia's full-scale invasion of Ukraine in February 2022 is an unlawful war of aggression — a violation of jus ad bellum.[57] The prohibition on such wars is codified in Article 2(4) of the United Nations Charter, which provides that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity

[52] James Waterhouse & Toby Luckhurst, *"It Flew Right into Her Room": Ukrainian Girl Killed by Russian Drone as Attacks Surge*, BBC (Nov. 12, 2024), https://www.bbc.com/news/articles/c8jyrn4z1gko [https://perma.cc/99HC-54BG].

[53] U.N. Hum. Rts. Off. of the High Comm'r, *Ukraine: Protection of Civilians in Armed Conflict March 2026 Update* (2026), https://ukraine.ohchr.org/sites/default/files/2026-04/Ukraine%20-%20protection%20of%20civilians%20in%20armed%20conflict%20%28March%20%202026%29_ENG.pdf [https://perma.cc/H5HZ-6NBW].

[54] U.N. Hum. Rts. Off. of the High Comm'r, *Report on the Human Rights Situation in Ukraine: 1 March – 31 May 2024*, at 6-7 (2024), https://ukraine.un.org/sites/default/files/2024-07/24-07-03%20OHCHR%2039th%20periodic%20report%20on%20Ukraine.pdf [https://perma.cc/9PLK-KAV9]; Press Release, U.N. Hum. Rts. Off. of the High Comm'r, Ukraine: Civilians Killed in Café Attack (Oct. 6, 2023), https://www.ohchr.org/en/press-briefing-notes/2023/10/ukraine-civilians-killed-cafe-attack [https://perma.cc/S5AQ-HU8J]; Lori Hinnant, Mstyslav Chernov & Vasilisa Stepanenko, *AP Evidence Points to 600 Dead in Mariupol Theater Airstrike*, ASSOCIATED PRESS (May 4, 2022, 4:12 AM), https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1 [https://perma.cc/4RFZ-3FHY].

[55] *See* sources cited *supra* note 54.

[56] *See* U.N. Hum. Rts. Off. of the High Comm'r, *Two-Year Update: Protection of Civilians: Impact of Hostilities on Civilians Since 24 February 2022* (Feb. 15, 2024), https://www.ohchr.org/sites/default/files/2024-02/two-year-update-protection-civilians-impact-hostilities-civilians-24.pdf [https://perma.cc/YA5K-ESGD].

[57] *See* G.A. Res. ES-11/5, ¶¶ 1–2 (Nov. 15, 2022).

or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[58]

Where a war is launched in violation of jus ad bellum, its unlawfulness makes even otherwise lawful harms to civilians within it unlawful. In an unlawful war, therefore, one civilian can suffer loss from a violation of international humanitarian law (for example, summary execution) and another from a lawful act (for example, fallen debris), but both have a legal right to compensation. The source of law for jus ad bellum violations differs from that for jus in bello violations.

Whereas the Hague Convention and Additional Protocol to the Geneva Convention confirm the obligation to pay for violations of international humanitarian law,[59] no treaty confirms the reparations obligation for violations of jus ad bellum.[60] Instead, this legal obligation is rooted in customary international law.[61] That these reparations obligations are not codified in any single written treaty does not undermine their legal force. A century ago, even the peace treaties that victors imposed on vanquished states sometimes rooted their penalties in appeals to jus ad bellum. In compelling Germany to pay crushing sums in reparations in relation to World War I, the Treaty of Versailles referred to the "loss and damage" that was "a consequence of the war imposed upon [the Allies and Associated Governments] by the *aggression* of Germany and her allies."[62] Three decades later, after World War II, the Treaty of San Francisco, which the Allied Powers and Japan signed in 1951, reached a more balanced compromise between liability and reparations. But like Germany in the Treaty of Versailles, Japan was held responsible because of its unlawful use of force. In the peace treaty,

[58] U.N. Charter art. 2(4).

[59] *See* Hague Convention IV, *supra* note 38; Additional Protocol I, *supra* note 5, art. 91.

[60] *See* Elisabeth Günnewig, *The Duty to Pay Reparations for the Violation of the Prohibition of the Use of Force in International Relations and the Jus Post Bellum*, *in* NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 439, 443-44 (Claus Kreb & Robert Lawless eds., 2020).

[61] *Id.*; *see also* Hannes Jöbstl & Dean Rosenberg, *The Humanization of War Reparations: Combatant Deaths and Compensation in Unlawful Wars*, 45 MICH. J. INT'L L. 39, 45 (2024).

[62] Treaty of Peace Between the Allied and Associated Powers and Germany art. 231, June 28, 1919, 42 Stat. 1939 (emphasis added).

Japan accepted responsibility based on Article 2 of the UN Charter, which included the obligation "to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State."[63]

The United Nations has repeatedly affirmed that a violation of jus ad bellum triggers reparations obligations, with or without related violations of international humanitarian law or human rights. The breadth of this reparations obligation is reflected in the *Rainbow Warrior* arbitration, which arose out of an incident in 1985 in which French intelligence operatives sank a Greenpeace ship in New Zealand, killing one of Greenpeace's photographers. New Zealand claimed that this action violated its sovereignty.[64] The arbitration tribunal, which made a recommendation for France to pay $2 million to New Zealand, said, "any violation by a State of any obligation, *of whatever origin*, gives rise to State responsibility and consequently, to the duty of reparation."[65]

More recently, in its 2022 judgment on the Democratic Republic of the Congo's case against Uganda for acts of aggression, the ICJ held that Uganda was responsible for compensation for "cases of displacement that have a sufficiently direct and certain causal nexus to Uganda's violation of the jus ad bellum, *even if they were not accompanied by violations of international humanitarian law or human rights obligations*."[66] Although they do not arise from codified treaties, jus ad bellum violations, standing alone, trigger reparations bills.

In the jus ad bellum context, states, rather than individuals, are usually the recipients of reparations. An important exception is the International Criminal Court's Victims Trust Fund, which can dispense money to individuals harmed, including as a result of a crime of aggression.[67] Certain claims commissions have also sought to facilitate

[63] Treaty of Peace with Japan, JP.-U.S., Sept. 8, 1951, 4 U.S.T. 3171.

[64] Rainbow Warrior (N.Z. v. Fr.), 19 R.I.A.A. 199, 200, 207 (Perm. Ct. Arb. 1986).

[65] Rainbow Warrior (N.Z. v. Fr.), 20 R.I.A.A. 215, 251 (Perm. Ct. Arb. 1990) (emphasis added).

[66] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. 85, ¶ 214 (Feb. 9) (emphasis added).

[67] Rome Statute, *supra* note 51, art. 79 ("A Trust Fund shall be established . . . for the benefit of victims of crimes within the jurisdiction of the Court . . . . The Court may order money and other property collected through fines or forfeiture to be transferred . . . to the Trust Fund.").

payments to individuals. In response to Iraq's invasion of Kuwait in 1990, the UN Security Council passed UNSCR 687, which stated that Iraq "is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's *unlawful invasion* and occupation of Kuwait."[68] Based on this assessment, the United Nations established a UN Compensation Commission to pay individuals victimized as a result of the invasion and occupation, whether or not the specific harm was a violation of international humanitarian law.[69]

Under international law, therefore, Russia's invasion of Ukraine is a clear-cut example in which a state owes reparations to civilians, even for lawful harm within the unlawful war.[70] The jus ad bellum violation makes otherwise noncompensable harm resulting from lawful acts compensable. Other countries agree: Europe and the United States have undertaken significant steps toward holding Russia accountable for paying war reparations. Among other things, the Council of Europe has established a Register of Damage designed to support a future compensation mechanism.[71] The European Union is also working on an

[68] S.C. Res. 687, ¶ 16 (Apr. 8, 1991).

[69] Before the invasion of Kuwait, the United Nations often spoke against conflicts, yet did not call for reparations. *See* Günnewig, *supra* note 60, at 448-54. After the invasion, the UNCC practice did not stick: even though the Security Council has the power to require reparations, it often does not. *See* Oona A. Hathaway, Maggie M. Mills & Thomas M. Poston, *War Reparations: The Case for Countermeasures*, 76 STAN. L. REV. 971, 988 (2024).

[70] In his separate declaration in *Armed Activities on the Territory of the Congo*, Judge ad hoc Verhoeven explained that a violation of the prohibition on the use of force creates a reparation obligation for "injury," which "comprises all the damage deriving from the violation of the prohibition on the use of force, regardless of whether it stems from acts or practices which in themselves comply with the rules of the law of war." He continued, "[i]t may be that breach of these rules augments the responsibility deriving from the violation of the jus ad bellum; be that as it may, compliance with the jus in bello is never sufficient to release a party from the obligation to make good all consequences of its violation of the jus ad bellum." Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 5 (Dec. 19) (declaration of Verhoeven, J. ad hoc).

[71] Council Committee of Ministers Resolution CM/Res(2023)3 Establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the

initiative to provide a "reparations loan" to Ukraine, allowing Ukraine to gain access to many of Russia's frozen Central Bank assets.[72] But recent estimates place the cost of Ukraine's recovery and reconstruction at nearly $600 billion.[73] The prospects of full reparation for these harms remain uncertain at best.

B. Loss as a Result of Lawful Acts

While international law imposes clear — if too often unenforced — obligations to compensate civilians harmed by unlawful acts, it creates no such duty when civilian harm results from lawful military operations. Even when civilians suffer devastating losses — homes, businesses, lives — the absence of international legal wrongdoing means states bear no obligation to provide redress.[74]

Here we explore harm stemming from actions in two main categories: loss as a result of intentional but lawful decisions to harm civilians (commonly referred to as "collateral damage"); and loss as a result of "mistakes" or accidents in military operations that do not rise to the level of international humanitarian law violations.

1. "Collateral Damage"

When the Israeli military's bomb hit, it felled a six-story apartment complex in Beirut. The strikes killed at least 33 people and injured 195, according to Lebanon's health ministry.[75] They also killed Hassan

Russian Federation Against Ukraine 2 (May 12, 2023), https://rm.coe.int/090000 1680ab2595 [https://perma.cc/N22J-XM8U].

[72] *See* Eur. Parliament, Stepping up Funding for Ukraine and Using Frozen Russian Assets (Oct. 21, 2025), https://www.europarl.europa.eu/news/en/agenda/briefing/2025-10-20/2/stepping-up-funding-for-ukraine-and-using-frozen-russian-assets [https://perma.cc/7PY9-U5AX].

[73] *See Ukraine: $588 Billion Recovery Cost over the Next 10 Years*, UN NEWS (Feb. 23, 2026), https://news.un.org/en/story/2026/02/1167016 [https://perma.cc/W3TY-NMG4].

[74] *See* NATALINO RONZITTI, SHUICHI FURUYA & RAINER HOFFMAN, HAGUE CONFERENCE: REPARATION FOR VICTIMS OF ARMED CONFLICT, DRAFT DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON REPARATION FOR VICTIMS OF ARMED CONFLICT (SUBSTANTIVE ISSUES), art. 4 cmt. 3 (2010).

[75] Aric Toler & Riley Mellen, *2,000-Pound Bombs Likely Used in Attack that Killed Nasrallah, Video Shows*, N.Y. TIMES (Sept. 28, 2024),

Nasrallah, the leader of Hezbollah. Before the strikes, Israel had warned civilians to evacuate buildings used by Hezbollah (though these warnings, some allege, were confusing — how were civilians to know where Hezbollah was? — and came in the middle of the night).[76] In that case as in others, Israel's position was that any civilian harm resulting from the strike was justified "collateral damage." Israel has claimed to be operating lawfully, within the proportionality limits of international humanitarian law, in targeting sites like schools and hospitals, though such claims have come under significant criticism.[77]

Lawful collateral damage encompasses civilian casualties, property destruction, and other civilian losses that result from military operations conducted in compliance with international humanitarian law. Unlike violations of international humanitarian law or mistakes, these losses stem from deliberate military decisions deemed legally permissible despite their known potential for civilian harm. The qualification of damage as "lawful" requires, first, that military planners have determined that the expected civilian harm was not excessive in

https://www.nytimes.com/2024/09/28/world/middleeast/israel-nasrallah-bunker-buster-bombs.html?smid=url-share [https://perma.cc/658F-RL6K].

[76] Kareem Chehayeb, *Israel's Airstrike Warnings Terrify and Confuse Lebanese Civilians*, ASSOCIATED PRESS (Oct. 10, 2024, 10:04 PM), https://apnews.com/article/israel-lebanon-hezbollah-evacuation-warnings-war-d131e6f7043623bc109eab768decc2a1 [https://perma.cc/5ZG9-4GZT] (describing late-night evacuation alerts and widespread confusion among civilians about what areas are at risk of airstrikes); *Lebanon: Israel's Evacuation 'Warnings' for Civilians Misleading and Inadequate*, AMNESTY INT'L (Oct. 10, 2024) https://www.amnesty.org/en/latest/news/2024/10/lebanon-israels-evacuation-warnings-for-civilians-misleading-and-inadequate [https://perma.cc/5C68-LW5X] (finding that warnings used misleading maps, were issued at short notice in the middle of the night, and failed to provide safe routes); *see also Lebanon Sees Deadliest Day Since Civil War as Israeli Attacks Kill 492*, AL JAZEERA (Sept. 23, 2024, 8:27 PM), https://www.aljazeera.com/news/2024/9/23/israel-warns-lebanon-civilians-of-air-strikes-on-hezbollah [https://perma.cc/K74W-6847] (reporting that vague Israeli warnings had left residents in targeting areas "wonder[ing] how they [were] supposed to know where Hezbollah has stored its weapons" and that such uncertainty "created a lot of confusion and a lot of anger").

[77] *See, e.g.*, Leonard Rubenstein, *Israel's Rewriting of the Law of War*, JUST SEC. (Dec. 21, 2023) https://www.justsecurity.org/90789/israels-rewriting-of-the-law-of-war/ [https://perma.cc/NX6A-JFFJ] (arguing that Israel's theory of justifiable conduct in war, which elevates claims of military necessity over the protection of civilians, runs counter to conventions of international humanitarian law).

relation to the anticipated military advantage — the core proportionality calculation required by international humanitarian law.[78] Second, the attacking force must have taken all feasible precautions to minimize civilian harm while still achieving the military objective, including choice of weapons, timing of attacks, and advance warnings where possible.[79] Finally, the attack must have been directed at a legitimate military objective, with civilian harm occurring as a secondary consequence rather than an intended effect.[80]

Reisman has criticized this system for failing to distinguish between "punishing the law violator, on the one hand, and succoring the victims who suffer, on the other."[81] The result is a system where civilians may bear devastating losses from military operations that fully comply with the law. The law authorizes military actions even though the actor using force knowingly harms innocent civilians.[82] This category of loss presents unique challenges precisely because it occurs within the bounds of law.

2. Lawful "Mistakes"

On August 29, 2021, in Kabul, Afghanistan, Zemari Ahmadi pulled his Corolla into the courtyard of the building where he and four other families lived. Some of the children from the building ran out to greet him. A few seconds later, a U.S. drone launched the Hellfire missile that incinerated Ahmadi.[83] The U.S. military, working under intense pressure amid the chaotic withdrawal from Afghanistan, believed they had just eliminated an ISIS-K member transporting bombs throughout Kabul. But Ahmadi was not an ISIS-K member. He was an aid worker transporting water. The same strike killed nine other civilians — seven

[78] Additional Protocol I, *supra* note 5, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

[79] *Id.* art 58.

[80] *Id.* art 52.2.

[81] *See* Reisman, *The Lessons of Qana*, *supra* note 12, at 397.

[82] *Id.* at 398; *see also* Crootof, *War Torts*, *supra* note 14, at 1101; Wexler & Robbennolt, *supra* note 13, at 148.

[83] 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 [https://perma.cc/M5E5-8GMG].

of them children, at least some of whom were readily visible in the drone footage.[84] DoD would later stress that spotting the children in the footage was obvious only with "the luxury of time."[85]

Some so-called "mistakes" rise to the level of "recklessness" and may violate international humanitarian law.[86] Here, however, we are concerned specifically with mistakes that would not rise to the level of an unlawful violation of international humanitarian law. Unlike collateral damage, where civilian harm is foreseen but deemed proportionate to military advantage, mistakes involve unintended civilian casualties that would have been avoided had accurate information been available or proper procedures followed. A lawful mistake under international humanitarian law is one in which the individual perpetrator may have acted negligently, but not recklessly.[87]

Under international humanitarian law, state responsibility for lawful mistakes may exist even when no individual can be held criminally liable, because "State responsibility . . . is not subject to all the limits that apply to criminal responsibility."[88] Cases of systemic or structural failures that lead to repeated mistakes in targeting or intelligence assessments can therefore incur state responsibility, even if there is no individual who may be held criminally liable. At the same time, a mistake that does not violate international humanitarian law also does not generate state responsibility — and therefore does not create a legal obligation to compensate those who suffer as a result.

The absence of legal obligations to compensate victims of lawful mistakes creates a troubling gap in civilian protection. While states may choose to make payments as a matter of policy or discretion, these payments remain purely voluntary. This stands in stark contrast to cases where mistakes rise to the level of recklessness and thus violate international humanitarian law, which do trigger compensation obligations under international law. The distinction can seem arbitrary

---

[84] *Id.*

[85] *Id.*

[86] Hathaway & Khan, *supra* note 35, at 20.

[87] *See* Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgment, ¶ 345 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) (finding that indiscriminate artillery fire that killed civilians was a criminally reckless act).

[88] Hathaway & Khan, *supra* note 35, at 31.

from the civilian perspective — the same drone strike might require compensation if launched recklessly but create no legal obligation if launched negligently, even though the harm done is identical.

So long as the distinction between mistakes and international humanitarian law violations defines the responsibility to compensate, states have even more incentive to characterize potential violations as mere negligence, thereby avoiding legal liability and the ensuing obligation to make reparations. Reputable observers have characterized the strike that killed Ahmadi and the nine other civilians as a violation of international humanitarian law — a failure to take reasonable precautions.[89] But as we have described, the umbrella of "mistake" leaves states significant leeway to escape liability. Indeed, following an internal investigation, DoD declared that the strike was just that: a mistake.[90] The Commander of U.S. Central Command, Marine Corps General Kenneth F. McKenzie, Jr. was clear: "It was a mistake, and I offer my sincere apology. As the combatant commander, I am fully responsible for this strike and its tragic outcome."[91] The DoD press release accompanying this admission concluded by stating that the Department was exploring the possibility of issuing voluntary condolence payments to those harmed by the strike.[92] No payment was ever issued.[93]

---

[89] Marko Milanovic, *The Law and Tech of Two Targeted Killings*, EJIL: TALK! (Sept. 30, 2021), https://www.ejiltalk.org/the-law-and-tech-of-two-targeted-killings [https://perma.cc/UYJ4-UAAM]; *US: End Impunity for Civilian Casualties*, HUM. RTS. WATCH, (Dec. 14, 2021), https://www.hrw.org/news/2021/12/14/us-end-impunity-civilian-casualties [https://perma.cc/52V8-ZPX7].

[90] Todd C. Lopez, *DoD: August 29 Strike in Kabul 'Tragic Mistake,' Kills 10 Civilians*, DOD NEWS (Sept. 17, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2780257/dod-august-29-strike-in-kabul-tragic-mistake-kills-10-civilians [https://perma.cc/ZP37-K8UC]; Eric Schmitt, *U.S. Pledges to Pay Family of Those Killed in Botched Kabul Drone Strike*, N.Y. TIMES, https://www.nytimes.com/2021/10/15/us/politics/kabul-drone-strike-victims-payment.html (last updated Nov. 2, 2021) [https://perma.cc/73UP-8YJR].

[91] Lopez, *supra* note 90.

[92] *Id.*

[93] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2021, at 13 (Sept. 27, 2022), https://media.defense.gov/2022/Sep/27/2003086234/-1/-1/1/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-

II. CIVILIAN COMPENSATION UNDER U.S. & FOREIGN LAW

As civilian death and destruction has accumulated globally, no government has designed a compensation system that adequately addresses either lawful or unlawful harm. In this Part, we ask how states address situations where civilians suffer in war — whether as a result of death or injury or significant property damage. We begin with the United States, which offers a patchwork of programs for compensating civilians in war. We then put the U.S. system into comparative context — looking at both multilateral and foreign systems for civilian compensation in war. We find that while some civilian compensation systems are more complete than others, none is comprehensive.

A. U.S. Civilian Compensation

In January 2015, a U.S. CIA drone strike in Pakistan aimed at an al-Qaeda compound killed two aid workers being held hostage there: an Italian, thirty-nine-year-old Giovanni Lo Porto, and an American, seventy-three-year-old Warren Weinstein.[94] President Barack Obama offered a public explanation: "What we did not know, tragically, is that al Qaeda was hiding the presence of Warren and Giovanni in this same compound."[95] The U.S. government described Lo Porto and Weinstein's

OPERATIONS-IN-2021.PDF [https://perma.cc/8R33-NPCG] (showing no payment that year); *see also* Abigail Hauslohner, *A Year After U.S. Drone Strike Killed Afghan Civilians, Relatives on Path to Resettlement*, WASH. POST (Aug. 15, 2022), https://www.washingtonpost.com/national-security/2022/08/15/afghanistan-family-united-states-withdrawal [https://perma.cc/UUJ9-3MU6] (noting that the families were still seeking compensation as of 2022).

[94] Greg Miller & Greg Jaffe, *U.S. Agrees to Pay Nearly $3 Million to Family of Italian Killed in CIA Strike*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213af6-7c1a-11e6-bd86-b7bbd53d2b5d_story.html [https://perma.cc/Y75Y-Z7PR]. When the payment to Lo Porto was announced, the negotiations with the family of Weinstein were still ongoing.

[95] Press Release, The White House, Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto (Apr. 23, 2015, 10:05 AM), https://obamawhitehouse.archives.gov/the-press-office/2015/04/23/statement-president-deaths-warren-weinstein-and-giovanni-lo-porto [https://perma.cc/573V-NYTS].

deaths as an inadvertent tragedy and agreed to pay Lo Porto's family close to $3 million as a "condolence" payment.[96]

Most civilians and their families are not so generously compensated. One of the highest payouts under the Foreign Claims Act, which allows DoD to provide compensation outside situations of armed combat, was for the deaths of three children in Iraq. In June 2006, U.S. soldiers "accidentally discharged 155 mm rounds" into a civilian home killing three children ages five, sixteen and eighteen. The family was given $35,000 in total — $11,000 for each of the children and $2,000 for damage to house.[97] While $11,000 each may seem a paltry amount — it pales in comparison to the several million the U.S. government agreed to pay to survivors of Lo Porto, the Italian aid worker — this compensation is still more generous than what is provided in the vast majority of cases. Usually, civilians receive no compensation from the United States at all.[98]

As these cases illustrate, the United States sometimes provides compensation to civilians harmed by its military, but it offers wildly differing levels of compensation for similar harms — and it most often offers nothing. The legal framework governing civilian compensation includes formal legislative acts, such as the Foreign Claims Act, as well as more flexible, ad hoc systems like condolence payments and the Commander's Emergency Response Program (CERP). Each has its own set of rules, limitations, and applications, often leading to disparate outcomes for civilians harmed under similar circumstances. The result

---

[96] Miller & Jaffe, *supra* note 94.

[97] *See Documents Received from the Department of the Army in Response to ACLU Freedom of Information Act Request 157-160*, ACLU (Oct. 31, 2007), https://www.aclu.org/sites/default/files/webroot/natsec/foia/log.html [https://perma.cc/78SZ-S7WF] [hereinafter *ACLU FOIA Records*]. A three-member Foreign Claims Commission approved the payments. DEP'T OF THE ARMY, PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL (June 3, 2006), https://web.archive.org/web/20081105083113/https://www.aclu.org/natsec/foia/pdf/Army0157_0160.pdf [https://perma.cc/7S7D-TYDF].

[98] *See, e.g.*, Natasha Bertrand & Oren Liebermann, *US Military Admits that Airstrike Killed Civilian in Syria Last Year*, CNN (May 2, 2024, 12:02 PM), https://www.cnn.com/2024/05/02/politics/us-military-admits-air-strike-killed-civilian-syria/index.html [https://perma.cc/VBB9-84TZ] (reporting that the U.S. military did not offer compensation to the family of a Syrian civilian mistakenly killed by an airstrike).

is a system that frequently falls short of its stated goals due to its complexity and inconsistency, as well as the gaps between different compensation mechanisms. Here we examine the primary components of this compensation patchwork, highlighting its strengths, weaknesses, and the ongoing challenges to providing fair and consistent redress to civilians harmed by U.S. military operations abroad.

1. The Foreign Claims Act

The practice of paying civilians for harm caused by the U.S. military dates to World War I where, as John Fabian Witt has vividly demonstrated, the unprecedented expansion of motor vehicles use in war — and the ensuing accidents — led to demands for a compensation system for off-battlefield damage.[99] By 1918, General John Pershing was begging Congress to create a program to compensate victims of the accidents occurring all over Europe, which he insisted was essential for protecting the reputation of the United States.[100] In April 1918, President Woodrow Wilson signed into law "An Act to give indemnity for damages caused by American forces abroad," which provided payment for claims of inhabitants of any "European country not an enemy or ally of an enemy for damages caused by American military forces."[101] Pershing would later write in his memoirs that "[t]he prompt settlement of claims had an excellent effect upon the people of the European countries concerned."[102]

As the United States entered World War II, President Franklin Roosevelt quickly moved to pass the Foreign Claims Act in order to update the 1918 Act on indemnity, aware that there were about to be many more American troops stationed on friendly ground abroad.[103] The Foreign Claims Act, enacted in 1942, applies to inhabitants of foreign countries who suffer property damage, injury, or death caused by U.S. armed forces overseas.[104] The Act announces its purpose in its preamble:

[99] Witt, *supra* note 14, at 1458-61.

[100] *Id.* at 1460.

[101] Act of Apr. 18, 1918, ch. 57, 40 Stat. 532.

[102] Witt, *supra* note 14, at 1460 (quoting 2 JOHN J. PERSHING, MY EXPERIENCES IN THE WORLD WAR 16-17 (1931)).

[103] Witt, *supra* note 14, at 1461.

[104] Foreign Claims Act, 10 U.S.C. § 2734(a).

"To promote and to maintain friendly relations through the prompt settlement of meritorious claims."[105]

Foreign Claims Act claimants may recover damages generally on the grounds of that friendliness — payouts are only eligible to individuals from "friendly" nations or who are "friendly" to the United States themselves (if their home country is at war with, or allied with a country at war with, the United States).[106] Claims are assessed by Foreign Claims Commissions made up of one to three commissioned officers, typically members of the Judge Advocate General Corps.[107] The Foreign Claims Commissions adjudicate claims and payouts based on local tort liability, and can authorize payments of up to $100,000 — though awards tend to be much smaller in practice.[108]

The Foreign Claims Act has notable gaps. Perhaps the most glaring is its combat exception: the Act applies strictly to noncombat situations, meaning that civilians harmed in battle have no recourse to file a claim.[109] The combat exception is not applied uniformly, leading different Foreign Claims Commissions to reach different determinations for highly factually similar cases.[110] Unpredictability in the application of the combat exception has been a source of resentment toward the United States in some civilian populations, directly contrary to the statute's aims.[111] Also excluded from Foreign Claims Act liability are private contractors and foreign military partners, who are not employees of the U.S. armed forces for the purposes of the Act.[112] Even

[105] *Id.* § 2734.

[106] *Id.* § 2734(b)(1)–(b)(2).

[107] Witt, *supra* note 14, at 1461-62.

[108] *Id.* at 1472.

[109] *See* Cora Currier, *Our Condolences: How the U.S. Paid for Death and Damage in Afghanistan*, INTERCEPT (Feb. 27, 2015, 9:22 AM), https://theintercept.com/2015/02/27/payments-civilians-afghanistan [https://perma.cc/K8E4-XEST].

[110] *See* Major Katharine M.E. Adams, *A Permanent Framework for Condolence Payments in Armed Conflict: A Vital Commander's Tool*, 224 MIL. L. REV. 314, 322 (2016) ("[I]n an escalation of force incident involving a civilian approaching a checkpoint in Iraq, one judge advocate determined that the combat activity exclusion did not apply and paid $7000 for a civilian's death. Another unit with a substantially similar claim determined that the combat activity exclusion did apply, and denied the claim entirely.").

[111] *Id.* at 323.

[112] Witt, *supra* note 14, at 1464-65.

if a claim is valid and meritorious, there is no language in the Foreign Claims Act mandating that an award be paid. Instead, claims can be denied if payment is "not in the best interest of the United States" — for instance, if the claimant is considered "unfriendly to the United States."[113] Such open-ended discretion results in wildly inconsistent results.

The combat exception has proved frustrating for judge advocates and commanders who, for decades, have faced intense pressures from civilians and U.S. forces alike to authorize such payments.[114] In several conflicts over the twentieth century, the United States sought to circumvent its exception. In Vietnam, Grenada, and Panama, U.S. forces worked to set up systems to hear combat claims, working with funds provided, at different points, by the U.S. Agency for International Development, the U.S. Department of State, and the U.S. Army Claims Service.[115] Seeking even greater flexibility, over the course of further conflicts, U.S. forces began providing ad hoc condolence payments for civilians harmed in and by combat.[116]

An alternative to the Foreign Claims Act, available only to select, similarly friendly countries, are Status of Forces Agreements (SOFAs), which set the level of contribution other countries pay for U.S. military presence.[117] A SOFA provides an exclusive avenue through which host citizens can make claims; if such an agreement covers a country, no claims can be made under the Foreign Claims Act.[118] As part of SOFAs, host governments bear some cost for harm, in military action or outside it, to their citizens. The U.S. SOFA with South Korea, for instance, allows "residents of the Republic of Korea (ROK) to file claims for loss

[113] Foreign Claims Act, 32 C.F.R. § 536.138(h).

[114] Adams, *supra* note 110, at 330.

[115] *Id.*

[116] Witt, *supra* note 14, at 1470-72.

[117] *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 68 (outlining agreement concerning forces and civilians of NATO or the United States in one another's countries).

[118] *See* Claims Against the United States, 32 C.F.R. § 536.34(d)(1) (2024). "Claims by foreign inhabitants, arising in a foreign country, which are not cognizable under a SOFA, fall exclusively under the FCA." *Id.*

or injury caused by the negligence of U.S. Armed Forces personnel."[119] The ROK Treasury makes an initial payment, which the United States can partially reimburse depending on whether it accepts liability (and how much).[120] Where an incident is entirely the responsibility of the United States, the ROK will nonetheless pay twenty-five percent of the claim; if responsibility is equally shared, it will pay fifty percent. The same formula governs the U.S. SOFA with Japan.[121]

2. Ad Hoc Condolence Payments

Condolence payments are discretionary and made by U.S. military commanders to express sympathy for civilian harm caused during military operations.[122] At the outset, we clarify some confusing and, at times, overlapping terminology. Ad hoc condolence payments encompass both solatia and ex gratia payments. For the purposes of this subsection, we distinguish them as follows: solatia payments are made in countries where DoD has explicitly determined that monetary expressions of sympathy are culturally appropriate and/or expected. Ex gratia payments, by contrast, are discretionary condolence payments made without regard to cultural expectations or appropriateness in the receiving country.

a. Solatia

Condolence payments as a DoD practice originated with solatia: payments to victims or families meant to express sympathy, rather than to serve as compensation or an admission of liability.[123] These payments

[119] U.S. ARMY, SOFA CLAIMS — INFORMATION PAPER 1 (n.d.), https://api.army.mil/e2/c/downloads/328723.pdf [https://perma.cc/D3Y9-25KW].

[120] *Id.*

[121] *See* Agreement (with Agreed Minutes and Exchange of Notes) Under Article VI of the Treaty of Mutual Co-operation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1652.

[122] Adams, *supra* note 110, at 332.

[123] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 2 (2007).

come from unit-level operations and maintenance funds.[124] Solatia are culturally contingent, and DoD requires a determination that such payments are appropriate in the region where forces on the ground seek to use them.[125] These determinations have not always been accurate: at the beginning of the wars in Iraq and Afghanistan, for instance, solatia were initially (and confoundingly) prohibited by U.S. Central Command,[126] despite abundant evidence — known to the U.S. military at the time — that solatia were a common practice in the Middle East.[127]

Over time, the U.S. military has moved to a more flexible program: the Commander's Emergency Response Program, discussed below.[128] For the purposes of the ad hoc condolence payments discussed here, CERP is relevant as the first program that gave broad authorization to military commanders to make condolence payments that were not specifically tied to cultural appropriateness. This practice laid the groundwork for (and was ultimately replaced by) the most flexible form of ad hoc condolence payments: ex gratia payments.

b. Ex Gratia

Ex gratia payments have long been an informal part of the U.S. military's operating procedure, but it was only in the last decade that the U.S. government sought — largely unsuccessfully — to institutionalize them. In 2016, President Barack Obama issued an Executive Order that instructed: "relevant agencies shall . . . acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including ex gratia payments, to civilians who are injured or to the families of civilians who are killed."[129] Four years later,

---

[124] *See* 10 U.S.C. § 2242.

[125] Adams, *supra* note 110, at 332.

[126] *Assistance for Civilian Casualties of War: Hearing Before a Subcomm. of the Comm. on Appropriations United States Senate*, 111th Cong. 41 (2009) (statement of Jonathan Tracy, Associate Director, National Institute of Military Justice).

[127] *See* U.S. DEP'T OF THE ARMY, LEGAL SERVICES: CLAIMS PROCEDURES 340-41 (Aug. 8, 2003), https://www.govinfo.gov/content/pkg/GOVPUB-D101-PURL-LPS20037/pdf/GOVPUB-D101-PURL-LPS20037.pdf [https://perma.cc/7R44-RDFS].

[128] *Id.* at 334; *see supra* Part II.A.3.

[129] Exec. Order No. 13,732, 3 C.F.R. 13,732 (2016). The Trump Administration later revoked Section 3 of Executive Order 13,732, which included reporting requirements on drone strikes. *See* Exec. Order No. 13,862, 84 Fed. Reg. 8,789 (2019).

Congress authorized and provided annual, recurring funding of ex gratia payments.[130] DoD, under the first Trump Administration, subsequently issued a set of Interim Regulations to provide more systematic guidance on condolence payments.[131] The regulations authorize ex gratia payments "in the event of property damage, personal injury, or death that is incident to the use of force" by the United States or any coalition of which the United States is a part.[132] The regulations also, however, prohibit payments "to residents of a foreign locality or country where the population of the area as a whole is in a state of armed conflict or war against the United States."[133] The guidelines thus disallow any payments to even friendly civilians who are under the control of hostile nations or groups.

Ironically, since Congress passed the law funding ex gratia payments in 2020, such payments have all but vanished. As Table 1 shows, from 2020 through 2022 (the last year for which this information has been made public), DoD made exactly one ex gratia payment using these funds.[134] This is a sharp decline from 2019, when DoD reported that 611 ex gratia payments had been extended.[135] Part of this decline is likely attributable to a decrease in civilian casualties caused by U.S. military

[130] *See* Joanna Naples-Mitchell & Annie Shiel, *For Another Year, DoD Fails to Make Condolence Payments to Civilian Harm Victims*, JUST SEC. (May 7, 2024), https://www.justsecurity.org/95485/dod-civilian-harm [https://perma.cc/V6S7-TXKD].

[131] Memorandum from Off. of Under Sec'y of Def. for Pol'y on Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That Is Incident to Military Operations 9-10 (June 23, 2020) [hereinafter 2020 Interim Regulations], 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 [https://perma.cc/3PMB-6L59].

[132] *Id.* at 1.

[133] *Id.* at 5.

[134] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2022, at 11 (2024) [hereinafter ANNUAL REPORT 2022]; DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2021, at 13 (2022) [hereinafter ANNUAL REPORT 2021]; DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2020, at 16 (2021) [hereinafter ANNUAL REPORT 2020].

[135] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2019, at 18 (2020) [hereinafter ANNUAL REPORT 2019].

operations abroad from 2020 to 2024, though it is worth noting that the figures reported by DoD are very likely undercounting civilian deaths and injuries. For each of the years from 2020 to 2024, for instance, where DoD reported thirty-three, seventeen, zero, five, and four civilian casualties, respectively, Airwars, a nonprofit that assesses credible allegations of civilian harm, recorded a minimum of 40, 19, 18, 47, and 118 casualties for each of those same years.[136] But even taking DoD's estimates at face value, there remains no explanation for why, in 2021 (a year where DoD assessed "there were approximately 12 civilians killed and approximately 5 civilians injured . . . as a result of U.S. military operations") there were zero ex gratia payments.[137] In short, even with congressionally earmarked funds, almost none of the civilian victims of U.S. military operations are compensated.

* * *

[136] *Incidents with Civilian Harm Allegations*, AIRWARS, https://airwars.org/civilian-casualties/?belligerent=us-forces&start_date=2024-01-01&end_date=2024-12-31&civilian_harm_reported=yes (last visited Jan. 13, 2026) [https://perma.cc/LB9X-4VUW] (documenting civilian harm allegations in 2024); *Incidents with Civilian Harm Allegations*, AIRWARS, https://airwars.org/civilian-casualties/?belligerent=us-forces&start_date=2023-01-01&end_date=2023-12-31&civilian_harm_reported=yes (last visited Jan. 13, 2026) [https://perma.cc/7XNQ-QTC5] (documenting civilian harm allegations in 2023); *Incidents with Civilian Harm Allegations*, AIRWARS, https://airwars.org/civilian-casualties/?belligerent=us-forces&start_date=2022-01-01&end_date=2022-12-31&civilian_harm_reported=yes (last visited Jan. 13, 2026) [https://perma.cc/X2BP-5RF6] (documenting civilian harm allegations in 2022); *Incidents with Civilian Harm Allegations*, AIRWARS, https://airwars.org/civilian-casualties/?belligerent=us-forces&start_date=2021-01-01&end_date=2021-12-31&civilian_harm_reported=yes (last visited Jan. 13, 2026) [https://perma.cc/6B9V-9W84] (documenting civilian harm allegations in 2021); *Incidents with Civilian Harm Allegations*, AIRWARS, https://airwars.org/civilian-casualties/?belligerent=us-forces&start_date=2020-01-01&end_date=2020-12-31&civilian_harm_reported=yes (last visited Jan. 13, 2026) [https://perma.cc/LB9X-4VUW] (documenting civilian harm allegations in 2020). All *Airwars* figures are current as of September 29, 2025, but may be subject to future revision.

[137] ANNUAL REPORT 2021, *supra* note 134, at 6.

Table 1: Reported Civilian Casualties and Ex Gratia Payments

Year	Civilian Casualties (reported by DoD)	Ex gratia payments recorded[138]
2017	1,083 (864 deaths, 219 injuries)[139]	None recorded.
2018	185 (120 deaths; 65 injuries)[140]	None recorded.
2019	223 (132 deaths; 91 injuries)[141]	611[142]
2020	33 (23 deaths, 10 injuries)[143]	0[144]
2021	17 (12 deaths, 5 injuries)[145]	1[146]
2022	0[147]	0[148]
2023	5 (3 deaths, 2 injuries)[149]	3[150]
2024	4 (2 deaths, 2 injuries)[151]	0[152]

[138] *See id.*; ANNUAL REPORT 2022, *supra* note 134; ANNUAL REPORT 2020, *supra* note 134; ANNUAL REPORT 2019, *supra* note 135.

[139] ANNUAL REPORT 2019, *supra* note 135, at 8-9 (revising previous assessments of casualties in 2017).

[140] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2018, at 5 (2019).

[141] ANNUAL REPORT 2019, *supra* note 135, at 6.

[142] *Id.* at 18. The ex gratia payments this year were unusually high, with DoD reporting hundreds more payments than casualties. This discrepancy may be explained by compensation for property damage. *See id.* (noting that the 611 payments include those made "in the event of property damage, personal injury, or death").

[143] ANNUAL REPORT 2020, *supra* note 134, at 6.

[144] *Id.* at 16.

[145] ANNUAL REPORT 2021, *supra* note 134, at 6.

[146] *Id.* at 13.

[147] ANNUAL REPORT 2022, *supra* note 134, at 5.

[148] *Id.* at 11.

[149] DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2024, at 4-5 (2024) [hereinafter ANNUAL REPORT 2024] (revising assessment from 2023 to add incidents); DEP'T OF DEF., ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2023, at 5 (2024) [hereinafter ANNUAL REPORT 2023].

[150] ANNUAL REPORT 2023, *supra* note 149, at 10; ANNUAL REPORT 2024, *supra* note 149, at 5-6 (documenting a 2024 offer of an ex gratia payment for an incident that took place on December 26, 2023).

[151] ANNUAL REPORT 2024, *supra* note 149, at 4-5.

[152] *Id.* at 5-6 (reporting two cases where such payments were "under consideration").

c. Condolence Payments as Stopgaps

Condolence payments have sometimes been made when a Foreign Claims Commission denies a payment under the Foreign Claims Act, especially when such a payment is denied under the combat exception. This makes some sense, as condolence payments largely originated because of the Foreign Claims Act's exclusion of combat-related deaths. But in practice, the ad hoc systems used for condolence payments do not remedy the selective and, at times, inconsistent application of the combat exception — they compound it.

In Iraq, records obtained by the American Civil Liberties Union showed that the combat exception was often used to deny Foreign Claims Act claims arising from shootings of civilian drivers by Coalition Forces.[153] In these incidents, drivers were killed for driving near convoys,[154] driving too quickly through checkpoints,[155] or driving around streets that had been blocked by soldiers.[156] Sometimes the families of these victims received condolence payments.[157] However, these payments were highly inconsistent, and, at least as recorded by the Foreign Claims Commissions, do not appear to correlate with dangerousness, fault, or need.

The record suggests little rhyme or reason to the issuance of condolence payments. A man delivering vegetables was shot and killed at a checkpoint on his way to work: no condolence payment.[158] A driver

---

[153] *See ACLU FOIA Records*, *supra* note 97.

[154] *Id.* at Army Bates 1165–69 ("[Redacted] was driving to Balad to sell his fruit. According to claimant, [Redacted] met a Coalition Forces convoy driving down the wrong side of the road. [Redacted] pulled over but was shot and killed. . . . Finding: denied due to combat exception.").

[155] *Id.* at Army Bates 666–68 ("According to claimant, [Redacted] reduced his speed and US forces shot on him without warning, killing him and damaging the car. According to the Army memo, [Redacted] increased speed towards the checkpoint and did not stop at the warning shots. Finding: denied due to combat exception.").

[156] *Id.* at Army Bates 1681–84 ("Claimant's father was shot and killed by Coalition Forces (CF) who had blocked a street to investigate a possible Improvised Explosive Device (IED). SIGACTS reported that a SUV tried to go around the blocked traffic, and when CF fired at the vehicle, it became engulfed in flames. . . . Finding: denied due to combat exception.").

[157] *See, e.g.*, *id.* (driver received $2,500 condolence payment).

[158] *Id.* at Army Bates 785–886.

was shot and killed after losing control of his car at a checkpoint: $2,500 condolence payment.[159] An elderly man was shot and killed after he accidentally drove onto a blockaded street: no condolence payment.[160] A man was shot and killed for driving into a Coalition Forces convoy: $2,500 condolence payment.[161] Records maintained by the Foreign Claims Commission provide little explanation for these and other condolence payments, hence it is difficult to determine why payments were made in any given case. In the context of Iraq and Afghanistan, however, the rationale for paying condolence payments at all was part of a broader strategy of counterinsurgency, as discussed below in Part II.A.3.

Public information reveals that U.S. ex gratia payments are incredibly rare. So are U.S. government admissions that its military operations have resulted in civilian death and injury in the first place. In its most recent Section 1057 Report (named for the part of the National Defense Authorization Act that requires it) on civilian harm, DoD stated: "U.S. military operations in 2024 resulted in two civilians killed and two civilians injured."[162] One civilian, an adult man, was killed in an airstrike in Al Qaim, Iraq; the other, a child, in an undisclosed part of Syria. For both deaths, ex gratia payments were "under consideration."[163] In the case of the adult man whom an airstrike killed in Iraq, the Joint Task Force Operation "contacted the affected family to express their condolence."[164] For a 2023 strike that killed two *different* adult men in Al Hillah, Iraq, however, the DoD report reflects that the U.S. government *did* offer a payment. The military "coordinated with an NGO for assistance in contacting the affected families to offer an ex gratia payment," the report to Congress reads. "Each family expressed that they did not want any further contact regarding this incident."[165]

The rarity of ex gratia may be a matter of policy. A provision of the 2020 Interim Regulations provided that "offers of ex gratia payments

[159] *Id.* at Army Bates 1677–80.

[160] *Id.* at Army Bates 1206–07.

[161] *Id.* at Army Bates 1165–69.

[162] ANNUAL REPORT 2024, *supra* note 149, at 3.

[163] *Id.* at 4-5.

[164] *Id.* at 5-6.

[165] *Id.* at 6.

. . . will not be used to circumvent the 'combat exclusion' in the FCA . . . (e.g., by trying to compensate recipients for the value of losses (i.e., property damage, personal injury, or death), for what would otherwise be noncompensable under the FCA)."[166] This might be interpreted to prohibit payments in the exact situations in which condolence payments were initially made, and would substantially reduce the usefulness of such payments.

3. Commander's Emergency Response Program

The CERP was initially conceived to provide U.S. military commanders in Iraq and Afghanistan the ability to swiftly and flexibly allocate funds for urgent humanitarian relief and reconstruction,[167] funding the construction of schools, hospitals, roads, sewers, and similar projects.[168] CERP was aligned with a broader "Money as a Weapon System" (MAAWS) counterinsurgency strategy, in which "money is touted as a 'non-kinetic force' that can win the hearts and minds of the local population by stimulating the economy through infrastructure development, job creation, and business stimulation."[169] And to that end, commanders were also authorized to use CERP funds to provide condolence payments to civilians harmed by U.S. operations.[170] The condolence payments in Iraq discussed above in Part II.A.2, for instance, were all authorized using CERP funds.

MAAWS developed into an important strategic tool for U.S. and Coalition Forces in the wars in the Middle East. The Counterinsurgency

---

[166] 2020 Interim Regulations, *supra* note 131, at 2.

[167] Memorandum from Deputy Sec'y of Def. to Sec'ys of the Military Dep'ts et al., Management of the Commander's Emergency Response Program 1 (May 10, 2010), https://dod-executiveagent.osd.mil/Agents/ViewAgent.aspx?agentId=100 [https://perma.cc/6APD-VUAC].

[168] *See* OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SIGIR 10-003, IRAQ COMMANDER'S EMERGENCY RESPONSE PROGRAM GENERALLY MANAGED WELL, BUT PROJECT DOCUMENTATION AND OVERSIGHT CAN BE IMPROVED 2 (2009) [hereinafter SIGIR 10-003].

[169] Emily Gilbert, *Money as a "Weapons System" and the Entrepreneurial Way of War*, 1 CRITICAL MIL. STUD. 202, 202 (2015).

[170] *See* U.S. FORCES AFG., USFOR-A PUB 1-06, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) SOP 4 (2009); MULTI-NAT'L CORPS – IRAQ, MNC-I CJ8 SOP, MONEY AS A WEAPON SYSTEM 10-11 (2009).

Field Manual, first released in 2006, contains a section on Integrated Monetary Shaping Operations, which are "the coordinated use of money, goods, or services to support the commander's objectives. *They are a means to an end.*"[171] To the extent that commanders authorized payments in Iraq and Afghanistan, it therefore may have been because they believed that the payments would win the hearts and minds of locals and enhance the force protection postures of units under their control.[172]

The MAAWS focus meant that CERP was a tactical tool aimed at securing short-term operational advantages[173] — for instance, providing "martyr payments" to encourage locals to continue to fight or side against the insurgents.[174] This tactical orientation yielded mixed results, with spending rarely leading to longer-term stability.[175] CERP funds are congressionally authorized for specific conflicts, and so are not available in all circumstances.[176] For now, the authority to make condolence payments under CERP has been retired. When the 2020 NDAA established a new $3 million pot of money for ex gratia payments, it also eliminated the authority of CERP funds to be used for condolence payments.[177]

---

[171] U.S. DEP'T OF THE ARMY, FM 3-24/MCWP 3-33.5, INSURGENCIES AND COUNTERING INSURGENCIES ¶ 10-56 (2014) [hereinafter 2014 ARMY FIELD MANUAL] (emphasis added).

[172] *See* 1 CTR. FOR L. & MIL. OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 175 (2004).

[173] *See* SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, LEARNING FROM IRAQ 14 (2013), https://www.files.ethz.ch/isn/163646/Report_-_March_2013.pdf [https://perma.cc/NGE8-PVWS].

[174] *See* MULTI-NAT'L CORPS – IRAQ, *supra* note 170, at B-12, B-14-3 (defining, as part of the MAAWS strategy, "Iraqi Hero payments" — or "Martyr payments" — as payments to the surviving spouses or next of kin of local forces killed in action).

[175] Rebecca Jensen, *(Mis)Use of Weapons: CERP in the Afghan Surge*, 10 MCU J. 63, 69 (2019).

[176] Adams, *supra* note 110, at 317.

[177] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1213, 133 Stat. 1198, 1629-30 (superseding all other ex gratia authorities by declaring § 1213 the "sole authority" for such payments).

B. International Comparisons

The challenge of providing civilian compensation in wartime is not limited to the United States. It confronts militaries globally. Foreign systems of compensation for civilian harm suffer from many of the same limitations as do their U.S. equivalents. Indeed, sometimes the systems are tethered: U.S. and foreign compensation is often coordinated, either explicitly or implicitly, in multinational military operations. In other instances, systems originated or matured in the same circumstances — among many U.S. allies and partners, they took shape during the conflicts in Iraq and Afghanistan.[178]

1. Multinational

U.S. and foreign compensation procedures interact most closely when their militaries operate together. The U.S. Civilian Harm Mitigation and Response Action Plan acknowledged and incorporated U.S. interconnectedness with other countries' compensation efforts.[179] Under the plan's 2023 DoD Instruction, the U.S. military was required to maintain its standards in multinational operations, encourage other countries to adopt similar standards, and assess allies' and partners' current civilian harm mitigation records.[180]

NATO's approach to civilian compensation developed through joint operations in Afghanistan and Iraq, mirroring U.S. practices of making ex gratia payments without accepting legal liability. The alliance stood up a claims office in Afghanistan,[181] and in 2010, issued nonbinding civilian-casualty guidelines.[182] Assistance "could include ex gratia payments or in-kind assistance, such as medical treatment, the replacement of animals or crops, and the like."[183]

---

[178] *See* Steven van de Put, Ex Gratia *Payments and Reparations: A Missed Opportunity?*, 14 J. INT'L HUMANITARIAN LEGAL STUD. 131, 136-38 (2023).

[179] DOD INSTRUCTION, *supra* note 10, at 41.

[180] *Id.* at 6.

[181] *See* Lone Kjelgaard, *HQ ISAF Claims Office*, NATO LEGAL GAZETTE (NATO, Brussels, Belg.), Apr. 7, 2009, at 12, 12.

[182] NATO, NATO Nations Approve Civilian Casualty Guidelines (Aug. 6, 2010), https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/2010/08/06/nato-nations-approve-civilian-casualty-guidelines [https://perma.cc/92U4-AFQ9].

[183] *Id.*

Other multinational groupings, without the United States, have also coordinated on compensation. In Somalia, a peacekeeping force of the African Union has wrestled with whether and how to compensate civilians.[184] The African Union Transition Mission in Somalia established a Civilian Casualty Tracking, Analysis and Response Cell in 2012, five years into its mission, and has made payments of at least $30,000 to five families, but it lacks funding for a more standardized amends process.[185] These limited payments are also ex gratia.

2. Foreign Government Approaches

Most countries do not have an overarching approach to civilian harm compensation, across multiple conflicts or even within one. In Afghanistan, for example, the United Kingdom, Canada, Poland, the Netherlands, Australia, and Norway instituted payment programs for civilians.[186] By contrast, Italy, Germany, and France did not establish systems, though they did make some ad hoc ex gratia payments.[187] Even for those countries that do have stated policies or laws, implementation has been inconsistent.

The UK approach has similarities to the United States, including an underlying hearts-and-minds justification. According to the UK Ministry of Defence in 2008, payments "contribute to the effort in

[184] *See* Zecharias Zelalem, *Families Want Justice, 'Blood Money' for AU Peacekeeper Killings in Somalia*, AL JAZEERA (Oct. 15, 2024), https://www.aljazeera.com/features/2024/10/15/families-want-justice-blood-money-for-au-peacekeeper-killings-in-somalia [https://perma.cc/BY4V-DCNQ].

[185] Afr. Union, *Progress Report of the Chairperson of the Commission on the Situation in Somalia/Amisom* 6 (Aug. 17, 2019), https://www.peaceau.org/uploads/psc-progress-report-865-meeting-amisom-somalia-7-august-2019-eng.pdf [https://perma.cc/K2UX-Z2NM]; Abdullahi Abdille Shahow, *Before Leaving Somalia, African Union Should Provide Compensation for Civilian Harm*, JUST SEC. (Feb. 28, 2024), https://www.justsecurity.org/92822/before-leaving-somalia-african-union-should-provide-compensation-for-civilian-harm [https://perma.cc/J58Y-6RSZ].

[186] Roseanne Burke & Mark Lattimer, *Reparations for Civilian Harm from Military Operations* 5, CEASEFIRE CTR. FOR CIVILIAN RTS. (Dec. 2021), https://www.ceasefire.org/wp-content/uploads/2021/12/CFR_Reparations_Nov21_Final.pdf [https://perma.cc/A67U-4AUP].

[187] *Id.* at 25-27.

winning the consent of the local population."[188] Like the United States, the UK provided ex gratia payments on the ground in Iraq and Afghanistan. The British government has characterized those programs as aberrations, specific to the "special circumstances of operations in Iraq and Afghanistan."[189] In campaigns against ISIS in Iraq and Syria, the UK no longer carried forward the practice.[190]

Where Britain differs from the United States is in its willingness to make payments that recognize legal liability. The UK area-claims offices in Afghanistan and Iraq offered ex gratia payments, which carried no liability, and public-liability payments, which did.[191] The Ministry of Defence gives broad factors for determining the appropriate claim size: "An individual's pain and suffering, degree of injury, property losses, past and future financial losses and level of care required."[192] The sums that the UK government has sporadically disclosed, which do not distinguish between ex gratia and public-liability payments, reveal wide variation. For property damage in Afghanistan, payments ranged from $10.27 to $232,400.[193] For the category of "civilian death or injury," claims offices in Afghanistan paid as little as $50 and as much as £1.5 million.[194]

In 2009, the Australian government established the Tactical Payment Scheme, authorizing the Minister for Defence to make payments for

[188] UK MINISTRY OF DEF., CLAIMS ANNUAL REPORT 2007–2008, at 29 (2008).

[189] *Ministry of Defence: Compensation, Question for Ministry of Defence*, UIN 54689, UK PARLIAMENT (Nov. 24, 2016), https://questions-statements.parliament.uk/written-questions/detail/2016-11-24/54689 [https://perma.cc/7CX8-92S9] (quoted in Burke & Lattimer, *supra* note 186, at 50).

[190] *See id.*

[191] Burke & Lattimer, *supra* note 186, at 5.

[192] *Official Statistics MOD Common Law Compensation Claims Statistics 2022/23*, UK MINISTRY OF DEF. (Feb. 26, 2024), https://www.gov.uk/government/statistics/mod-common-law-compensation-claims-statistics-202223/mod-common-law-compensation-claims-statistics-202223 [https://perma.cc/L396-V49Q].

[193] Baroness Goldie, *Armed Forces: Deployment Question for Ministry of Defence*, UIN HL8874, UK PARLIAMENT (July 12, 2023), https://questions-statements.parliament.uk/written-questions/detail/2023-06-28/HL8874 [https://perma.cc/QEA6-MGTX]. The original source (the Baroness's written answer to the parliamentary question) provides these figures in dollars rather than pounds.

[194] *Id.*

civilian harm from military operations abroad.[195] A 2013 law authorized "act of grace payments," the equivalent of ex gratia payments; these payments are "used where any obligation to the applicant is moral, rather than legal."[196] The Australian government justified the compensation system as "critical for maintaining local community support and thereby ensuring the safety of deployed forces."[197] From 2009 to 2016, Australia's Department of Defence paid $206,937, in 2,836 individual payments to Afghans, and one $1,619 payment to an Iraqi citizen.[198] The act-of-grace system gives the government wide discretion. For example, the Australian treasury rejected a request from an Iraqi man who claimed that an Australian airstrike killed thirty-five of his family members in 2017 during the campaign against ISIL.[199]

The Australian government faced new pressure to compensate Afghans when, in 2017, journalists published a seven-part investigation based on leaked documents that revealed possible unlawful killings by the Australian special forces.[200] That public pressure prompted an investigation. The resulting Brereton Report, released in 2020,

---

[195] *Defence Act 1903* (Cth) s 123H (Austl.).

[196] *Public Governance, Performance and Accountability Act 2013* (Cth) div 7 (Austl.); *Act of Grace Payments*, AUSTL. GOV. DEP'T OF FIN., https://www.finance.gov.au/sites/default/files/2019-11/Act-of-Grace-Payments-fact-sheet.pdf (last visited Jan. 25, 2025) [https://perma.cc/2FJP-FQQ4]; *Glossary*, AUSTL. GOV. DEP'T OF FIN., https://www.finance.gov.au/about-us/glossary (last visited Jan. 25, 2025) [https://perma.cc/QK8C-FFCA].

[197] *Tactical Payments Scheme*, AUSTL. GOV. DEP'T OF DEFENCE (2020), https://www.transparency.gov.au/publications/defence/department-of-defence/department-of-defence-annual-report-2019-20/chapter-4---financial-summary/tactical-payments-scheme (last visited Jan. 25, 2025) [https://perma.cc/5W4D-YBWK].

[198] Daniel Hurst, *Australia Pays $207,000 Compensation to 2,800 Afghans over Six Years*, GUARDIAN (Jan. 12, 2016, 2:12 PM), https://www.theguardian.com/world/2016/jan/13/australia-pays-207000-compensation-to-2800-afghans-over-six-years [https://perma.cc/GWF3-EYCA].

[199] Nino Bucci, *Iraqi Man Alleging 35 Family Members Were Killed by Australian Airstrike Denied Compensation*, GUARDIAN (Apr. 10, 2022, 1:30 PM), https://www.theguardian.com/australia-news/2022/apr/11/iraqi-man-alleging-35-family-members-were-killed-by-australian-airstrike-denied-compensation [https://perma.cc/SU4N-BCSE].

[200] *See* Dan Oakes & Sam Clark, *The Afghan Files: Defence Leak Exposes Deadly Secrets of Australia's Special Forces*, ABC (July 10, 2017, 1:02 PM), https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642 [https://perma.cc/H3X6-2NC9].

examined incidents of misconduct and possible crimes, including murder, by Australian armed forces in Afghanistan; it included compensation for civilians — payments that should not "be contingent on establishing criminal liability"[201] — among its 143 recommendations.

In response to the inquiry, Australia's Department of Defence announced the Afghanistan Compensation Scheme through a new regulation under the Defence Act 1903 that went into effect on July 19, 2024.[202] Under the regulation, the Australian Chief of the Defence Force "may" refer claims to a newly created Afghanistan Inquiry Compensation Advocate.[203] As of 2024, the Afghanistan Advocate had not yet paid any sums as a response to the Brereton Report "due to significant legal, practical and logistical issues relating to the ongoing political situation in Afghanistan."[204]

Like Australia, the Netherlands has acted on civilian harm mitigation and response policy following revelations of its military's involvement in civilian deaths.[205] The most high-profile civilian-death incident involving the Netherlands was an air strike in June 2015, in Hawija, Iraq, the explosions of which killed an estimated eighty-five people. In response to press investigations in 2019, the Dutch parliament established an independent commission to investigate.[206] In December

[201] INSPECTOR GEN. OF THE AUSTL. DEF. FORCE, AFGHANISTAN INQUIRY REPORT 173 (2020), https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf [https://perma.cc/X42W-KG93].

[202] Richard Marles, *Closure of the Afghanistan Inquiry Report*, AUSTL. GOV. DEP'T OF DEFENCE (Sept. 12, 2024), https://www.minister.defence.gov.au/media-releases/2024-09-12/closure-afghanistan-inquiry-report [https://perma.cc/65AH-VSGF].

[203] *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024* (Cth) s 5 (Austl.).

[204] AUSTL. GOV. DEP'T OF DEFENCE, AFGHANISTAN INQUIRY REFORM PROGRAM CLOSURE REPORT 2023-24, at 14 (2024), https://www.defence.gov.au/sites/default/files/2024-09/AfghanistanInquiryReformProgramClosureReport.pdf [https://perma.cc/3K9M-ELEB].

[205] *See The Dutch MOD Announces Policy Changes Regarding Civilian Harm: A Positive Development but Shortcomings Remain*, OPEN STATE FOUND., https://openstate.eu/wp-content/uploads/sites/14/2022/05/Roadmap-Statement_ENG-3.pdf (last visited Jan. 26, 2025) [https://perma.cc/UY3G-LSWB].

[206] *See* SABA AZEEM, LAUREN GOULD, ERIN BIJL & JOLLE DEMMERS, AL-GHAD LEAGUE FOR WOMEN & CHILDCARE, INTIMACIES OF REMOTE WARFARE & PAX FOR PEACE, AFTER THE STRIKE: EXPOSING THE CIVILIAN HARM EFFECTS OF THE 2015 DUTCH AIRSTRIKE ON *HAWIJA* 17

2020, the ministry of defense announced €4.4 million for community-building, such as "electricity supplies, economic activities, job opportunities, and water supplies," to be administered by the International Organization for Migration and the United Nations Development Programme in Hawija.[207]

Since 2022, the Dutch government has instituted a "Roadmap Process" to reform its civilian harm reduction and mitigation. This process has already produced some results. The Netherlands formed a dedicated protection-of-civilians team in its Ministry of Defence, and when deploying the Armed Forces, the military must now notify parliament of the risks of civilian casualties and its plans for civilian protection in "Article 100 letters."[208] The new process has improved transparency on civilian casualties and attention to mitigating harm to civilians, but the Civilian Protection Monitor warns "there is no comprehensive, government-wide document clearly detailing all aspects of" civilian harm mitigation and response.[209]

Another set of laws and policies involves governments compensating their own citizens for harm resulting from counterterrorism and other combat operations within their territory.[210] For example, Egypt has made community investments and individual payments for residents

(Feb. 2022), https://paxforpeace.nl/wp-content/uploads/sites/2/import/2022-04/PAX_REPORT_HAWIJA_04.pdf [https://perma.cc/N28Q-M4TQ].

[207] Pesha Magid, *No Accountability: How a Rare Effort to Compensate Iraqi Airstrike Victims Failed*, INTERCEPT (Oct. 29, 2022, 7:00 AM), https://theintercept.com/2022/10/29/iraq-hawija-airstrike-accountability [https://perma.cc/LY7P-64AR].

[208] *See More Transparency on Civilian Casualties*, NETH. MIN. OF DEF., https://english.defensie.nl/topics/civilian-casualties/more-openness-on-civilian-casualties (last visited Jan. 26, 2025) [https://perma.cc/H5SN-XB5J].

[209] *See* LUCCA DE RULTER, MEGAN KARLSHØJ-PEDERSEN & ERIN BIJL, CIVILIAN PROT. MONITOR, COUNTRY REPORT: THE NETHERLANDS 15-17 (Apr. 2025), https://civilianprotectionmonitor.org/wp-content/uploads/2025/04/CPM_NL_2024_single.pdf [https://perma.cc/M8FR-RNS2]; Lauren Gould, *Recommendations: How the Netherlands and its Allies Can Improve Transparency and Accountability vis-a-vis Civilian Harm*, UTRECHT UNIV. (May 23, 2024), https://intimacies-of-remote-warfare.nl/podcasts-documentaries/recommendations-to-the-dutch-mod-on-how-to-improve-the-protection-of-civilians-in-military-operations [https://perma.cc/98AK-8TW6].

[210] *See* U.S. Dep't of State, *Uzbekistan*, 2016 COUNTRY REPS. ON TERRORISM 272 (2017), https://et.usembassy.gov/wp-content/uploads/sites/188/crt_2016.pdf [https://perma.cc/S3W2-ZUH6].

displaced by fighting in North Sinai.[211] Ukraine has similarly legislated a "sum of compensation to persons that suffered damage" from "terrorist act[s] conducted by the state budget of Ukraine in accordance with law."[212] And decades into its campaign against the Kurdish Workers' Party, Turkey enacted a law to compensate the 300,000 people displaced.[213] The law followed several cases in the European Court on Human Rights, including *Doğan v. Turkey*, in which the court found Turkey had provided an insufficient remedy to displaced people.[214] The law's purpose, the preamble announced, is "to deepen trust in the State, to strengthen the State-citizen relationship, to contribute to social peace and the fight against terrorism."[215] In a subsequent European Court on Human Rights decision, the court determined that the compensation system satisfied Turkey's responsibilities and, based on that assessment, rejected 1,500 applications for "non-exhaustion of domestic remedies."[216] The remedy was imperfect, however: the government provided inconsistent amounts to people displaced, with little transparency about how the amounts were calculated, and no room for appeals.[217]

[211] *See* U.S. Dep't of State, 2021 COUNTRY REPS. ON TERRORISM 130-31 (2023), https://www.state.gov/reports/country-reports-on-terrorism-2021 [https://perma.cc/EY3R-NUDT].

[212] On the Fight Against Terrorism 2003, § 4, art. 19 (Ukr.), https://www.vertic.org/media/National%20Legislation/Ukraine/UA_Law_Fight_against_Terrorism.pdf [https://perma.cc/6JMQ-Y9BL].

[213] *See* Hum. Rts. Watch, Unjust, Restrictive, and Inconsistent: The Impact of Turkey's Compensation Law with Respect to Internally Displaced People (Dec. 20, 2006), https://www.refworld.org/reference/countryrep/hrw/2006/en/18229 [https://perma.cc/5RAJ-E92J].

[214] Doğan v. Turkey, App. No. 8803/02 (June 29, 2004), https://hudoc.echr.coe.int/eng/?i=001-61854.

[215] Preamble to Draft Law on Compensation for Damage Arising from Terror and Combating Terror No. 5233 of 2004 (Iraq).

[216] *See* Doğan v. Turkey, App. No. 8803/02, ¶ 6 (July 13, 2006), https://hudoc.echr.coe.int/eng/?i=001-76309 (summarizing İçyer v. Turkey, App. No. 18888/02 (2006), https://hudoc.echr.coe.int/eng?i=001-72123).

[217] Hum. Rts. Watch, *supra* note 213.

Iraq's compensation law, enacted in 2009 and revised in 2015, retroactively covers harm since 2003.[218] The harm can result from violations of international humanitarian law or lawful acts, and it can be at the hands of ISIS or the Iraqi counterterrorism efforts. The sums are higher than the average U.S. payments for civilian harm in Iraq: the equivalent of $4,200 for deaths or grave injuries, and $2,100 to $3,800 for lesser injuries.[219] Like the Turkish law, however, the Iraqi system has faced criticism: Iraq's compensation-claims committees have lacked resources and imposed onerous requirements on claimants. Each had to produce up to nineteen documents, and complete a several-months-long process to receive a "security clearance" (a background check to determine lack of ISIS affiliation).[220]

In other instances, Yemen and Pakistan have compensated their citizens for harm by U.S. drones. In 2014, Yemen's government paid $60,000 to the families of twelve people killed in a U.S. drone strike (and $20,000 to fifteen people injured).[221] The year before, the Yemeni government paid $158,000 and 101 rifles (a traditional gesture of apology) to families.[222] In Pakistan, meanwhile, local officials have made payments to victims of U.S. drone strikes, even as courts demand reparation from the United States.[223] In North Waziristan, for example,

[218] *See* Ctr. for Civilians in Conflict, *"We Hope, but We Are Hopeless": Civilians' Perceptions of the Compensation Process in Iraq* 8 (June 2017) [hereinafter *We Hope, but We Are Hopeless*], https://civiliansinconflict.org/wp-content/uploads/2018/11/2018.MENA_.We-Hope-But-Are-Hopeless.CompReport.Web_.pdf [https://perma.cc/E2KS-B927].

[219] *See* The First Amendment to the Law on Compensation of Victims of War Operations, Military Mistakes and Terrorist Operations No. 57 of 2015 art. 8 (Iraq).

[220] *See We Hope, but We Are Hopeless*, *supra* note 218, at 12, 14, 18.

[221] *See* Greg Miller, *Yemeni Victims of U.S. Military Drone Strike Get More than $1 Million in Compensation*, WASH. POST (Aug. 18, 2014), https://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390_story.html [https://perma.cc/9GT5-YCHW].

[222] Hum. Rts. Watch, US/Yemen: Investigate Civilian Deaths from Airstrikes (Dec. 17, 2013), https://www.hrw.org/news/2013/12/17/us/yemen-investigate-civilian-deaths-airstrikes [https://perma.cc/7UC8-EEWB].

[223] *See* Found. for Fundamental Rts. v. Fed'n of Pak., (2013) PLD (High Ct. Peshawar) 93 (Pak.), https://www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf [https://perma.cc/PHH8-D4ZW].

the Pakistani government paid the equivalent of $3,500 to the families of dozens killed and $1,200 to those injured in a U.S. strike.[224]

Israel's system of civilian compensation is specific to its history. Under the Civil Wrongs (Liability of the State) Law, 5712, Israel allows noncitizens (in practice, often Palestinians) to make tort claims for actions of its agents in domestic courts.[225] While this process was designed as a "rare exception to typical bars on bringing claims against the injuring state in the context of armed conflicts,"[226] in recent decades, the Knesset and the courts have erected hurdles to Palestinians attempting to bring such cases.[227] The central problem is an ever-expanding immunity category of a combatant-activity and other exceptions, including the government's ability to deny liability in areas that it deems "enemy territory," as it has characterized Gaza.[228] In 2022, Israel's Supreme Court ruled that this expansion is constitutional.[229] Outside of the courts, civilians can make claims in two other ways: through an application to the Ex Gratia Committee of the Ministry of Defense or, more rarely, a Claims Headquarters Officer in the Ministry of Defense, who can authorize payments to Palestinians.[230]

---

[224] *See* Press Release, Ctr. for Civilians in Conflict, PAKISTAN: Compensation Promised to Civilian Drone Victims (Mar. 28, 2011), https://civiliansinconflict.org/press-releases/pakistan-compensation-promised-to-civilian-drone-victims [https://perma.cc/N4ZM-P7UM].

[225] *See* Ya'ara Mordecai, *When the Cannons Roar, Tort Laws Are Silent? A Re-examination of Section 5B of the Civil Wrongs (Liability of the State) Law*, 56 ISR. L. REV. 41, 43 (2023).

[226] Bachar, *supra* note 14, at 398.

[227] *See id.* at 401-02.

[228] *See* Yuval Shany & Amichai Cohen, *Moving Toward Blanket Immunity: Israeli Supreme Court Blocks Gaza Tort Cases*, LAWFARE (July 26, 2022, 8:01 AM), https://www.lawfaremedia.org/article/moving-toward-blanket-immunity-israeli-supreme-court-blocks-gaza-tort-cases [https://perma.cc/D8KB-BUJF].

[229] *See* Rabea Eghbariah, *An Unarmed Teen Was Shot During a Cease-Fire. Israel Was Never Held to Account*, N.Y. TIMES (Nov. 3, 2023), https://www.nytimes.com/2023/11/03/opinion/unarmed-teen-israel-gaza.html [https://perma.cc/TF8X-PWYA] (describing holding in CivA 993/19 Nabaheen v. Israeli Def. Ministry (2022) (Isr.)).

[230] *See* Bachar, *supra* note 14, at 401-02.

C. Shared Traits of Existing Civilian Compensation

Existing systems for compensating civilian harm, in the United States and internationally, share traits that limit their effectiveness. First, existing schemes provide incomplete coverage with significant structural gaps; second, they are characterized by arbitrary and opaque implementation that creates inconsistent outcomes; third, they are grounded in contingent and underinclusive rationales rather than more fundamental moral, ethical, or legal imperatives; fourth, they lack international coordination; and fifth, they do not adequately make up for the barriers to courts that victims face.[231]

1. Incomplete Compensation

Existing civilian harm compensation systems suffer from significant structural gaps that leave many victims without adequate recourse. The Foreign Claims Act exemplifies this problem with its combat exception, which categorically excludes a large category of civilian victims from seeking compensation through official channels. Command-level restrictions on payments further limit the availability of compensation, even in situations where it might theoretically be available. For instance, under current ex gratia regulations, payments are prohibited to civilians who live in territories controlled by U.S. adversaries.[232] This excludes even friendly civilians who happen to be under the control of hostile nations or groups — in wartime scenarios, perhaps a significant percentage of the otherwise eligible pool of those in need of compensation.

These structural gaps are compounded by limitations in geographic and temporal scope. Many compensation mechanisms are tied to specific conflicts or theaters of operation, leaving victims in other contexts without access to remedy. The CERP program, for example, was only authorized for Iraq and Afghanistan. Similarly, the combat exception in the Foreign Claims Act creates arbitrary distinctions

[231] In his analysis of compensation systems in the United States, Canada, and Israel, Haim Abraham found additional common features, two of which — inconsistency and lack of transparency — we include in our list. ABRAHAM, *supra* note 14, at 146-54.

[232] 2020 Interim Regulations, *supra* note 131, at 5.

between combat and noncombat situations that fail to account for the complex reality of modern warfare where these lines are often blurred.

2. Arbitrary and Opaque Standards

Even when compensation mechanisms exist, their implementation is frequently inconsistent and opaque. Similar incidents may be treated differently depending on their classification as "combat" or "noncombat" situations. In Iraq and Afghanistan, as discussed, highly factually similar cases often received very different treatments, with no clear pattern to explain the differences in outcomes. The reliance on discretionary payments exacerbates these inconsistencies. Records from Iraq show widely varying treatment of civilian deaths at checkpoints and during convoy operations, with no clear pattern explaining different outcomes. Even systems grounded in legislation, like Australia's act-of-grace framework, retain significant discretion with limited transparency about decision-making processes.

The process for seeking compensation is often poorly understood and inaccessible to those who need it most. Victims face unclear procedures, burdensome documentation requirements, and little transparency about how decisions are made. The result is a system that appears arbitrary and fails to provide consistent or predictable outcomes for civilian victims.

3. Contingent and Underinclusive Rationales

Many existing compensation programs are driven by strategic — or political — considerations rather than moral or legal obligations to civilian victims. This approach is evident in the "hearts-and-minds" rationale that underpinned many compensation efforts in Iraq and Afghanistan, where payments were often viewed as a tool of counterinsurgency strategy rather than a moral imperative. Similarly, the Foreign Claims Act and SOFAs are often motivated by the desire to maintain positive relationships with host nations and local populations, rather than a commitment to justice for civilian victims.

The problem with these context-dependent rationales is that they may not apply consistently across different military contexts. For instance, in drone warfare, where there is minimal U.S. ground

presence, the strategic value of maintaining friendly relations with the local population is diminished. Alternatively, in a conventional interstate conflict, the perceived benefits of compensating civilian victims from an "enemy" state may be considered less important than in scenarios where the United States is attempting to replace or support a government (as in Iraq and Afghanistan). In fact, making such payments is currently prohibited under the Foreign Claims Act and ex gratia regulations. This inconsistency means that civilian victims in some contexts may be left without recourse, simply because their compensation is not deemed strategically valuable.

Without grounding principles, political or public pressure also plays an outsized role. Take Australia, where media reporting prompted the Brereton Report — the basis for recommendations to compensate.[233] Or the Netherlands, where the government's community-based assistance resulted from a pilot speaking to a reporter. Such responsiveness to political pressure adds to the arbitrariness of compensation.[234] It advantages victims who are able to draw public attention but not the many who go unnoticed. And it lacks workable standards to ensure consistency, predictability, or fairness. Such susceptibility to political pressure also means that when it is politically advantageous not to compensate, countries may do so. The Trump Administration's lack of commitment to civilian harm reduction underscores this risk.[235]

4. Lack of International Coordination

Another oddity of the status quo approach to compensation is its emphasis on national action for what are often inherently transnational questions: making payments to affected civilians in other countries. NATO, for example, blessed guidelines on human security in 2016 but

[233] *See* Evelyn Manfield, *Defence Department Sets out Compensation Plan for Unlawful Afghanistan Killings*, ABC (July 20, 2024, 3:03 AM), https://www.abc.net.au/news/2024-07-20/compensation-pathway-set-out-for-unlawful-afghanistan-killings/104123014 [https://perma.cc/L5NQ-6NWF]; *see also* Oakes & Clark, *supra* note 200.

[234] *Cf.* AZEEM ET AL., *supra* note 206, at 10-12 (describing the Dutch government's actions to mitigate civilian harm only after public reporting).

[235] *See* Beynon, *supra* note 11.

did not include provisions for compensation.[236] The United States recently helped establish the International Contact Group on Civilian Harm Mitigation and Response, in which NATO countries participate,[237] but the Alliance notes that "CHMR [Civilian Harm Mitigation and Response] remains primarily a National responsibility."[238] Such a national perspective is particularly insufficient given the prevalence of multinational operations. The lack of more formal accountability to partner countries — as well as a lack of recognized obligations under international law to compensate for lawful harm — has resulted in relatively few national efforts, as in the Netherlands, that individual countries take upon themselves to institute.

5. Barriers to Redress in Court

Deficiencies in existing policies are particularly stark because civilians often cannot seek other routes for compensation in court. Plaintiffs from Germany to Japan have faced arguments that international humanitarian law violations do not create a cause of action for individuals.[239] U.S. courts, meanwhile, have tended to be inhospitable to victims of U.S. military–caused harm seeking to sue the government.[240]

[236] *See* NATO, Human Security: Approach and Guiding Principles, (Oct. 20, 2022), https://www.nato.int/en/about-us/official-texts-and-resources/official-texts/2022/10/20/human-security [https://perma.cc/EF8U-M7DT].

[237] The participants in the September 2024 meeting were Austria, Australia, Belgium, Denmark, Finland, Germany, Netherlands, Norway, the United Kingdom, and the United States. Press Release, Dep't of Def., Readout of International Contact Group Meeting on Civilian Harm Mitigation and Response (Sept. 24, 2024), https://www.defense.gov/News/Releases/Release/Article/3915930/readout-of-international-contact-group-meeting-on-civilian-harm-mitigation-and [https://perma.cc/GP6K-G6M7].

[238] NATO, *Human Security Agenda* 25 (2024), https://www.nato.int/nato_static_fl2014/assets/pdf/2024/8/pdf/240830-human-security-en.pdf [https://perma.cc/AU94-QEL7].

[239] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 6, 2016, III ZR 140/15 (Ger.) (denying compensation to Afghan relatives of civilians killed in 2009); Dieter Fleck, *Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, *in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 171, 204 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007); Emily Camins, *Bridging Fault Lines: Exploring an Obligation Under International Law to Assist Victims of Armed Conflict*, 36 HARV. HUM. RTS. J. 89, 107 n.149 (2023).

[240] *See* Mark Gibney, *Compensation for Civilians Harmed in the Pursuit of Foreign Policy Goals: Recent Litigation in U.S. Courts*, 22 CAL. W. INT'L L.J. 59, 59 n.4 (1991).

For example, courts have dismissed cases against the U.S. government for losses from drone strikes on the grounds that it was a nonjusticiable political question.[241]

In 1952, the U.S. Supreme Court reversed a lower court that had found oil companies were owed compensation for the Army's use of them in the Philippines after Pearl Harbor and, in the process, announced an ungenerous approach to compensation in war. "The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war," wrote Justice Vinson for the majority. "This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign."[242] Justice Douglas dissented. He proposed a "guiding principle," which we echo in this Article: "Whenever the government determines that one person's property — whatever it may be — is essential to the war effort and appropriates it for the common good, the public purse rather than the individual, should bear the loss."[243]

Growing attention by some governments to civilian compensation is welcome. Yet gaps remain in systems for compensating unlawful harm and especially lawful harm. After having made significant gains, the United States has ceded its leadership role in mitigating and compensating civilian harm.[244] More fundamentally, old rationales for these systems fall short. They risk perpetuating existing problems by treating compensation for lawful harms as optional, discretionary, and charitable. They often arise only after public pressure. As we have seen, this approach has left untold numbers of civilians uncompensated. The next Part interrogates these rationales — and offers new ones.

---

[241] *See, e.g.*, Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (dismissing a case brought against the U.S. government for a drone strike on a wedding in Yemen); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 837-38 (D.C. Cir. 2010) (dismissing a case brought by owners of a Sudanese pharmaceutical plant that the U.S. military bombed).

[242] United States v. Caltex, 344 U.S. 149, 156-57 (1952).

[243] *Id.* at 156 (Douglas, J., dissenting).

[244] *See* Beynon, *supra* note 11.

III. REASONS FOR EXPANDING CIVILIAN COMPENSATION

In his 2024 address to the world's ambassadors to the Vatican, Pope Francis spoke about international law. Reflecting on the wars in Gaza and Ukraine, the late Pope stressed that enforcing international humanitarian law was the "only way to ensure the defence of human dignity in situations of warfare."[245] He lamented that, "it appears that the distinction between military and civil targets is no longer respected" and urged that, "[e]ven when exercising the right of legitimate defence, it is essential to adhere to a proportionate use of force."[246] Even as Pope Francis insisted that states abide the law, he addressed harm to civilians writ large, no matter the cause of their suffering. "Perhaps," he said, "we need to realize more clearly that civilian victims are not 'collateral damage.'"[247]

We argue that international law, which mandates compensation for civilian harm only when it results from legal violations, is too narrow. Here we outline moral and prudential reasons to expand civilian compensation beyond the minimum required by international law.

A. Moral

There is no legal obligation to provide civilian compensation to civilians harmed in war as a result of lawful conduct. But is there a moral obligation? Here we divide lawful harm during war into two categories: intentional and unintentional — which correspond to "collateral damage" and lawful (not reckless) mistakes. We consider the moral arguments for providing compensation to civilians for harm caused by actions in each category.

1. Intentional and Lawful Harm

When military commanders make proportionality assessments, they determine whether the expected harm to civilians and civilian objects is

---

[245] Pope Francis, Address of His Holiness Pope Francis to Members of the Diplomatic Corps Accredited to the Holy See (Jan. 8, 2024), https://www.vatican.va/content/francesco/en/speeches/2024/january/documents/20240108-corpo-diplomatico.html#_ftn3 [https://perma.cc/9K8A-VUBP].

[246] *Id.*

[247] *Id.*

proportional to the anticipated military advantage. If the answer is yes, then the strike complies with international humanitarian law. Such strikes may be lawful, but they place the full cost of the military's decision to proceed on the civilians who are knowingly harmed.

Corrective-justice principles — grounded in the idea that liability should rectify the injustice which one party inflicts on another — demand that the military compensate the civilians.[248] Under this moral framework, a particular plaintiff has a right to a remedy from a particular defendant, because that defendant "has realized a gain correlative to the plaintiff's loss."[249] There is a moral imbalance between the parties, and the relational corrective-justice framework, by focusing on the specific interaction between the parties involved, rather than abstract considerations of risk and harm, is able to justify why the defendant ought to be the one paying the plaintiff. Even if international humanitarian law sanctions civilian casualties as lawful when proportional to the expected military advantage, in other words, the legal permission does not extinguish the moral responsibility that flows from knowingly causing harm to civilians.

The idea that states should provide compensation for lawful infliction of harm is familiar. In other contexts where lawful injury is intentionally inflicted, American policymakers have deemed it important to guarantee compensation for the victims who bear the downside risk. These compensation schemes tend to arise in the context of practices either encouraged or undertaken by the U.S. government. They are guided by both moral considerations — the recognition that persons harmed by no fault of their own ought to receive compensation — and by functional exigencies: the compensation often ensures support for programs deemed desirable as a matter of public policy.

In the domestic context, the U.S. government's treatment of takings and eminent domain provides an example of how the government operationalizes obligations to compensate individuals who suffer

[248] *See* Marcus Schulzke & Amanda Cortney Carroll, *Corrective Justice for the Civilian Victims of War: Compensation and the Right to Life*, 21 J. INT'L RELS. & DEV. 372, 374 (2015) ("The right to life not only creates a first-order duty to avoid harming civilians but also gives rise to a second-order corrective duty whenever that right is breached."); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002).

[249] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 65 (2012).

known, concentrated harms in service of a public benefit. Under the Fifth Amendment's Takings Clause, "private property [shall not] be taken for public use, without just compensation."[250] This holds true when government action is entirely lawful and serves legitimate purposes. The Takings Clause prevents government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[251] The United States is far from alone: most states around the world provide compensation in similar situations.[252]

Of course, civilian casualties in war differ from takings of property in fundamental ways. The loss of life or limb cannot be compensated in the way that seized land can be. The fog of war creates practical challenges of foreseeability and intentionality that are rarely present in routine eminent domain or regulatory cases. Yet the core insight remains: when a state imposes known, concentrated harms on particular individuals in pursuit of public benefits, corrective justice demands compensation to those who realized a loss. A similar rationale for compensation applies, we argue, in circumstances where a government decides to harm civilians abroad as part of a military operation.

2. Unintentional and Lawful Harm

In the case of civilian harm, the state's responsibility for unintentional and lawful harm — often referred to as "mistakes" — stems not from legal violation or institutional negligence. It stems instead from its creation of "nonreciprocal risks," the government's unilateral ability to inflict harm on populations who cannot meaningfully protect themselves or reciprocate risk.[253] The attacking state bears responsibility for mistakes precisely because it alone makes the choice to engage in — and often has the capacity to set the terms of — these

[250] U.S. CONST. amend. V.

[251] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[252] EMINENT DOMAIN: A COMPARATIVE PERSPECTIVE 3 (Iljoong Kim, Hojun Lee & Ilya Somin eds., 2017).

[253] *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 541-42, 548 (1972) ("If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence.")

inherently dangerous operations. Meanwhile, civilians simply suffer the consequences.

Whereas the corrective-justice framework offers a rationale for compensating intentional, lawful harm, unintentional harm demands a different explanation. The attribution of moral culpability is less obvious; the attacker is not affirmatively taking civilian lives to realize a specific gain but is instead engaging in a risky activity where they know, inevitably, civilians will die. The moral folly is not instrumentalization, but indifference. Accounts for how and why we compensate mistaken harm may thus find parallels in examining the way legal systems handle other forms of socially sanctioned but dangerous activities with statistically inevitable victims.[254]

Guido Calabresi's foundational work on accident costs provides one such framework: society accepts the occurrence of many activities that will certainly cause harm to some unlucky individuals, requiring us to determine how to fairly distribute those costs.[255] Just as we accept that operating vehicles or running factories will cause some accidents despite best precautions, modern warfare inherently creates enormous risks to civilian populations even when conducted with utmost care. These predictable risks thus demand a relatively reliable system for recourse: in Calabresi's telling, the tort system.

The workers'-compensation system, meanwhile, offers a more routinized model for handling inevitable, unintentional harms. Like military operations, industrial activities serve broader social purposes while imposing concentrated risks on specific individuals. The workers'-compensation framework acknowledges this reality by providing automatic compensation for workplace injuries regardless of fault.[256] Indeed, Congress has established a system modeled on workers'

[254] We note here that wars are rarely — if ever — "socially sanctioned" by all parties to the conflict. For this section, we frame the choice to engage in war or undertake a particular military operation as a valuable matter of national security from the perspective of the attacking state, since that is the relevant actor to which we assign the costs of compensation.

[255] GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 17-20 (1970).

[256] *See generally* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC (2006) (tracing the Progressive-Era creation of an administrative, no-fault workers'-compensation scheme and its displacement of tort liability).

compensation to insure private military contractors and subcontractors assisting the U.S. military abroad.[257] This "grand bargain" replaced uncertain tort litigation with guaranteed compensation, recognizing that when some party benefits from dangerous but necessary activities — such as working in a warzone — that party should shoulder the costs of resulting injuries.[258]

For all the talk of the economic balance sheets and the allocation of risk, this account reverts to a moral question: If the benefiting party should pay, we must ask, who benefits from the risks of war? We contend that, in most cases, it is the attacking state. After all, the attacking state has chosen to engage in the military operations that led to the harm. The core issue is not whether the military specifically benefits from the specific mistakes, but rather whether the mistakes follow foreseeably from the choice to engage in — and benefit from — some inherently dangerous activity. This is what Congress has, in the private-contractor context, acknowledged as a "war risk hazard."[259] The essential moral insight is that where tragic mistakes are likely to result from actions toward a broader goal, the actor who creates those risks and reaps the benefits ought to pay.[260] In general, this is the attacker, though we acknowledge scenarios in Part IV.C.2 in which the purported "defending" belligerent shoulders some or most responsibility for civilian harm.

The attacking state's position as the dominant creator of nonreciprocal risks in waging war generates special obligations to those it places at risk. The state bears responsibility for mistakes precisely because it can choose unilaterally whether to engage in dangerous operations, and it possesses unique capabilities to minimize mistakes through better training, equipment, and intelligence. Meanwhile,

---

[257] 42 U.S.C. § 1651; *id.* §§ 1701–1717.

[258] *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 71-72 (1967).

[259] §§ 1701–1717.

[260] *Cf.* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1317-21 (2001) (articulating an enterprise-liability account of strict liability under which risk-creating activities must internalize and distribute their "characteristic" accident costs so that losses fall on those who benefit from the enterprise, not on random victims).

civilians must simply endure the consequences of risks they neither choose (unlike private contractors who travel to conflicts) nor can meaningfully mitigate.

The massive power imbalance between modern military forces and affected civilian populations further suggests an obligation to provide compensation. Minako Ichikawa Smart and Shunzo Majima argue that the state's moral responsibility is particularly acute in modern "expeditionary interventions" in which sophisticated military forces operate in territories where civilian populations have no political voice in the military decisions affecting them.[261] Under this rationale, the state bears responsibility for all mistakes that harm civilians — even those that are faultless — because the very act of deploying lethal military force creates moral obligations to those placed at risk.

B. Prudential

Beyond legal obligations and moral imperatives, there are compelling practical reasons for states to compensate civilians harmed during military operations. These justifications have historically centered on immediate tactical advantages in counterinsurgency operations — defusing retaliatory threats and winning hearts and minds to maintain positive relations with local populations. As military operations evolve away from large-scale ground presence toward more remote engagements, and from counterinsurgency to strategic competition, the prudential case for compensation has similarly transformed. Traditional strategic benefits of civilian compensation, while still relevant, are now complemented by broader institutional and diplomatic advantages. A systematic approach to civilian compensation can generate valuable information about patterns of harm, driving operational improvements and preventing future casualties. Moreover, as international norms around civilian protection develop, a robust compensation system allows adopting countries to demonstrate moral leadership while building diplomatic capital with allies and creating leverage over adversaries.

[261] *See* Minako Ichikawa Smart & Shunzo Majima, *The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions: Beyond the Just War Tradition*, 26 INT'L J. APPLIED PHIL. 181, 190 (2012).

1. "Hearts and Minds"

Perhaps the most commonly cited prudential justification for compensating civilian harm is that it helps win the "hearts and minds" of local populations. This rationale has played a central role in the development of U.S. compensation practices over time, from General Pershing's advocacy for compensation in World War I and the expansion of Foreign Claims Act payout availability for "friendly civilians" in Vietnam to the integration of condolence payments as part of counterinsurgency strategy in Iraq and Afghanistan.[262] This reasoning has continued to the present. The 2020 DoD Interim Regulations on civilian protection noted that the principal goal of condolence payments is to "maintain friendly relations with and the support of local populations where U.S. forces are operating."[263]

This hearts-and-minds rationale has particular force in counterinsurgency operations, where the support of local populations is decisive.[264] While this justification may be less critical as U.S. and allied military strategy shifts away from such operations and toward great power competition, it remains an important reason for providing compensation.[265] Empirical research strongly illustrates a negative relationship between civilian harm and support for occupying counterinsurgent forces. Studies in Afghanistan, for instance, have demonstrated that civilian casualties inflicted by U.S. and NATO forces significantly reduced public support for international forces and

[262] *See* Witt, *supra* note 14, at 1456, 1459, 1468.

[263] 2020 Interim Regulations, *supra* note 131, at 4.

[264] *See* 2014 ARMY FIELD MANUAL, *supra* note 171, ¶¶ 1-78, 9-26 (noting that the main goals of counterinsurgency are to win legitimacy among the population and turn its support toward the government). *See generally* DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE (1964) (arguing that popular support is the decisive factor in counterinsurgency).

[265] *See* STEPHEN BIDDLE, NONSTATE WARFARE: THE MILITARY METHODS OF GUERILLAS, WARLORDS, AND MILITIAS 1-2 (2021); CHRISTOPHER S. CHIVVIS, JENNIFER KAVANAGH, SAHIL LAUJI, ADELE MALLE, SAM ORLOFF, STEPHEN WERTHEIM & REID WILCOX, STRATEGIC CHANGE IN U.S. FOREIGN POLICY 2 (2024), https://carnegieendowment.org/research/2024/07/strategic-change-us-foreign-policy?lang=en [https://perma.cc/FEN7-2VCY]; RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE — ISSUES FOR CONGRESS 3 (2021).

increased support for the Taliban.[266] The U.S. Counterinsurgency Field Manual thus explicitly frames monetary payments as tools for commanders to shore up their objectives in securing local cooperation, especially in the face of civilian harm.[267]

The importance of winning over the trust and support of the local population is compounded by the fact that, in counterinsurgency settings, states are in constant competition with nonstate armed groups that not only benefit from asymmetric perceptions of blameworthiness for civilian harm,[268] but sometimes also make condolence payments of their own.[269] In this respect, the hearts-and-minds justification is distinct from tactical security justifications; it tends to be more about long-term strategy.

2. Security of the Troops

A second and related prudential argument focuses on force protection. It runs as follows: compensating civilian harm can enhance the security of military personnel by reducing the risk of retaliatory violence. This rationale appears to underlie, in part, the decision by DoD to expand the use of condolence payments in Iraq and Afghanistan. In one instance, following a military operation in which U.S. forces killed eighteen civilians in Fallujah, the mayor of Fallujah informed U.S. forces that paying *diya* ("blood money") would be the only way to prevent mass

[266] *See* Jason Lyall, Graeme Blair & Kosuke Imai, *Explaining Support for Combatants During Wartime: A Survey Experiment in Afghanistan*, 107 AM. POL. SCI. REV. 679, 696 (2013).

[267] 2014 ARMY FIELD MANUAL, *supra* note 171, ¶ 10-56 ("Integrated monetary shaping operations [including condolence payments] are used to . . . build partnerships . . . to win the support of an indigenous populace and erode support for the adversary. ").

[268] *See* Lyall et al., *supra* note 266, at 681 ("[I]ndividuals are more likely to punish out-groups for transgressions, simply confirming biases about the outgroup's disposition. Harm inflicted by the in-group . . . [is] justified by appeal to extenuating circumstances that forced the in-group's hand.").

[269] *See* Luke Moffett, *Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations*, 102 INT'L REV. RED CROSS 1057, 1058 (2020); Ali Ibrahim Al-Moshki, *AQAP Apologizes for Hospital Attack in Ministry of Defense Operation*, YEMEN TIMES, Dec. 24, 2013, at 2, 2.

retaliation.[270] The ensuing condolence payments appeared to markedly reduce attacks against U.S. soldiers.[271]

Data indicate that killing civilians increases violent reprisals. Analyses of civilian casualties in Iraq, for instance, found that additional civilian deaths caused by coalition forces were associated with an increase in subsequent insurgent attacks in that area.[272] As a result, making condolence payments to prevent retaliatory violence appears repeatedly in military documents justifying compensation programs.[273] Rather than aiming to increase the standing of U.S. forces in the region, condolence payments through this lens are targeted moves to address concrete threats of reprisal.

The security argument has both immediate and longer-term dimensions. In the short term, prompt compensation can defuse tensions in the immediate aftermath of civilian casualties. Over time, consistent compensation practices help maintain positive relations with local communities, which can translate into better intelligence and cooperation crucial for force protection and strategic success, as discussed more extensively in the subsection above. Like the hearts-and-minds rationale, the security argument loses some force in the context of conflict between states. States' likelihood of retaliation for attacks is not as likely to respond to whether the attacking state pays (or attempts to pay) compensation to civilians harmed.

The same may be true for more remote operations. Data show a dramatic shift in force posture: the number of U.S. troops across the Middle East has fallen, and the vast majority are located far from active combat.[274] In place of ground troop commitments, the United States has

---

[270] *See* Adams, *supra* note 110, at 341-42.

[271] *See id.*

[272] *See, e.g.*, Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. POL. SCI. 167, 174-77, 184 (2012) (analyzing data from Iraq from 2004 to 2009 and finding that "[c]oalition killings of civilians predict higher levels of insurgent violence and insurgent killings predict less violence in subsequent periods").

[273] *See* 1 CTR. FOR L. & MIL. OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 175 (2004).

[274] *See id.* at 6.

increased its use of drone strikes.[275] Other states, too, are increasingly relying on remote warfare. When drone strikes kill civilians, but no state forces stand in harm's way for the anticipated retaliation, the expected strategic benefit of a condolence payment might appear to be reduced. Indeed, the United States appears to have been paying less in the way of condolence payments in such conflicts.[276] But this calculation is short-sighted: civilian harm from drone strikes can bolster radicalization and recruitment for hostile groups abroad.[277] Even when troops are not stationed in an area where civilians are killed in a drone strike, there remain strong incentives to mute the ability of armed groups to capitalize on civilian harm.

3. Institutional Learning and Development

A system of civilian compensation can help generate information that can support institutional learning and development, further reducing civilian harm. Objective 7 of the DoD Civilian Harm Mitigation Reduction Action Plan, for example, states that the plan aims to "[e]stablish Department-wide procedures for assessing and investigating civilian harm resulting from operations and expand the sources of information used in assessments and investigations."[278]

While efforts at information gathering on civilian harm are necessary and overdue, placing the onus to initiate investigations exclusively on a country's own military or defense ministry may invite bias and blind spots. A policy to initiate assessments of civilian harms known to military or government actors is necessarily underinclusive, leaving

[275] *See* JOHN W. ROLLINS, ARMED DRONES: EVOLUTION AS A COUNTERTERRORISM TOOL 1 (2023).

[276] *See* Daphne Eviatar, *Why Isn't the US Compensating Families Torn Apart by Its Air Strikes?*, DEF. ONE (July 24, 2020), https://www.defenseone.com/ideas/2020/07/why-isnt-us-compensating-families-torn-apart-its-air-strikes/167134 [https://perma.cc/2BVB-EQDQ].

[277] U.S. intelligence reports have concluded as much. *See* Philip Dorling, *Drone Strikes Counterproductive, Says Secret CIA Report*, SYDNEY MORNING HERALD (Dec. 18, 2014), https://www.smh.com.au/world/drone-strikes-counterproductive-says-secret-cia-report-20141218-129ynq.html [https://perma.cc/TA95-6UN5] (citing a leaked CIA report that concluded drone strikes "may increase support for the insurgents, particularly . . . if non-combatants are killed in the attacks").

[278] CHMR-AP, *supra* note 10, at 24.

unreported or undiscovered harms uninvestigated. When the harm is unanticipated or results from a mistake, such as a target misidentification or a failure to detect civilians, this flaw is compounded; states may be likely to "treat unexpected civilian casualties as one-off events."[279]

A more routinized system for compensating civilian harm may help to fill some informational and investigative gaps. Ideally, such a system would create a standardized, accessible mechanism for civilians affected by military operations to submit claims and provide information about harm they have experienced. This would dramatically expand the pool of data available to military planners, potentially uncovering patterns of harm that might otherwise go unnoticed.

By generating data that might reveal patterns of harm, a systematic approach to civilian compensation offers benefits beyond individual redress. While military investigations alone catch only a fraction of civilian harm incidents, a robust compensation system could help identify systemic problems and drive operational improvements. As Calabresi notes, optimal deterrence requires that actors internalize the full costs of their risky activities.[280] In contemporary military operations, the state can impose enormous risks on foreign civilians who have no practical ability to avoid or mitigate their exposure. Only the state can avoid that harm, and a robust compensation scheme provides an incentive for the state to learn about, and internalize, some of the costs it imposes on civilians.

Such a system for handling civilian harm claims could drive meaningful operational improvements. First, like the discovery process in tort litigation, systematic compensation procedures generate detailed information about operational flaws, training gaps, and policy shortcomings that contribute to civilian casualties.[281] This granular data can inform improvements in training procedures, rules of engagement, and operational planning.

---

[279] Hathaway & Khan, *supra* note 35, at 87.

[280] CALABRESI, *supra* note 255, at 73-75.

[281] *See* Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345, 356 (2022); Crootof, *War Torts*, *supra* note 14, at 1120-22.

A consistent civilian compensation scheme could also indirectly foster safer practices and more careful decision making in military operations. The cost of compensating civilians is unlikely to deter a state as wealthy as the United States from engaging in operations deemed to be tactically important. In Israel, for instance, which previously allowed tort claims to be brought against the state for harm caused by its military, "state actors . . . expressed that neither the possibility of an imposition of tort liability nor actual instances in which it was imposed influence their decisions about whether to engage in belligerent activities or how to conduct them."[282] Similarly, there is no evidence that financial considerations played a role in any decisions to engage a given target in any operation.[283]

Rather than deterring or constraining military action outright, a consistent system of compensation could encourage improved recordkeeping, more thorough prestrike assessments, and enhanced poststrike investigations.[284] By creating these incentives, a comprehensive and consistent civilian compensation system could serve not only as a mechanism for individual redress but also as a tool for systemic improvement in how armed conflicts are conducted. This systematic approach to learning and improvement — enabled and necessitated by a routinized compensation scheme — only becomes more crucial as military operations evolve. With the increasing prevalence of autonomous weapons systems and remote warfare, the incentives created by a regularized compensation regime may prove especially beneficial.[285] Better data on strikes by autonomous weapons may enable more robust testing, more stringent safety protocols, and less civilian harm overall.[286]

---

[282] Haim Abraham, *Tort Liability, Combatant Activities, and the Question of Over-Deterrence*, 47 LAW & SOC. INQUIRY 885, 914 (2022).

[283] *See* Adams, *supra* note 110, at 353.

[284] *See* Crootof, *War Torts*, *supra* note 14, at 1122.

[285] *See generally id.* (proposing an international war-torts system).

[286] *See id.*

4. Diplomatic and Reputational Benefits

A robust system for civilian compensation could yield significant diplomatic advantages. States often develop cooperative practices not only for direct material gains, but also to build reputations as reliable international actors and to ease cooperation with current and prospective allies.[287] The evolution of civilian compensation may follow a pattern that Martha Finnemore and Kathryn Sikkink identify in patterns of norm emergence: practices that begin as tactical choices by individual actors and states may over time cascade into standardized expectations of appropriate behavior.[288]

This pattern of norm emergence may help to explain why the DoD under President Joe Biden moved from viewing compensation purely as a tactical tool — what military doctrine termed Integrated Monetary Shaping Operations — toward embracing it as part of a broader system of civilian harm mitigation aimed at protecting core "U.S. and professional military values."[289] DoD Instruction 3000.17, which established official DoD policy on civilian harm mitigation, defines the demonstration of global "moral leadership" as an essential aim of civilian compensation.[290] President Donald Trump and Defense Secretary Pete Hegseth, however, have critically weakened these programs, and so it will be instructive to see whether future leadership at the Pentagon will recommit to compensation and redress of civilian harm.

State action — or inaction — in addressing civilian harm has a diplomatic effect. In September 2023, the then–Minister of Defence of the Netherlands praised the U.S. Civilian Harm Mitigation and Reduction Action Plan as both "inspiring" and "relatable."[291] The

[287] *See generally* ROBERT O. KEOHANE, AFTER HEGEMONY (1984) (discussing the incentives States face to maintain and improve their reputations to increase reliability and smooth transaction costs).

[288] Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895-905 (1998).

[289] DOD INSTRUCTION, *supra* note 10, at 4.

[290] *Id.*

[291] Kajsa Ollongren, Neth. Minister of Def., Speech of the Netherlands Minister of Defence for the visit to Columbia University, New York (July 25, 2023), https://english.defensie.nl/downloads/speeches/2023/09/25/speech-of-the-netherlands-

Netherlands joined in reforming its approach to civilian protection and compensation, announcing its Roadmap Process in April 2022, three months after U.S. Secretary of Defense Lloyd Austin ordered a review of civilian harm mitigation in the U.S. DoD.[292] In the closing months of the Biden administration, the United States and the Netherlands, drawing upon their own efforts in civilian harm mitigation, drove a multinational effort to promote civilian harm reduction–related developments and best practices in theaters from counterinsurgency to large-scale warfare.[293]

States may commit to meeting standards of conduct toward civilians to demonstrate a commitment to shared values.[294] As the then–Dutch Minister of Defense said of her government's efforts to improve civilian harm mitigation and response, attention to civilian harm mitigation and redress "distinguishes our way of warfare from that of others . . . who choose to target civilians and civilian objects," contrasting the Netherlands with Russian President Vladimir Putin, Syrian leader Bashar Al-Assad, and the Taliban.[295] General David Petraeus made the same argument a decade and a half ago, in 2010; in a foreword to a report on reducing civilian casualties, he wrote, "American concern for civilians differentiates the United States from its adversaries."[296] But if

minister-of-defence-for-the-visit-to-columbia-university-new-york [https://perma.cc/5LZ3-3F8R] ("The ambition expressed in the American action plan is unprecedented [sic], relatable and inspiring.").

[292] *See* Jim Garamone, *Austin Directs DOD to Develop Action Plan on Civilian Harm Mitigation*, DEP'T OF DEF. (Jan. 27, 2022), https://www.defense.gov/News/News-Stories/Article/Article/2914989/austin-directs-dod-to-develop-action-plan-on-civilian-harm-mitigation [https://perma.cc/K22K-Y7VV].

[293] *See* Erin Bijl, *Key Takeaways for Civilian Harm Mitigation and Response from the Russia-Ukraine War*, JUST SEC. (Jan. 21, 2025), https://www.justsecurity.org/106576/key-takeaways-civilian-harm-mitigation-russia-ukraine [https://perma.cc/K379-VE65]; Press Release, Dep't of Def., Readout of International Contact Group Meeting on Civilian Harm Mitigation and Response (Sept. 24, 2024) https://www.war.gov/News/Releases/Release/Article/3915930/readout-of-international-contact-group-meeting-on-civilian-harm-mitigation-and [https://perma.cc/V3D2-C3ZS].

[294] For a version of this argument, see MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 167 (2004).

[295] Ollongren, *supra* note 291.

[296] HARV. UNIV. & U.S. JOINT FORCES COMMAND, REDUCING AND MITIGATING CIVILIAN CASUALTIES: AFGHANISTAN AND BEYOND, at iii (2010), https://www.esd.whs.mil/Portals

this attempt at differentiation is not meaningfully honored, including by compensating civilians for their losses, then it turns from distinction to hypocrisy, leaving states who have expressed these values vulnerable to whataboutism.

In Part II.B.1, we discussed the parallel approaches adopted by the United States and its NATO allies in handling civilian compensation claims in Afghanistan. It remains to be seen whether the United States will continue its tradition of moral military leadership, incentivizing its allies and military partners to adopt similar processes and, in turn, contributing to an emerging international norm of compensation for civilian harm in war. If it does, the United States and its allies will gain a strong rhetorical vantagepoint from which to demand Russia compensate Ukrainian civilians for the massive damages it has inflicted over the course of its unlawful war. In the absence of American leadership, it will be up to other states to take that lead.

5. Strengthening International Humanitarian Law

By compensating for harms regardless of whether they are caused by lawful military operations or not, countries can help strengthen international humanitarian law. Sharp distinctions between compensation requirements for harm caused by lawful versus unlawful military operations risk encouraging miscategorization. Existing compensation systems largely rely on the states who would be responsible for compensating civilians to determine themselves if they have an obligation to do so. In the case of "collateral damage," for instance, states are expected to self-assess the intentions and internal estimates of their armed forces. Especially for countries with sophisticated legal capacity, skillfully describing incidents of civilian harm using the language of international humanitarian law can help avoid responsibility. Indeed, when then–Secretary of Defense Lloyd Austin publicly answered questions about halting a shipment of weapons to the Israeli Defense Forces over concerns that they may be used in violation of international humanitarian law, Austin said that the

/54/Documents/FOID/Reading%20Room/Joint_Staff/12-F-0460-Reducing_and_Mitigating_Civilian_Casualties.pdf [https://perma.cc/X8P9-AXDQ] (declassified report).

2,000-pound bombs the United States delayed "could create a lot of collateral damage," blurring categories of legal and illegal harm.[297]

Under current law, states may sweep civilian casualties into "lawful" categories and thereby avoid not only legal, even criminal, responsibility but also compensation obligations. But the categorization may be imprecise or incorrect, depriving civilians who have a legal right to compensation from receiving it. A blanket right to some compensation removes such incentives. Moreover, as noted, a civilian compensation system can generate information about civilian harm. That information can help states learn about the harm that they are causing to civilians — both lawfully and unlawfully — and enable them to take steps to learn from those failures.

This Part has established that there are ample moral and prudential reasons for adopting a comprehensive civilian compensation system that goes beyond the minimal requirements for compensation under international law. In the next Part, we put forward a proposal to do so.

IV. WAR HAZARDS COMPENSATION FOR CIVILIANS

This Article has aimed to demonstrate that existing systems for civilian compensation — in the United States and around the world — are inadequate, even as threats to civilians grow. As we showed in Part II, the U.S. system for compensation offers a crazy quilt of inconsistent systems that occasionally provides for significant compensation but usually provides for little or none at all. Other states fare no better. Together, these existing systems are plagued by incomplete coverage and arbitrary and opaque implementation. Even when they do provide for compensation, the rationales are often contingent and underinclusive.

We are not the first to notice and attempt to address this problem. Crootof proposes an ambitious international legal regime for "war torts" to compensate for lawful harms and help close the accountability

[297] Helene Cooper & Eric Schmitt, *U.S. Military's Plea to Israel: Do More to Protect Gazans in War Zone*, N.Y. TIMES (May 10, 2024), https://www.nytimes.com/2024/05/10/us/politics/us-military-israel-gaza.html [https://perma.cc/LEW9-YZKS].

gap.[298] Larry May, meanwhile, has gone further, advocating a "worldwide, no-fault insurance scheme," in which "every State of the world would have to pay into a fund," whether or not they were involved in the harm.[299]

Here we recommend a related but novel approach: War Hazards Compensation for Civilians. This proposal acknowledges the inherently hazardous nature of war, accounts for the value militaries receive from civilian harm, and draws on existing law. As we will show, the proposal, while ambitious, is feasible, because a similar statutory system already exists for another group of civilians: private military contractors. We do not present War Hazards Compensation for Civilians as a solution to every single problem we have identified with existing civilian compensation systems. No single reform will solve all of the problems identified, and any comprehensive solution will require a multifaceted approach. But this existing statutory scheme demonstrates that it is possible for states to reliably compensate civilians — including noncitizens — for harm inflicted on them in war zones. While the proposal outlined here draws on existing U.S. law,[300] and the proposal is made with the United States as the central focus, the essential approach is one that could be adopted by any state.

A. Defense Base Act & War Hazards Compensation Act

A pair of World War II–era laws offer a longstanding but overlooked model for civilian compensation: the Defense Base Act and the War Hazards Compensation Act.[301] Both laws are part of a no-fault worker's-

[298] *See* Crootof, *War Torts*, *supra* note 14, at 1101. For many related proposals, see sources cited *supra* notes 12, 13 & 14.

[299] LARRY MAY, AFTER WAR ENDS 194 (2012). May notes that this proposal is "impractical." *Id.* at 196.

[300] There are international and domestic mechanisms for providing compensation for harm inflicted by states on an essentially similar framework — that is, providing an institutionalized mechanism for determining harm and providing compensation. For an overview of several such systems, see Crootof, *Implementing War Torts*, *supra* note 14, at 339-41.

[301] 42 U.S.C. § 1651; *id.* §§ 1701–1717. These statutes have been overlooked in the context of civilian harm compensation. Scholars and practitioners have, however, analyzed the statutes on their own terms or in relation to the role of private military contractors in U.S. wars. *See, e.g.*, Milligan, *supra* note 15 (arguing that the Defense Base

compensation system for civilian workers supporting the U.S. military abroad. Neither applies to local civilians not engaged in a contractual relationship with the U.S. military — for example, the shepherd killed in an airstrike. Instead, covered entities who made claims under the Defense Base Act include high-profile private military contractors, such as Blackwater Security Consulting.[302] Nevertheless, we argue, these statutes provide a technical, systematized framework and underlying rationale that could reasonably apply to everyday foreign civilians.

The Defense Base Act, enacted in 1941, requires employers to provide compensation akin to standards under the Longshore and Harbor Workers' Compensation Act to contractors or subcontractors to work for the U.S. government overseas, on bases or otherwise for "public works."[303] By importing compensation equations from the Longshore predecessor, the Defense Base Act resembles a standard workers'-compensation program, but for the fact that the worker must be working on a U.S. military base or similar location — what the Supreme Court dubbed in its midcentury cases as the "zone of special danger."[304] In *O'Leary v. Brown-Pacific-Maxon*, the Court held that a contractor in Guam who drowned while attempting to save two others in the ocean was eligible for coverage under the Defense Base Act despite the fact that his death did not happen in the course of his employment.[305] "All that is required," Justice Frankfurter wrote, "is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose."[306] Within this zone, the occupations of covered

Act and War Hazards Compensation Act create inefficiencies and are ill-equipped to meet contemporary challenges); Robinson, *supra* note 15 (outlining the mechanics of the statutes).

[302] *Defense Base Act Case Summary by Employer*, DEP'T OF LAB., https://www.dol.gov/agencies/owcp/dlhwc/dbaallemployer6-30-12 [https://perma.cc/N6ES-QUFH]; *Defense Base Act Case Summary by Nation*, DEP'T OF LAB., https://www.dol.gov/agencies/owcp/dlhwc/dbaallnation6-30-14 [https://perma.cc/R9NS-M3RF] (showing the number of claims from incidents in Iraq and Afghanistan outpace every other nation).

[303] 42 U.S.C. § 1651.

[304] O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 507 (1951).

[305] *Id.*

[306] *Id.*

workers can vary widely, from an administrative assistant in Saudi Arabia to a professor on a military base in Japan.[307]

The Defense Base Act's limitations became clear months after its passage, when, in December 1941, Japanese forces held captive more than one thousand civilian construction workers on Wake Island. The harm was not compensable under the Defense Base Act because the injuries and deaths were the result of hostile action.[4] In 1942, enter the War Hazards Compensation Act, which added a provision for injury or death resulting from "war risk hazards."[308] The statutory definition of a "war risk hazard" has three parts. The first is context-based: the hazard must arise

> during a war in which the United States is engaged; during an armed conflict in which the United States is engaged, whether or not war has been declared; or during a war or armed conflict between military forces of any origin, occurring within any country in which a person covered by this Act is serving.[309]

The second is relational: the statute covers people under contract with the U.S. government overseas or "otherwise engaged for personal services outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense."[310] And the third is action-based: the injury must "proximately resul[t] from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment."[311] The statute lists actions, ranging from the specific — "collisions of vessels in convoy" or the use of a "noxious thing by a hostile force or person" — to the broad: an "action of a hostile force or person."[312]

---

[307] *See* Kerry J. Anzalone, *USDOL/OALJ Law Library: The Defense Base Act: A Growth Industry?*, DEP'T OF LAB. (2004), https://www.dol.gov/agencies/oalj/PUBLIC/LONGSHORE/REFERENCES/REFERENCE_WORKS/THE_DEFENSE_BASE_ACT%282004%29 [https://perma.cc/2VLJ-78FA].

[308] 5 U.S.C. § 8101.

[309] 42 U.S.C. § 1711.

[310] *Id.* § 1701(a).

[311] *Id.*

[312] *Id.*

To qualify for coverage under the War Hazards Compensation Act, a claim must first meet the standard of the Defense Base Act, then show a war-risk hazard. Given the heightened risk from war-risk hazards — and their sky-high insurance costs — the U.S. government reimburses claims that employers pay for death or injury resulting from war-risk hazards.[313] Employers submit claims to the Department of Labor and the insurance company that could be eligible for compensation under both laws as Defense Base Act claims; they must do so within ten days of the injury or death, or ten days from the date that the contractor has knowledge of that injury or death — under threat of civil penalty for failing to report.[314] In 2024, the U.S. government approved and paid more than $700 million in war-hazards claims.[315]

The two statutes diverge in their treatment of foreign nationals. Since 1958, the Defense Base Act has applied to foreign nationals, though it is somewhat less generous than the benefits provided to U.S. and Canadian nationals.[316] In 2017, the Ninth Circuit confirmed, for the first time, that the Defense Base Act covers even nationals working in their home countries.[317] The War Hazards Compensation Act, by contrast, explicitly excludes coverage for local nationals. It does not apply to people whose "residence is at or in the vicinity of the place of his employment," and "who is not living there solely by virtue of the

[313] DEP'T OF LAB., PROCEDURE MANUAL ¶ 6a, https://www.dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECA-PT4#403006 (last visited Jan. 26, 2026) [https://perma.cc/SXG4-LXLR].

[314] Workers' Compensation Insurance (Defense Base Act), 48 C.F.R. § 52.228-3 (2026). The U.S. government has brought enforcement actions against contractors for failing to report Defense Base Act–covered injuries of employees within the required time period. *See, e.g.*, Press Release, Off. of Worker's Comp. Program, Dep't of Lab., US Department of Labor Reaches Settlement with Contractor on Failure to Report Injuries and Fatalities Under Defense Base Act (Jan. 31, 2013), https://www.dol.gov/newsroom/releases/owcp/owcp20130131 [https://perma.cc/4XRF-972Z] (describing $75,000 settlement with company for failure to report thirty employee deaths and injuries in Iraq).

[315] DEP'T OF LAB., OWCP HAS TAKEN STEPS TO ADDRESS THE BACKLOG OF WAR HAZARDS CLAIMS 12 (May 12, 2025), https://www.oig.dol.gov/public/reports/oa/2025/23-25-003-04-432.pdf (reporting $717,812,970.16 in War Hazards Compensation Act claims approved and paid for 2024 through October 17 of that year).

[316] 42 U.S.C. § 1652(b).

[317] *See* Chugach Mgmt. Servs. v. Jetnil, 863 F.3d 1168, 1175 (9th Cir. 2017).

exigencies of his employment, unless his injury or death resulting from injury occurs or his detention begins while in the course of his employment."[318] That exclusion may reflect the original logic for war-risk hazard compensation — as a contractor-recruitment mechanism. In advocating for the War Hazards Compensation Act in November 1942, Representative Emanuel Celler cited urgent concerns from the Navy of "difficulties and embarrassments in getting sufficient force of civil workers" to bases around the world. "Without the relief accorded by this bill," he said, "men refuse to go."[319] That rationale does not apply to people who already live in war zones.

Even as we suggest that these Acts provide valuable models, we also acknowledge they are imperfect. To begin with, foreign subcontractors are frequently subject to poor treatment, and they often do not seek out or receive benefits they are owed.[320] During U.S. operations in Iraq and Afghanistan in 2009, for example, just fifteen percent of claims under the Defense Base Act came from foreign nationals, despite the fact that two-thirds of contractors were foreign nationals.[321] Insurance companies, meanwhile, made significant profits from the Defense Base Act, in part because they negotiated their own premiums with the U.S. government.[322] More broadly, claims under the Defense Base Act skyrocketed during U.S. wars in Iraq and Afghanistan, increasing from 432 cases paid in 1997 to 11,887 in 2007 — so much so that, in 2008,

[318] 42 U.S.C. § 1701.

[319] 77 CONG. REC. 8869 (1942).

[320] *See, e.g.*, Sarah Stillman, *The Invisible Army*, NEW YORKER (May 30, 2011), https://www.newyorker.com/magazine/2011/06/06/the-invisible-army [https://perma.cc/3NQC-BJHB] (investigating abuse of third-country-national subcontractors in warzones).

[321] *See* T. Christian Miller, *Sometimes It's Not Your War, but You Sacrifice Anyway*, PROPUBLICA (Aug. 17, 2009, 9:19 AM), https://www.propublica.org/article/sometimes-its-not-your-war-but-you-sacrifice-anyway-817 [https://perma.cc/8WQF-RTCM].

[322] Memorandum from Majority Staff, Committee on Oversight and Government Reform to Members of the Committee on Oversight and Government Reform, Supplemental Information on Defense Base Act Insurance Claims (May 15, 2008), https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/migrated/20080515102024.pdf [https://perma.cc/E6DA-DMRJ].

Congress held a hearing titled, "Defense Base Act: Are Taxpayers Paying Too Much?"[323]

A new law devoted to compensating the other civilian casualties of war, those locals not contracted to assist the U.S. war effort, could avoid many of these problems. It could explicitly prioritize foreign nationals (whom the military has determined are civilians, not combatants). And it could place the responsibility on the U.S. government to proactively ensure civilians in the line of fire are compensated — rather than relying on private insurance companies or employers to do so.

B. War Hazards Compensation for Civilians

We recommend that states adopt a new system for War Hazards Compensation for Civilians to provide both individual and community-level compensation for harm done to civilians as a result of the conduct of military operations. In the United States, that would mean eliminating the disjointed system of the Foreign Claims Act, ad hoc condolence payments, and the CERP, and replacing it with a unified compensation system, by statute, that would apply to all situations involving U.S. military–caused civilian harm.

This proposal would draw on the example offered by the Defense Base Act and War Hazards Compensation Act. Like contractors, civilians are a group separate from soldiers. They are not lawful military objectives in war, but they are nonetheless often subject to violence in war. Indeed, international law tolerates this infliction of harm on civilians and civilian objects so long as it is necessary to achieve a lawful military objective and the expected harm to civilians and civilian objects is proportionate to the military advantage anticipated. While in a sense these civilians may be used to achieve military ends, they do not elect to travel to a warzone to make a profit — unlike contractors. Instead, war finds them.

---

[323] VALERY BAILEY GRASSO, BAIRD WEBEL & SCOTT SZYMENDERA, THE DEFENSE BASE ACT (DBA): THE FEDERALLY MANDATED WORKERS' COMPENSATION SYSTEM FOR OVERSEAS GOVERNMENT CONTRACTORS 4 (2010); *Defense Base Act: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (2008); *see also Defense Base Act Case Summary by Nation*, DEP'T OF LAB., https://www.dol.gov/agencies/owcp/dlhwc/dbaallnation6-30-14 (last visited Feb. 7, 2025) [https://perma.cc/B9J6-G3HF] (showing the number of claims from incidents in Iraq and Afghanistan outpace every other nation).

The War Hazards Civilian Compensation plan would prioritize speed, so that claims can be filed as soon as the armed conflict begins — rather than waiting for the conclusion of hostilities. Under the Defense Base Act structure, such claims must be made by employers within ten days — the same should apply for the military to report known or suspected civilian harm. There should be a process for receiving reports of civilian harm from the civilians, their families, or nongovernmental organizations, and an obligation to initiate an investigation of those reports within the ten days and complete them within a reasonable timeframe. Investigations must be carried out by an entity separate from the unit responsible for the decision to use force and, ideally, outside the chain of command for the decision to use force. This is important because a finding of civilian harm may have implications for command responsibility. Where claims are denied, there must be an obligation to give reasons for the denial to the extent possible and an opportunity to appeal the decision.

The new compensation system should cover the same expenses as does the Defense Base Act: "funeral and burial expenses, medical, hospital, or other similar costs for treatment and care; and reasonable and necessary claims expense in connection therewith."[324] They should also be routinized, with preset compensation amounts for a given injury, as in the Longshore Act, so that discretion for what militaries offer civilians is cabined.[325]

Speed and standardization offer several advantages. One is practical. In the modern era, wars are often undeclared, involve nonstate actors, and never come to a formal peace treaty, which traditionally made provisions for reparations. Indeed, the conflict between the United States and al-Qaeda and associated forces has already lasted for more than two decades. The second reason is moral: each moral imperative for compensation detailed in Part III.A emerges at the time the harm occurs. Forcing those harmed to wait for years compounds the harm and thus the moral failing. Finally, there are pragmatic reasons for initiating the compensation claims system from the moment the armed conflict begins: as detailed in Part III.B., there are many interests that states

[324] 42 U.S.C. § 1704.

[325] *See* 33 U.S.C. § 908.

have in providing prompt civilian compensation for harms imposed by their forces — not least the very security of those forces. These all counsel in favor of prompt compensation and thus for making the claims process available to civilians at the very start of the conflict.

Under the War Hazards Compensation Act and Defense Base Act, insurance is managed through the private contractor's employer.[326] That is, perhaps obviously, not possible in the case of this new group of civilians, who do not have an employment relationship with the United States government. But it is not an essential feature of the compensation scheme. In other contexts, the government has set up compensation programs where it does not know in advance who may fall within its scope, unlike a set group of employees. Take, for example, the Vaccine Injury Compensation Program. This program offers compensation for rare adverse effects from vaccines without requiring proof of fault.[327] Similarly, the Radiation Exposure Compensation Program compensated (through July 2024) individuals exposed to radiation from nuclear testing and uranium mining, recognizing the government's responsibility in those activities without requiring litigation or admitting fault.[328] In both cases, those who would be eligible to make claims are not identified in advance — they file claims under the system once the adverse effects become apparent.

There should be attached to the compensation system a reporting requirement to Congress and the public regarding the number of claims filed, the number found to be meritorious, the appeals rate, and the compensation paid. There could also be reporting requirements at the outset of a conflict. Since 2022, the Dutch Cabinet has committed to including in its notification to the House of Representatives "the Ministry of Defence's expectations for civilian casualties and its actions

[326] 42 U.S.C. § 1704(a); *id.* § 1701(a)(1).

[327] *See* Sam Halabi, Katherine Ginsbach, Katie Gottschalk, John Monahan & Judith Murungi, *No-Fault Vaccine Injury Compensation Systems Adopted Pursuant to the COVID-19 Public Health Emergency Response*, 37 EMORY INT'L L. REV. 55, 55 (2022).

[328] *See* SCOTT D. SZYMENDERA & REDACTED COAUTHORS, CONG. RSCH. SERV., RL34670, THE RADIATION EXPOSURE COMPENSATION ACT (RECA): COMPENSATION RELATED TO EXPOSURE TO RADIATION FROM ATOMIC WEAPONS TESTING AND URANIUM MINING 5 (2024). In advocating for her war-torts regime, Crootof analyzes the possible benefits and drawbacks of what she terms indemnification systems. *See* Crootof, *Implementing War Torts*, *supra* note 14, at 341-45.

to mitigate them."[329] Such notifications are roughly similar to War Powers Resolution Reports in the U.S. context. Under the War Powers Resolution's reporting requirement, the President must submit a report to Congress within forty-eight hours of introducing forces into hostilities.[330] Members of Congress and scholars have frequently and, so far, unsuccessfully recommended major reform of the War Powers Resolution.[331] Our proposal is more modest; we recommend that Congress add a subsection to its reporting requirement in Section 1543, which lists the information the President must provide to Congress; as is, the list is: (A) the "circumstances necessitating the introduction of United States Armed Forces"; (B) the "constitutional and legislative authority under which such introduction took place"; and (C) the "estimated scope and duration of the hostilities or involvement."[332] We recommend that Congress add a subsection (D): "the estimated civilian harm or damage, the measures planned to reduce and compensate for that damage."

These recommendations draw on U.S. law, but their design and logic are not limited to the United States. Indeed, other states can take the lead. Already, the Netherlands has, through its Roadmap Process, set high standards for civilian harm reduction and mitigation. NATO, whose Secretary General Mark Rutte is a former Dutch prime minister, should multilateralize this effort. NATO should establish a Civilian Protection Center of Excellence, modeled on the recently disbanded U.S. version, with the Netherlands as a Framework Nation.[333] The Center, like the

[329] *See More Transparency on Civilian Casualties*, NETH. MIN. OF DEF., https://english.defensie.nl/topics/civilian-casualties/more-openness-on-civilian-casualties (last visited Jan. 14, 2026) [https://perma.cc/UBT5-QB77].

[330] 50 U.S.C. § 1543.

[331] For Senate efforts, see, for example, The War Powers Reform Act, H.R. 560, 114th Cong. (2015). *See generally* Oona Hathaway, Tom Campbell, Andrew Rudalevige, David Bonior, Charles Boustany & Tess Bridgeman, *Report of the Subcommittee on War Powers*, *in* PRINCETON UNIV., REPORTS OF THE PRINCETON INITIATIVE ON RESTORING THE CONSTITUTIONAL POWERS OF CONGRESS (2024) (chaired by Oona Hathaway, Tom Campbell, and Andrew Rudalevige).

[332] 50 U.S.C. § 1543.

[333] Beynon, *supra* note 11. For background on similar NATO initiatives, see NATO, Centres of Excellence (Jan. 15, 2025), https://www.nato.int/cps/eb/natohq/topics_68372.htm [https://perma.cc/K8NN-CAVY].

existing but more informal Contact Group, should share best practices to reduce civilian harm; it should also go beyond that, elevating NATO-wide standards for civilian compensation. In particular, we recommend that NATO countries analyze each country in which their state is currently engaged — with the potential for civilian harm — and approve a standardized amount of compensation for death, injury, and property loss. A commitment to compensate civilians is especially important for NATO as it demands reparations for Ukrainian reconstruction from Russia for its unlawful invasion.[334]

C. Challenges — and How to Address Them

The new system of War Hazards Compensation for Civilians will face threshold definitional challenges that the war hazards compensation system for private military contractors does not. First, what is a civilian or a civilian object? Second, how can a compensation system avoid funding the very force the compensating country is fighting on the ground? Third, how does a new system avoid sanitizing war? Here we raise — and attempt to answer — these concerns.[335]

1. Who Is Covered — and For What?

In creating a War Hazards Compensation for Civilians system, it will be necessary to confront a significant challenge: who is covered? That,

[334] *See* Jens Stoltenberg, NATO Sec'y Gen., Press Conference Following the First Day of the Meetings of NATO Defence Ministers (June 13, 2024), https://www.nato.int/cps/em/natohq/opinions_226423.htm [https://perma.cc/43NZ-J4UR]; Press Release, Eur. Comm'n, First Transfer of €1.5 Billion of Proceeds from Immobilised Russian Assets Made Available in Support of Ukraine Today (July 26, 2024), https://neighbourhood-enlargement.ec.europa.eu/news/first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-support-ukraine-today-2024-07-26_en [https://perma.cc/F9ML-K8DL].

[335] There are also the obvious political challenges. While President Trump is unlikely to back the reforms offered here, Congress could nonetheless take steps to enact these changes — and it is possible that framing them as an extension of existing law could make the revision more palatable. The political environment can, moreover, change. And while these proposals are primarily aimed at the United States, other states could take the lead.

in turn, requires determining who is a civilian and not a combatant.[336] In an International Armed Conflict, it is often straightforward to determine who is a civilian. Generally speaking, combatants are members of the armed forces; civilians are not.[337] This is far more complicated in Non-International Armed Conflicts (NIACs). In a NIAC, members of the Organized Armed Group to the conflict are not members of any state armed forces. Rather, they are civilians who have become combatants by participating in hostilities.[338] War Hazards Compensation for Civilians would not cover civilians who participate directly in hostilities, thus losing their protected civilian status under international humanitarian law. There are many reasons for this exclusion. First, no military force would voluntarily subsidize the armed forces of its opponent by compensating those who fight on its behalf when they are lawfully injured or killed. Second, providing such compensation would incentivize civilians to participate in armed conflict — which would, in turn, undermine, rather than strengthen, the principles of international humanitarian law.

While we endorse the exclusion of civilians directly participating in hostilities from the War Hazards Compensation for Civilians program, it is important to acknowledge that there is substantial debate about which civilians are, in fact, "civilians directly participating in hostilities." There is, moreover, debate over whether members of

[336] Other scholars have explored the difficulties of making such distinctions — and considered whether to compensate combatants. *See* Crootof, *Implementing War Torts*, *supra* note 14, at 356-57 (weighing considerations in including or excluding combatants from compensation); Jöbstl & Rosenberg, *supra* note 61, at 41 (arguing that states conducting unlawful wars have compensation obligations to combatants of the "defending state").

[337] *International Humanitarian Law Databases, Rule 5: Definition of Civilians*, INT'L COMM. OF THE RED CROSS [ICRC], https://ihl-databases.icrc.org/en/customary-ihl/v1/rule5# (last visited Jan. 14, 2026) [https://perma.cc/4M4Y-V7YM] ("Civilians are persons who are not members of the armed forces."); Additional Protocol I, *supra* note 5, art. 50.

[338] *Compare* ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 30 (Nils Melzer ed., 2009), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0990.pdf [https://perma.cc/4J7M-MKXM] (explaining what actions constitute direct participation in hostilities), *with* DEP'T OF DEF., LAW OF WAR MANUAL 237, § 4.18.4.1 (last updated July 2023) [hereinafter DOD, LAW OF WAR MANUAL] (same).

organized armed groups lose their protected civilian status simply by virtue of their membership in that group, regardless of their role.[339] These definitional questions would need to be settled for a compensation system for civilians to function effectively.

The civilian compensation system should compensate not only for death and injury, but also for the destruction of civilian objects, including homes, private businesses, vehicles, and more. International humanitarian law establishes a bright line between "military objectives," which are legitimate targets of military force, and "civilian objects," which are to be strictly protected.[340] Once again, however, there are significant challenges to determining whether an object is a civilian object. This is complicated by the rise of what are sometimes referred to as "dual use objects" — objects that have both civilian and military uses.[341] In establishing a compensation system, it will be necessary to resolve some difficult and contentious definitional issues — for example whether, if a small part of a building (say one apartment in a large apartment building) is used for military purposes, the entire building is a legitimate military objective and thus not subject to compensation.[342] There are, however, clear guidelines — and while resolving the debates may not be easy, the choices are clear.[343]

Finally, a tenable system for compensation would need to delineate a set of cognizable war hazards and, in so doing, draw a bright line between which sources of harm are covered and which are not. War,

---

[339] *See* Oona A. Hathaway, Inbar Pe'er & Catherine Vera, *Crowdsourced War*, 100 N.Y.U. L. REV. 1561, 1600-06 (2025).

[340] *See* Additional Protocol I, *supra* note 5, art. 52 (1) ("Civilian objects are all objects which are not military objectives as defined in paragraph 2."); *id.* art. 52 (2) (defining a "military objective" as an object that "make[s] an effective contribution to military action" and whose destruction "offers a definite military advantage").

[341] Oona A. Hathaway, Azmat Khan & Mara R. Revkin, *The Dangerous Rise of "Dual-Use" Objects in War*, 134 YALE L.J. 2645, 2645 (2025).

[342] This is a position taken most notably by the United States and Israel. *See* Hathaway et al., *supra* note 341, at 2672; *see also* Michael N. Schmitt, *Targeting Dual-Use Structures: An Alternative Interpretation*, ARTICLES WAR (June 28, 2021), https://lieber.westpoint.edu/targeting-dual-use-structures-alternative [https://perma.cc/C7NL-AXM7] (analyzing two approaches to treating dual-use objects).

[343] *See* Hathaway et al., *supra* note 341, at 2652-53.

after all, has innumerable second- and third-order effects, like displacement, famine, and disease, in addition to the more direct harms from bombs and bullets. For this proposal, we mirror the War Hazards Compensation Act and would include for compensation the injuries immediately attributable to military forces:[344] in general, harms arising in war from the discharge of a weapon, explosive, or munition, or from the operation of vehicles, vessels, or aircraft.[345] This is an admittedly underinclusive set of harms, but nevertheless a step in the right direction.

2. Who Pays When Harms Are Multicausal?

Similarly complex questions may arise in determining who bears responsibility for providing compensation for a given act. As discussed in Parts III and IV.B, we conceive of the state who launches the strike, crashes the vehicle, fires the gun, etc. as the default payor. This will sometimes be clear. But modern conflicts often involve multiple actors who create — and benefit from creating — dangerous situations that cost civilian lives. These actors share the benefit of risk creation and civilian harm and therefore, in some cases, ought to jointly shoulder responsibility.

Consider, for example, if one side deliberately embeds combatants in civilian areas — using human shields in schools or hospitals in violation of international humanitarian law.[346] That side intentionally uses civilians and civilian objects to create a tactical advantage for themselves. Who pays when those civilians are harmed? Or take the case of unlawful invasion. A defending state must still abide by international humanitarian law, and if their strikes against a violator of jus ad bellum unlawfully kill civilians, international law would already require the

[344] This standard would also include harms by covert or paramilitary groups or other forces under the "effective control" of a state. *S*ee Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 115 (June 27).

[345] We import the list of harms included at 5 U.S.C. § 8101(13)(A)–(13)(E).

[346] *International Humanitarian Law Databases, Rule 97: Human Shields*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97 (last visited Jan. 14, 2026) [https://perma.cc/9ATW-CYEV].

defending state pay compensation.[347] But who pays when a defender's counterstrikes cause lawful civilian casualties in the aggressor state's territory?

In these complex situations, our priorities are grounded first in the imperative to pay compensation to the civilians who desperately need it. We recommend that the state that launched the attack should be obligated to pay. But the initial payor is entitled to seek reimbursement for those payments from the state or armed group that bears responsibility for unlawfully putting civilians in harm's way. This two-step approach ensures prompt assistance to civilians, minimizes perverse incentives, and maintains clarity about ultimate moral and legal responsibility.

3. How to Avoid Causing Harm?

Another challenge in providing compensation to civilians is that many of the civilians harmed during armed conflict live in chaotic and violent contexts. A related concern is that compensation can, in some contexts, make those receiving compensation vulnerable to harm, including threats or extortion by local militants, fear of hostage-taking, or risk of appearing to be complicit in the violence done to their communities.[348] Moreover, in some communities, even those who are not active participants in hostilities may support the combatants or the organized armed group for which they fight. Thus, providing significant civilian compensation in these contexts may indirectly fund the very groups that the military operation is aimed at defeating.[349] Any system of

[347] *See* Negm, *supra* note 49 (discussing situation in which Eritrea violated jus ad bellum but Ethiopia was still required to compensate Eritrean civilians for its violations of international humanitarian law).

[348] *See* Julie Freccero, Audrey Taylor, Joanna Ortega, Zabihullah Buda, Paschal Kum Awah, Alexandra Blackwell, Ricardo Pla Cordero & Eric Stover, *Safer Cash in Conflict: Exploring Protection Risks and Barriers in Cash Programming for Internally Displaced Persons in Cameroon and Afghanistan*, 101 INT'L REV. RED CROSS 685, 702-06 (documenting risks associated with humanitarian-aid payments in conflict areas, including community stigma; violence; theft; bribery and extortion at multiple points in the transfer cycle; and a perceived risk of kidnapping by armed groups). *But see id.* at 705 (noting that discretion in payments or transfers to bank accounts can ameliorate some of these risks).

[349] *See* MATTHEW JENKINS, CORRUPTION IN HUMANITARIAN ASSISTANCE IN CONFLICT SETTINGS 17-18 (2024), https://knowledgehub.transparency.org/assets/uploads/helpdesk

compensation for civilians must be mindful of these and other challenges.

As a first principle, compensation should be paid in a way that does not put the recipients at unnecessary risk. This may mean that, in some contexts, payment may be better made to the community — for example, building a school, constructing a road, providing for clean water — rather than to individuals.

Planners and policymakers could readily borrow from existing military guidance to make decisions about the appropriateness of individual compensation in a given area while combat operations are active. Under current regulations in the United States, for instance, geographic combatant commanders, in consultation with the State Department, conduct country- and regional-level assessments to determine where ex gratia payments are appropriate. These assessments consider factors including whether "payments present an undue risk [of] being used for efforts harmful to the United States . . . or its allies and partners. This can include payments that are likely to be subjected to confiscation, extortion, or unofficial taxation by terrorist or hostile insurgent groups."[350]

We recognize that entire countries may be officially designated as "areas of active hostilities" for years, even when conditions on the ground would allow for the safe payment of compensation. So individual compensation is the default method as it better comports with the legal, moral, and prudential justifications for compensation identified in this Article. This presumption holds even for individuals who live in territories designated as being sites of active hostilities. But combatant commanders — those with knowledge of conditions on the ground — may request that compensation in a specific area be provided at the community level. Funds for individuals would be earmarked and held in trust, with only community-level humanitarian assistance provided where feasible. The designation should be subject to periodic reviews and, once conditions have improved such that individual compensation can be safely paid, the reserved funds should be distributed to individual

/Corruption-in-humanitarian-assistance-in-conflict-settings_2024_Final.pdf [https://perma.cc/F26P-7W3N] (discussing diversion and taxation of revenue sources, including humanitarian aid, in areas under armed-group control).

[350] *See* 2020 Interim Regulations, *supra* note 131, at 5.

civilians — those suffering injury, property damage, or the death of a family member.

While community-level compensation may reduce some of the risks associated with individual payments, such programs must be carefully designed. The aftermath of the 2015 Hawija bombing in Iraq demonstrates the potential pitfalls. As part of the campaign against ISIS, the Netherlands carried out an airstrike that killed more than seventy civilians and destroyed millions of dollars' worth of property.[351] Following domestic outcry and amid the ensuing political pressure, as discussed in Part II, the Dutch government in 2019 established a €4.4 million compensation fund to be administered through UN agencies for infrastructure and economic development projects in the town.[352] The concept was promising, but the execution had many shortcomings: years on, these funds are regarded by the residents of Hawija as having failed to meaningfully assist bombing survivors, and there have been local tensions over program implementation and oversight.[353] Survivors were not consulted about their needs, and basic services remained unrestored; victims requiring ongoing medical care stemming from the bombing have received no direct assistance.[354] Local officials allege that much of the funding has been consumed by administrative overhead, security costs, and grift, leaving little to reach affected civilians. The mayor has since requested that future assistance bypass international organizations entirely in favor of direct support to survivors.[355]

Community-level compensation could also take lessons from the (limited) successes of CERP in Iraq (I-CERP), where U.S. forces executed hundreds of local construction and infrastructure projects.[356] By 2009, I-CERP had completed more than 800 projects across Iraq, including schools, health clinics, roads, and water treatment facilities,

---

[351] *IS Conflict: Dutch Air Strike Killed About 70 people in Iraq in 2015*, BBC (Nov. 4, 2019), https://www.bbc.com/news/world-europe-50286829 [https://perma.cc/8PQ8-XZPU].

[352] *See* Pesha Magid, *How a Rare Effort to Compensate Iraqi Airstrike Victims Failed*, INTERCEPT (Oct. 29, 2022, 7:00 AM), https://theintercept.com/2022/10/29/iraq-hawija-airstrike-accountability [https://perma.cc/2M39-D2XL].

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] *See* SIGIR 10-003, *supra* note 168, at 6.

with active documentation and oversight helping funds reach their intended purposes.[357] While the overall efforts to rebuild Iraq were ultimately "replete with challenges, over-promises, setbacks and shortcomings," it was the manageable, discrete projects funded through I-CERP — typically those with budgets under $100,000, carried out alongside local businesses — which tended to be more successful.[358] One lesson to be drawn here is that community-level compensation works best when undertaken with specific, concrete goals in mind, and with the compensating state playing an active role.

The law of war recognizes that certain obligations which may be impractical or dangerous during active combat become both feasible and necessary once hostilities conclude. For instance, after conflict ends, parties must remove explosive hazards or share information with their former adversaries about where such hazards have been placed.[359] Belligerents must also, at that point, release and repatriate all prisoners of war[360] — indeed, the DoD Law of War Manual writes that the cessation of hostilities may be understood as "the point in time when belligerents feel sufficiently at ease about the future" that they feel comfortable releasing their POWs.[361] These actions would be counterproductive during fighting but become essential for postconflict recovery. The same principle can help resolve the challenge of providing compensation in areas under enemy control.

---

[357] *Id.* at 6. The report notes that documentation and accounting could be improved, but that the Multi-National Force – Iraq nevertheless "properly allocated funds, is using funds for the intended purposes, and is accounting for how the funds are expended." *Id.* at 4.

[358] *Learning From Iraq: A Final Report from the Special Inspector General for Iraq Reconstruction: Hearing Before the H. Subcomm. on the Middle E. and N. Afr. of the H. Comm. on Foreign Affs.*, 113th Cong. 1 (2013) (statement of Rep. Ileana Ros-Lehtinen); *id.* at 45.

[359] *See* Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as Amended on May 3, 1996, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, art. 9(2), May 3, 1996, S. TREATY DOC. NO. 105-1(A), 2048 U.N.T.S. 93 (CCW Amended Mines Protocol).

[360] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[361] DOD, LAW OF WAR MANUAL, *supra* note 338, at 665-66.

During active hostilities, providing individual payments in enemy-controlled territories may raise legitimate security concerns. However, once hostilities end, this concern diminishes substantially. Even if an area remains under the control of a former adversary, the conclusion of active fighting removes the primary justification for withholding individual compensation, in the same way that it minimizes the concern that former POWs will return to the battlefield.

The end of hostilities could serve as a clear temporal trigger for transitioning from collective to individual compensation in previously contested areas. And unlike current U.S. ex gratia regulations, which impose a blanket prohibition against compensation to civilians in territories controlled by adversaries, this system could entail community-level compensation where practicable, even before the end of the conflict. In short, compensation would be mandatory either at the cessation of hostilities or when the relevant combatant commander determines that the payment would not present a risk of harm to the United States or its allies — whichever comes first.

4. The Risk of Sanitizing War

Critics may raise concerns that compensating civilians risks transmitting the wrong expressive values: that human loss is truly compensable, that rich countries can skirt accountability or buy lives, that war is transactional.[362] Compensation cannot quantify the value of a human life or repair the irreparable, nor does payment absolve states of ethical responsibility. Moreover, our proposal, in providing for compensation for harm regardless of whether the conduct that caused it was unlawful or not, might be seen as offering a trade-off between state admission of responsibility and practical benefit to civilians.

We acknowledge that there is some loss that comes from a system that does not turn on the legality or illegality of the acts that caused the harm. In some cases, civilians seeking compensation are not simply seeking money — they want an admission of wrongdoing. The claims

[362] *See* Crootof, *War Torts*, *supra* note 14, at 1134-36 (discussing the risk of "pricing harms"); *cf.* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021) (arguing that humanizing war risks justifying and prolonging it).

system would represent a partial answer to this desire — the creation of a compensation scheme involves admission that there was harm done by the state responsible and that the state bears responsibility for taking steps to repair that harm. But there is no opportunity to bring forward evidence that the act was unlawful. That is necessary for the system to be workable and comprehensive. It is also likely an essential condition to persuade states to adopt such a compensation scheme. But there is something lost.

And yet nothing about creating a civilian compensation scheme makes criminal liability for violations of the law impossible.[363] Indeed, states continue to have the obligation to investigate serious violations of international humanitarian law. A civilian claims system may not be set up to provide legal accounting for unlawful acts, but it can help bring to light harms that have been done to civilians and, in the process, prompt investigations. The hope, too, is that the information brought to light through the civilian compensation scheme might be used by militaries to reevaluate their targeting systems to avoid such harms in the future. The system of civilian compensation, then, may not provide full accountability for unlawful actions, but it does provide greater transparency regarding civilian harm of all kinds — which can help prompt accountability and policy changes.

A related concern is that routinized payments could "humanize" conflict and casualties to domestic audiences and thereby prolong the political feasibility of war.[364] We think it more likely that such a system and its associated demands for investigation and documentation actually increases the visibility of civilian harm and its salience in the media.[365] And to the extent the public is opposed to their government killing and injuring civilians in war, this should be expected to decrease

[363] *See* Crootof, *War Torts*, *supra* note 14, at 1101.

[364] *Cf.* MOYN, *supra* note 362, at 241-45 (suggesting that the Obama administration "played up the humanity of the fighting" in the Middle East and minimized collateral damage in public statements in order to ward off public scrutiny).

[365] *See* Maurice Oniango, *This Reporter Exposed the Civilian Toll of US Airstrikes. Her Warning: Be Ready for a More Hostile World*, GLOB. INVESTIGATIVE JOURNALISM NETWORK (June 19, 2025), https://gijn.org/stories/azmat-khan-investigating-airstrikes/ [https://perma.cc/X5R8-8V37] (discussing the use of declassified government documentation to report on otherwise undisclosed civilian casualties).

public support for wars or military operations likely to cause such harm.[366]

What is more, the idea of paying compensation to those harmed in war is far from new. Indeed, almost all states, and many nonstate armed groups, compensate their own soldiers and dependents with benefits that resemble hazard pay.[367] The U.S. military pays a monthly Dependency and Indemnity Compensation to the families — surviving spouses, children, and parents — of its soldiers who died as a result of their service.[368] In the course of its unlawful war against Ukraine, the Russian regime is paying out "insurance" to its soldiers for injuries — the standard rate was $30,240 (₽3 million), but has been reduced to $1,000 for some — and deaths ($47,392.46).[369] Ukraine, too, pays a death benefit to the families of deceased military personnel.[370] Civilian hazard pay would narrow the gap between compensation that states provide in recognition of their soldiers' contributions, as well as in recognition of private military contractors', and compensation the states provide civilians for theirs.

---

[366] *See* Robert Johns & Graeme A.M. Davies, *Civilian Casualties and Public Support for Military Action*, 63 J. CONFLICT RESOL. 251, 270-71 (2019) (finding that support for military action among American and British residents "invariably" declined "where the civilian death toll [of foreigners] — projected or actual — was higher").

[367] *See* Shai Farber, *Countering the Financing of Terrorists' Salaries*, 48 STUD. CONFLICT & TERRORISM 1415, 1415-16 (2025).

[368] *See Dependency and Indemnity Compensation*, MIL. ONESOURCE, https://www.militaryonesource.mil/benefits/dependency-and-indemnity-compensation/ (last visited Jan. 14, 2026) [https://perma.cc/T8PX-3KJC].

[369] *See Russian Government Shrinks Soldier Compensation for Less Severe Injuries, Fast-Tracking Change to Avoid Military Scrutiny*, MEDUZA (Nov. 14, 2024, 1:00 AM), https://meduza.io/en/news/2024/11/14/russian-government-shrinks-soldier-compensation-for-less-severe-injuries-fast-tracking-change-to-avoid-military-scrutiny [https://perma.cc/M3MR-EW59].

[370] Iryna Perepechko, *The Government as Simplified the Procedure for Payment of Benefits for the Death or Injury of Military Personnel*, Бабель [BABEL] (Sept. 25, 2024, 11:40 AM), https://babel.ua/en/news/111160-the-government-has-simplified-the-procedure-for-payment-of-benefits-for-the-death-or-injury-of-military-personnel [https://perma.cc/WAH4-VEM4].

CONCLUSION

As conflicts continue around the globe, civilians are caught in the middle. While international humanitarian law is supposed to insulate civilians from becoming the targets of violence in war, they are too often nonetheless injured or killed, and their property destroyed. For too long, this violence has been treated as an inevitable, if tragic, effect of war. No state has wanted to accept responsibility for repairing this harm — reasoning that, even if they caused the harm, they are not responsible for it as long as they behaved lawfully. When they have caused the harm unlawfully, they have too often denied responsibility and refused, once again, to provide any recompense. As a result, civilians suffer the harms imposed on them with little or no support to help repair the damage done and rebuild their lives.

This Article has argued that this situation is immoral and self-defeating. It also observes just how inconsistent states' posture to foreign civilians is with their treatment of other lives — those of their own soldiers and those of private military contractors. Everyday civilians with no contractual relationship to militaries are crucial to states' war efforts —they pay for states' military advantage with their lives, the lives of their loved ones, and their homes — yet they and their families usually receive nothing to recognize that tremendous loss. As Part II showed, even when states provide for compensation for civilian harm, the likelihood of compensation and the amounts provided often vary radically — for reasons that have little relationship to the harm suffered by the civilians. Those killed outside of combat are eligible for payment under the Foreign Claims Act, but those killed during combat are not. And ex gratia and solatia payments are explicitly contingent on the decisions of local commanders, who may apply radically different criteria from one another. This leads to the perception — and, indeed, the reality — of an almost random system of compensation.

To fill the gap, we have proposed War Hazards Compensation for Civilians. Building on an already existing system in the United States for compensating private military contractors, the plan would provide a system by which civilians could seek compensation. While no amount of money can fully repair the harm done, especially when lives have been lost, compensation allows civilians to begin to rebuild. The War Hazards Compensation for Civilians system would address these key

shortcomings. It would provide clear and consistent criteria for providing compensation for civilians harmed in war. The creation of a claims system, with set levels of compensation for particular forms of harm, allows for greater transparency regarding the criteria applied to deciding that compensation is to be provided. Not only would this address the incomplete coverage, arbitrary and opaque implementation, and contingent and underinclusive rationales of status quo systems — it would also better satisfy the important moral duties and obtain the prudential benefits detailed in Part III.

Finally, by eliminating the distinction between lawful and unlawful harm for purposes of compensation, this system addresses two fundamental flaws in existing compensation schemes. First, it dramatically simplifies administration. Instead of conducting complex investigations into military decision making or parsing the legality of specific operations, administrators need only verify two facts: a claimant's civilian status and the harm's causation by either U.S. forces or a multinational coalition in which the United States was a member. This transforms the process from a quasi-judicial proceeding into something more akin to an insurance claim — fast, predictable, and focused on documenting and compensating concrete harm. Second, eliminating the lawful-unlawful divide recognizes the moral reality that a civilian's suffering is no less devastating when caused by a "legitimate" military operation than by an illegal one. A family's loss, a child's injury, the destruction of a home — these demand recognition regardless of the military's intent or legal standing. This system thus aligns compensation with the actual experience of civilians caught in conflict, rather than with abstract legal categories that mean little to those who suffer.

This proposal aims to place the critical harm to civilians being done in the wars waged around the world at the center of the discussion. Too often, the focus of news accounts and public debate about violent conflicts is the geopolitical impact that conflict might have, the strategic aims of the forces at war, or the ways in which the conflict will affect trade routes or the price of oil. War Hazards Compensation for Civilians places that harm at the center of the conversation where it belongs. By expanding compensation to all civilians who are harmed by states' military operations, it would offer civilians who are harmed some measure of solace and support. In doing so, it would also render visible

the now-invisible costs to those whose lives are disrupted and destroyed by war.