

# Article

## Designing Amends for Lawful Civilian Casualties

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## INTRODUCTION

In January 2015, a U.S.-initiated drone strike in Pakistan accidentally killed U.S. citizen Warren Weinstein and Italian aid worker Giovanni Lo Porto. President Obama compensated the families<sup>1</sup> and gave a long speech in which he indicated that he “want[ed] to express our grief and condolences to the families of two hostages.”<sup>2</sup> The President justified his declassification and disclosure of this strike “because the [] families deserved to know the truth.”<sup>3</sup> He also offered the following mea culpa: “As President and as Commander-in-Chief, I take full responsibility for all our counterterrorism operations . . . I profoundly regret what happened. On behalf of the United States Government, I offer our deepest apologies.”<sup>4</sup> He concluded the discussion of the strike by noting,

I have directed a full review of what happened. We will identify the lessons that can be learned from this tragedy and any changes that should be made. We will do our utmost to ensure it is not repeated. And we will continue to do everything we can to prevent the loss of innocent lives—not just innocent Americans, but all innocent lives—in our counterterrorism operations.<sup>5</sup>

In October 2015, a U.S. airstrike hit a Doctors Without Borders trauma hospital in Kunduz, Afghanistan, killing twenty-two people. President Obama apologized to Dr. Joanne Liu, the head of Doctors Without Borders, promising that “he would make any changes necessary to ensure that such incidents were less likely in the future,” including a “full accounting” of the event and consideration of the military’s rules of engagement.<sup>6</sup> The Administration offered compensation to the families of those killed and injured.<sup>7</sup> Over the following months, the Pentagon completed a comprehensive investigation, disciplined numerous military personnel, and identified “a number of specific actions to . . . mitigate the potential for similar incidents in the future.”<sup>8</sup>

Contrast the responses to these incidents with how the United States has generally responded to the families of local civilians that it viewed itself as

1. Peter Baker, *Obama Apologized After Drone Kills American and Italian Held by Al Qaeda*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html>.

2. President Barack Obama, Remarks on the Deaths of Warren Weinstein and Giovanni Lo Porto (Apr. 23, 2015), <https://www.gpo.gov/fdsys/pkg/DCPD-201500295/pdf/DCPD-201500295.pdf>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Michael D. Shear & Somnin Sengupta, *Obama Issues Rare Apology Over Bombing of Doctors Without Borders Hospital in Afghanistan*, N.Y. TIMES (Oct. 7, 2015), <http://www.nytimes.com/2015/10/08/world/asia/obama-apologizes-for-bombing-of-afghanistan-hospital.html>.

7. *Afghan Hospital Bombing: Pentagon To Pay Compensation to Families*, GUARDIAN (Oct. 11, 2015), <https://www.theguardian.com/us-news/2015/oct/11/kunduz-pentagon-to-pay-compensation-over-afghan-hospital-bombing>.

8. Barbara Starr & Ryan Browne, *Pentagon: U.S. Bombing of Afghanistan Hospital Not a War Crime*, CNN (Apr. 29, 2016), <http://www.cnn.com/2016/04/29/politics/u-s-airstrike-hospital-afghanistan-investigation>.

having lawfully killed or injured during military operations. Unsurprisingly, direct presidential apologies, like those offered above, are reserved for truly exceptional cases.<sup>9</sup> When the United States has killed or injured local civilians during military operations in places like Afghanistan and Iraq—places where the United States has engaged in formally recognized armed conflict—the United States has tended neither to directly acknowledge its causal responsibility nor to make promises of non-repetition, though it has often provided small monetary payments as an expression of sympathy to affected families—disbursements known as condolence or solatia payments.<sup>10</sup> As for local civilians killed or injured in places where the United States does not acknowledge its military involvement, like Yemen or Pakistan, the United States has not offered direct information, apology, or money to families.<sup>11</sup> On occasion, however, it may have filtered solatia or condolence payments to the affected family through their home government.

States need not always approach foreign lives in the same manner as domestic ones,<sup>12</sup> but the taking of foreign lives and the treatment of families in the aftermath of such killings deserves thoughtful attention and justification. This is especially so when estimates of civilian casualties caused by the United States and its allies during the War on Terror reach into the thousands.<sup>13</sup> Although recent improvements in U.S. ground and air strike policies have reduced civilian casualties,<sup>14</sup> they still occur and we can expect them to occur

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9. While Obama did directly acknowledge responsibility for the accidental deaths of American and Italian aid workers in Pakistan and Anwar al-Awlaki's American-born son, the Obama Administration has not named any victims from Pakistan, Somalia, or Yemen. Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), <http://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html>; Naureen Shah, *Obama Order Looks To Curb Civilian Deaths in U.S. Airstrikes and Drone Attacks*, PBS NEWSHOUR (July 1, 2016, 6:46 PM), <http://www.pbs.org/newshour/bb/obama-order-looks-to-curb-civilian-deaths-in-u-s-airstrikes-and-drone-attacks/>; Shear & Sengupta, *supra* note 6.

10. See *infra* Section I.B.2.

11. Cora Currier, *Does the U.S. Pay Families When Drones Kill Innocent Yemenis?*, PROPUBLICA (Aug. 12, 2013), <http://www.propublica.org/article/does-the-u.s.-pay-families-when-drones-kill-innocent-yemenis> (noting that a Pentagon spokesperson said no condolence payments have been made in Yemen and central command has revealed that it has thirty-three pages on condolence in Yemen but will not release them); Amrit Singh, *Death By Drones: Civilian Harm Caused by U.S. Targeted Killings in Yemen*, OPEN SOC'Y FOUND. 31 (2015), <https://www.opensocietyfoundations.org/sites/default>

[/files/death-drones-report-eng-20150413.pdf](https://www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf). Though the United States does not have a condolence or solatia program in Pakistan, it has disbursed money to the Pakistani government for the provision of medical, psychological, and livelihood assistance to those in Khyber Pakhtunkhwa and the Federally Administered Tribal Areas. *After the Dead Are Counted, U.S. and Pakistani Responsibilities to Victims of Drone Strikes*, OPEN SOC'Y FOUND. 23 (2014), <https://www.opensocietyfoundations.org/sites/default/files/after-dead-are-counted-20141120.pdf>; *Conflict Victims Support Project, Pakistan*, U.S. AGENCY INT'L DEV. (Oct. 1, 2013), <https://scms.usaid.gov/sites/default/files/documents/1871/CVSP.pdf>.

12. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 512 (2014).

13. The difficulties of generating precise civilian casualty data are legion. See *generally* COUNTING CIVILIAN CASUALTIES: AN INTRODUCTION TO RECORDING AND ESTIMATING NONMILITARY DEATHS IN CONFLICT (Taylor B. Sebolt et al., eds., 2013) (estimating that civilian casualties induced by the United States and its allies during the War on Terror reach into the thousands); Neta C. Crawford, *War-Related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014*, BROWN U. WATSON INST. COST OF WAR PROJECT 20 (2015) (noting the difficulties of determining the indirect death toll of conflicts).

14. See *CIA and US Military Drone Strikes in Pakistan, 2004 to Present*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqv33HIGt09>

in conflicts to come. While international and domestic law provide some means of redress, however imperfect, for unlawful killings during armed conflicts,<sup>15</sup> the law says little about redress for lawful harms. But when law authorizes harm, as it does for certain civilian deaths and injuries during armed conflict, states should design processes for making amends that recognize the humanity of affected civilians and their families,<sup>16</sup> and that offer both the injured and the injurer a mechanism for addressing that harm.

In this Article, we offer some thoughts on the limitations of current practices for making solatia and condolence payments after lawful civilian deaths in satisfying the essential demands of amends for the recipient and the giver, and how those demands might inform the design of amends making processes in this context. While many have grappled with how to appropriately respond to the victims of unlawful harm,<sup>17</sup> analysis of the complexities of responding to the victims of lawful harm is significantly less developed. And,

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wgLZDSCP-BQaux51w/edit#gid=1000652376 (reporting a steep decline in the number of civilian casualties from U.S. drone strikes in Pakistan since 2012) (last visited Jan. 10, 2015); *see also US Strikes in Yemen, 2002 to Present*, BUREAU OF INVESTIGATIVE JOURNALISM, [https://docs.google.com/spreadsheets/d/1lb1hEYJ\\_om8lSe33izwS2a2lbiygs0hTp2Al\\_Kz5KQ/edit#gid=97725626](https://docs.google.com/spreadsheets/d/1lb1hEYJ_om8lSe33izwS2a2lbiygs0hTp2Al_Kz5KQ/edit#gid=97725626) (last visited Jan. 10, 2015) (reporting a reduction in the number of civilian casualties from U.S. drone strikes in Yemen since 2014). On the other hand, independent monitoring groups suggest U.S. drone strikes against ISIS in Syria have resulted in hundreds of civilian casualties. *See Alice Ross, Hundreds of Civilians Killed in US-led Air Strikes on ISIS Targets - Report*, GUARDIAN (Aug. 3, 2015), <http://www.theguardian.com/world/2015/aug/03/us-led-air-strikes-on-isis-targets-killed-more-than-450-civilians-report>.

15. *See infra* Part I.

16. *See infra* Section II.A.

17. Amends may also have value as a response to *unlawful* harm. Existing law, however, if properly implemented and enforced, can satisfy many of the functions of amends in the context of unlawful harm. On the demand-side, the process leading to a criminal determination of unlawfulness ought to provide an explanation of the events leading to the victim's death. The subsequent punishment should deter repetition and states may also choose to respond to criminal investigations with reform and promises of non-repetition. Both the willingness to prosecute and the subsequent sentence can serve as an acknowledgement of the victim's worth and function as the state's acceptance of responsibility. The reparations that accompany grave IHL breaches are now generally understood to include more than financial compensation; they ought to include restitution, rehabilitation, guarantees of non-repetition, and satisfaction (acknowledgement of wrongdoing) as well. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 18 (Dec. 16, 2005). In fact, our notion of "amends" mirrors this expansive understanding of what it is that victims are owed in the wake of unlawful state-imposed harms. Similarly, on the supply-side, criminal prosecutions may help win hearts and minds by disavowing violations of the law, allow individuals an opportunity for moral repair, and enhance military professionalism by reinforcing codes of conduct.

That said, status quo criminal proceedings notoriously lack a victim-orientation. Often the victim's only role is to participate as a witness and the victim's family may be largely left out of the process. Criminal proceedings may not always signal acceptance of state responsibility, but rather may be viewed as shifting the focus to a single perpetrator or a handful of perpetrators. In addition, as currently conducted, these proceedings are neither designed to restore the victim nor performed with any special attention to cultural appropriateness. Moreover, the United States does not currently provide monetary reparations to individuals in the wake of criminal proceedings. Rather, as we describe in Part I, such individuals may receive condolence or solatia payments independent of the outcome of criminal proceedings.

Amends, therefore, might usefully be offered as a complement to criminal proceedings for unlawful harms. We do not focus our attention on this possibility here, however, as we believe both legal reform and scholarly discussions are already seriously grappling with the issues surrounding appropriate responses to the victims of unlawful harm. Moreover, while improvements in criminal justice and reparations might address the problems of unlawful harms, they would do little to confront the lacuna raised by lawful harms. Thus, we focus here on the circumstances of *lawful* harm.

while many have urged coordination and standardization of solatia and condolence payments,<sup>18</sup> scant attention has been paid to how the absence of elements such as responsibility-taking or the promise of non-repetition might affect both those who have been injured and those who seek to make amends. The oft-repeated assumption that a simple program in the form of monetary payments can recognize human dignity, win hearts and minds, and benefit the providing troops is often asserted, but has yet to be systematically evaluated.<sup>19</sup> Grounding our inquiry in a close examination of the military's practices and in the empirical literature on amends and apology, we consider these payments' effects on three important constituencies: the victims,<sup>20</sup> the individuals causally responsible for the deaths, and the institutions that offer the payments. We consider whether existing payment practices serve their intended functions with regard to these three groups. In addition, we suggest how to integrate these monetary payments into a larger amends program that grapples with the complexities of responsibility-taking and promises of non-repetition, complicated questions about who has standing to give and receive apologies for lawfully inflicted injuries, and the difficulties inherent in cross-cultural exchanges.

We address these design questions through the lens of the governing body of law, international humanitarian law (IHL), which balances the needs of the military to achieve its objectives and the desire to maintain humanitarian limits during conflict.<sup>21</sup> Rooted in principles of reciprocity and humanity, this law

18. See *infra* Part III.

19. See Joint Staff, Commanders' Emergency Response Program (CERP), Briefing for Senate Appropriations Committee (Oct. 22, 2003), as reprinted in JASON W. CONDREY, *THE COMMANDER'S EMERGENCY RESPONSE PROGRAM: A MODEL FOR FUTURE IMPLEMENTATION* 17 (2010) ("When spent well, CERP funding convinced Iraqis that the coalition was truly committed to their well-being, increased the flow of intelligence to commanders and soldiers about hostile actors in the community, and improved security. . . ."); Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (Apr. 5, 2013), <http://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age> (quoting a retired general who supported condolence payments saying "[w]e are going to leave, and the only thing that's going to remain is the perception of America."); Chris Rogers, *Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces*, CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT 6 (2010), [http://civiliansinconflict.org/uploads/files/publications/Addressing\\_civilian\\_harm\\_white\\_paper\\_2010.pdf](http://civiliansinconflict.org/uploads/files/publications/Addressing_civilian_harm_white_paper_2010.pdf).

20. And by extension, the communities in which they are located.

21. See *infra* Section I.A. Even in conflicts with lower standards than those imposed for state-to-state conflicts, individuals must be treated humanely. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC for Armed Forces in the Field]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see also Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 796, 798 (2010) ("IHL represents a carefully thought out balance between the principles of military necessity and humanity. Every one of its rules constitutes a dialectical compromise between these two opposing forces."). While President-Elect Trump has voiced some disdain for the Geneva Conventions, he has said that he understands "that the United States is bound by laws and treaties" and that he would "not order our military or other officials to violate those laws and will seek their advice on such matters." Ryan Browne & Nicole Gaouette, *Donald Trump Reverses Position on Torture, Killing Terrorist's Families*, CNN (Mar. 4, 2016), <http://www.cnn.com/2016/03/04/politics/donald-trump-reverses-on-torture/>.

allows combatants to legally impose harm on both combatants and civilians, but places significant constraints on when and how that harm may be imposed. The law's emphasis on the dignity and humanity of individuals is revealed both by these constraints and additional requirements regarding the treatment of those who are killed or injured.<sup>22</sup> For instance, both the 1868 St. Petersburg Declaration<sup>23</sup> and the Martens clause<sup>24</sup> enshrine the laws of humanity into IHL, reflecting drafter F.F. Martens's view that everyone has an inviolable right to honor and dignity.<sup>25</sup> Even though IHL and the attendant scholarship often focus on how militaries ought to account for humanitarian demands when considering actions that might impose civilian casualties, we suggest that more attention should also be paid to how this humanitarian spirit of IHL might address the aftermath of the harm it authorizes. We contend that the provision of well-designed amends mechanisms to address lawfully imposed harmdoing would enhance satisfaction of IHL's humanitarian purposes while still respecting the inherent balance at the heart of this body of law.<sup>26</sup>

The consideration of appropriate responses to the loss of foreign lives in the military context is particularly timely. On July 1, 2016, President Obama issued an Executive Order on United States Policy on Pre-and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force.<sup>27</sup> In it, he committed the United States, as a matter of policy,<sup>28</sup> to "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."<sup>29</sup> In addition, the Executive Order calls for "engage[ment] with foreign partners to share and learn best practices for

22. IHL does contain some minimal obligations that attach after the death of civilians such as: searching for the dead, the taking of all measures to prevent the dead from being despoiled or pillaged, returning their remains and personal effects, disposing of the dead respectfully, including the recording of information prior to disposal, and marking the location of the graves. GC for Armed Forces in the Field, *supra* note 21, arts. 15-17.

23. *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Dec. 11, 1868, 18 MARTENS 474, reprinted in 1 SUPPLEMENT AM. J. INT'L L. 89, 95-96 (1907) (prohibiting weapons "which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity" and committing States to update their weapons regulations in order to "reconcile the necessities of war with the laws of humanity.").

24. Convention (II) Respecting the Laws and Customs of War on Land: Regulations Concerning the Laws and Customs of War on Land, Preamble, July 29, 1899, 32 Stat. 1803, T.S. No. 429 [hereinafter Convention II] (stating that "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience").

25. Vladimir Vasilievich Pustogarov, *Fyodor Fyodorovich Martens (1845-1909) - A Humanist of Modern Times*, 78 INT'L REV. RED CROSS 322, 334 (1996).

26. Of course, in order to strike this balance, one must be mindful of the military's capacity and not craft proposals so unduly burdensome that they will not be used.

27. Exec. Order No. 13,732, 81 Fed. Reg. 44,483, 44,485 (July 7, 2016). While executive orders can be revoked by future presidents, they often stay in place because revocation can be a politically costly act. Robert Chesney, *President Obama's Executive Order on Pre/Post Airstrike Policies and Practices*, LAWFARE (July 1, 2016, 2:55 PM), <https://www.lawfareblog.com/president-obamas-executive-order-prepost-airstrike-policies-and-practices>.

28. Exec. Order No. 13,732, *supra* note 27, §§ 5(d)-(e).

29. *Id.* § 2(b)(i).

reducing the likelihood of and responding to civilian casualties.”<sup>30</sup> Yet many have criticized the Executive Order as insufficiently victim-oriented.<sup>31</sup> With implementation of the order and a change in Administration<sup>32</sup> both imminent, it is an especially opportune moment to think carefully about how to design effective amends mechanisms.

While our research most directly addresses voluntary condolence and solatia payments for civilian victims of lawful armed conflict, it also speaks more generally to other settings in which the law permits harm to others. This includes other foreign military harm settings such as military claims payments for non-combat activities,<sup>33</sup> reparations for unlawful military acts,<sup>34</sup> and hero payments.<sup>35</sup> While the military setting is special for numerous reasons, including the exclusion of non-U.S. citizen victims and their families from the U.S. domestic political process,<sup>36</sup> it is hardly unique as a setting in which persons and institutions may lawfully cause the deaths of others. Our analysis, therefore, also speaks to the value and design of amends in domestic, non-military settings such as non-negligent policing resulting in death.<sup>37</sup>

This paper proceeds in three parts. In Part I, we situate payments for military takings of foreign lives in the legal and historical landscape. Looking at both domestic and international law, we describe the existing compensation regimes for harms imposed on the local population of a foreign country by the

30. *Id.* § 2(b)(iii).

31. Sarah Knuckey, *The Good and Bad in the U.S. Government's Civilian Casualties Announcement*, JUST SECURITY (July 2, 2016, 8:16 AM), <https://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement/> (criticizing the lack of victims' names in the annual report and lack of “victim and family centered language” in the order); Jameel Jaffer, *U.S. Releases Official Casualty Numbers and New Executive Order on “Targeted Killing,”* ACLU BLOG (July 1, 2016), <https://www.aclu.org/news/us-releases-official-casualty-numbers-and-new-executive-order-targeted-killing> (criticizing the Administration's lack of transparency); Shah, *supra* note 9 (requesting that the Administration focus more on the individual victims).

32. As of this writing, the Civilian Casualties Executive Order is not one that President-Elect Trump has identified as a target for repeal. Robert Chesney, *Annals of the Trump Administration #2: Which Executive Orders and Directives Are Doomed?*, LAWFARE (Nov. 18, 2016, 11:37 AM), <https://www.lawfareblog.com/annals-trump-administration-2-which-executive-orders-and-directives-are-doomed> (no mention of the Civilian Casualties executive order as one of the most likely security related executive orders to be repealed); Justin Holcomb, *The List of Executive Orders That Trump Will Dispose of Immediately*, Townhall.com (Nov. 10, 2016), <http://townhall.com/tipsheet/justinholcomb/2016/11/10/the-list-of-executive-orders-that-trump-will-dispose-of-immediately-n2243914> (identifying multiple executive orders for immediate rescission but omitting the Civilian Casualties Executive Order).

33. *See infra* Section I.B.1.

34. *See infra* Section I.A.

35. U.S. FORCES, U.S. DEP'T DEF., MONEY AS A WEAPON SYSTEM AFGHANISTAN, USFOR-A PUB 1-06 at 3, 5, 12 (2008) [hereinafter MAAWS-A]. Hero payments are part of the Secretary of Defense condolence payment program, and are paid to the surviving spouse or next of kin of host nations' personnel killed as a result of U.S., multinational, or supporting military operations. U.S. DEP'T DEF., NO. 09-27 HANDBOOK: COMMANDER'S GUIDE TO MONEY AS A WEAPONS SYSTEM 70 (2009).

36. *See* Rowell & Wexler, *supra* note 12. That said, in liberal democracies, governments often face significant political pressure to protect civilians in warfare. *See* Neta C. Crawford, *Just War Theory and the U.S. Counterterror War*, 1 PERSP. ON POL. 5, 15 (2003).

37. *See* Tracey L. Meares, Tom R. Tyler, & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople View Good Policing*, \_\_ J. CRIM. L. & CRIMINOLOGY \_\_ (forthcoming); Winnifred R. Louis, et al., *Collective Harmdoing: Developing the Perspective of the Perpetrator*, 21 PEACE & CONFLICT 306, 309 (2015) (noting that police who shoot in the line of duty might suffer similar consequences to those who kill in combat).

military. We explain the differences among regimes based on whether the harm was incurred during combat and whether the harm was lawful. We then focus on when and how the United States provides amends for lawful deaths incurred during combat activities in order to lay the groundwork for evaluating those practices in light of their possible purposes.

In Part II, we consider a number of justifications for why the United States might make amends for the lawful killing of civilians. In so doing, we review the existing literature on the effects of amends on victim responses to harm and harm-doers and the effects of making amends on harm-doers themselves, paying particular attention to research exploring the components of amends, the central role of taking responsibility for having caused harm, the victim's desire for reform, the question of who has standing to give and receive amends, and the cross-cultural aspects of amends. We look first at demand-side justifications for amends, exploring the reasons why affected individuals and families might desire amends following harm.

We also disaggregate the supply-side reasons for amends in this setting, exploring the military's perspective. Most accounts of amends making in this context emphasize "winning hearts and minds" or how a military might benefit strategically, particularly in a counterinsurgency, from successfully addressing the grievances, security, and legitimacy needs of the local population. Less appreciated, however, is the potential for amends making to address the moral injury suffered by some soldiers who engage in lawful killing of civilians. Finally, we investigate how making amends might reinforce military professionalism by emphasizing the military's respect for humanitarian restraints on killing in combat and its respect for civilians.

In Part III, we offer suggestions for the improved design of solatia and condolence practices as part of a larger amends making activity. First, we frame condolence and solatia payments as part of a relationship-oriented practice designed to serve the needs of both the injurer and the injured. Given this framing, we outline a redesign of current approaches that better encompasses all aspects of amends. This would include personalized payment processes respectful of culture and rituals, inclusion of service members who suffer from or are at risk of experiencing moral injury, the acknowledgement of causality, and enhanced mechanisms for facilitating the reduction of future harm. We identify some gaps in the empirical evidence that would help predict the likely effects of these reforms and conclude with a roadmap for future empirical research to close these gaps.

## I. THE LAW AND PRACTICE OF CONDOLENCE AND SOLATIA

In order to fully understand the existing condolence and solatia payments provided to civilian victims of lawful armed conflict, one must first appreciate the legal and factual landscape. The emerging demand for amends is best understood against the legal background in which condolence and solatia payments for civilians exist. We focus on those payments that states voluntarily offer to individuals they harm. For civilians injured or killed in armed conflict, voluntary payments offered to express sympathy are often termed "ex gratia" or



“condolence” payments. When performed in accordance with local custom, such disbursements might instead be called “solatia” payments. We are particularly interested in mechanisms that share the following characteristics: 1) the provision of financial payments to individuals or family members that may be accompanied by 2) an expression of sympathy, offered for 3) the death or injury of a civilian that 4) was caused by another state engaging in the use of force and 5) that is not currently required under international law. No legal or moral wrongdoing is required as the impetus for such payments, though it may be present in individual cases.

This Part introduces the international and domestic legal lacuna for lawful victims of armed conflict as well as the possible practical lacuna for victims of unacknowledged uses of force.<sup>38</sup> While civilians injured or killed by other states’ militaries may be entitled to compensation for tortious non-combat activity or for the use of unlawful force during armed conflict, no such compensation or other amends are currently required for the death of civilians as a result of lawful military force. Rather, as this Part describes, a variety of discretionary condolence and solatia efforts partially fill the gap.

#### A. *International Law of Reparations*

Under international law, states that commit a legally wrongful act in another state’s jurisdiction are generally expected to make reparations for any

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38. Although a state might lawfully injure civilians in another country in a variety of settings, we limit this conversation to the situation of armed conflicts and other uses of force. First, the aggregate consequences of lawful harm in armed conflict are likely to be quite significant, whereas lawful harms imposed in peacetime settings ought to be relatively infrequent. In addition, parties can seek first party insurance for most types of harms, but it is nearly impossible to do for acts of war, particularly for those in the countries where the United States is likely to be involved in armed conflict. Likewise, some of the supply-side and demand-side demands are likely lessened when the state is not engaged in activity that is high risk and designed to be lethal.

We acknowledge that amends might also make sense in other lawful harm contexts. In fact, some areas of law already create state obligations to compensate for harm caused by lawful acts. Under domestic and international law, for example, if a state takes privately held property for a public use, the state has a duty to provide compensation. 1 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 80.08(a) (David A. Thomas ed., 2016); Oscar Schacter, *Compensation for Expropriation*, 78 AM. J. INT’L L. 121 (1984). Similarly, international law recognizes the obligation for occupying powers to pay for “requisitions in kind and services from the inhabitants of an occupied territory.” See Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 52, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *Responsibility of States for Internationally Wrongful Acts: General Commentary*, [2001] 2 Y.B. Int’l L. Comm’n 31, 33, U.N. Doc. A/CN.4/SER.A/2001/Add.1; Yael Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT’L L. 1, 12 (2009). In many states, innocent persons convicted of a crime and then exonerated may receive compensation and other amenities as well as apologies from the state. See generally *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted> (identifying the “federal government, the District of Columbia, and 30 states” as those with compensation statutes and noting best practices). Such amenities include provisions like tuition waivers, health care, vocational training, and counseling. Alanna Trivelli, Note, *Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again*, 19 RICH. J. L. & PUB. INT. 257, 261-62 (2016). While a few jurisdictions limit their statutes to instances of wrongdoing by the state, many state statutes extend the possibility of compensation to all exonerees, including those towards whom the state behaved in good faith. Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 559 (2013).

harm caused.<sup>39</sup> Reparations can come in many forms. For individuals, the focus is often on restitution and rehabilitation in the form of monetary compensation.<sup>40</sup> But reparations also include what is termed “satisfaction”—reinstatement of the victim’s dignity by ceasing the specific individual violation and acknowledging harm to the individual.<sup>41</sup> Reparations can also include guarantees of non-repetition that might be satisfied by reform efforts such as training, institutional reform, and enhanced legal protections.<sup>42</sup>

Importantly, reparations have historically been available only to victims of unlawful harm. Harm that results from lawful conduct does not give rise to a claim for reparations.<sup>43</sup> In defining lawful and unlawful acts in the armed conflict setting, IHL seeks to strike a fundamental balance between a military’s ability to accomplish its objective of weakening or destroying opposition forces and the desire to maintain humanitarian restraint. Modern limitations on *jus in bello* (conduct in armed conflict) are predicated on the assumption that armed conflict can be a legitimate enterprise that should be regulated rather than prohibited. For instance, core provisions of the laws of war reflect that belligerents may injure and kill the enemy,<sup>44</sup> while the Geneva Convention explicitly prohibits targeted “violence to life and person” of “persons taking no active part in the hostilities.”<sup>45</sup>

We focus here on grave breaches of law in the context of international armed conflict,<sup>46</sup> for which numerous international treaties contemplate remedies.<sup>47</sup> First, states may not directly target civilians.<sup>48</sup> For example, the

39. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 285-87 (1978) (noting that reparations are a state’s legal responsibility under international law for breaching an international obligation). To make things confusing, sometimes the term “reparations” is used to mean cash payments for harms for activities lawful at the time, but now understood to be wrong but judicially irremediable. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003).

40. This compensation may be known as indemnity. Jiménez de Aréchaga, *supra* note 39, at 286.

41. Frederic Megret, *The International Criminal Court Statute and the Failure to Mention Symbolic Reparation*, 16 INT’L REV. VICTIMOLOGY 127, 129 (2009).

42. *Id.* at 130.

43. *See infra* notes 84-87.

44. Though the means of doing so is “not unlimited.” *See* Convention II, *supra* note 24, arts. 22, 23, 36.

45. GC for Armed Forces in the Field, *supra* note 21, art. 3.

46. While the scope of civilian protection in non-international armed conflict is not as fully treated as it is in international armed conflict, Common Article 3 of the Geneva Conventions and Additional Protocol II provide similar protections and many states choose to provide more civilian protections as a matter of policy.

47. *See, e.g.*, GC for Armed Forces in the Field, *supra* note 21, art. 3; Rome Statute of the International Criminal Court arts. 75(1)-(2), July 17, 1998, 2187 U.N.T.S. 90 (“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. . . . The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol] (“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. It shall be responsible for all acts committed by persons forming part of its armed forces.”).

48. *See* First Additional Protocol, *supra* note 47, art. 48. The Protocol also notes that “[t]he civilian population and individual civilians shall enjoy general protections against dangers arising from

intentional killing of a village full of elderly men, women, and children—as occurred in My Lai, Vietnam<sup>49</sup>—is prohibited.<sup>50</sup> Second, while states may target combatants or the narrow category of “civilians directly participating in hostilities” for such time as they are participating, states may not engage in actions expected to have excessive civilian casualties as weighed against any direct and concrete military advantage.<sup>51</sup> Combatants, for example, may not carpet bomb a village of hundreds of civilians in order to kill one low-level opposing combatant. These prohibitions are rooted in the IHL principle of distinction, which directs combatants to respect and protect civilians by distinguishing between civilian and military populations and directing attacks only at military objectives.<sup>52</sup> In order to satisfy these rules, combatants must behave reasonably. If a combatant makes a mistake as to a target or mistake as to how much damage will ensue from the action, IHL asks whether the combatant took sufficient precautionary measures to avoid recklessly causing harm.<sup>53</sup>

States and combatants may also invoke a right to self-defense to justify their use of force. Article 51 of the U.N. Charter governs the right of states to engage in individual or collective self-defense with some state disagreement as to what circumstances allow its invocation. Individual service members may also invoke the right to self-defense.<sup>54</sup> Should such defense be improperly and unreasonably invoked, however, reparations would be appropriate. In one example, the International Court of Justice found that the United States violated limitations on the use of force by mining Nicaraguan harbors, rejected the U.S. claim to collective self-defense, and ordered the United States to pay reparations.<sup>55</sup>

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military operations” and forbids making civilians “the object of attack” and employing indiscriminate attacks “which are not directed at a specific military objective” or “which employ a method or means of combat which cannot be directed at a specific military objective.” First Additional Protocol, *supra* note 47, arts. 51(1), (2), (4). While the United States has not ratified it, Article 51 has been understood to be customary international law. See Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INT’L L. STUD. 337, 346 (2002) (arguing that the general protection civilians are afforded against dangers from military operations under Article 51 “reaffirms a general rule of international law that has never been questioned despite being frequently disregarded in State practice”).

49. See generally Alfred P. Rubin, *Legal Aspects of the My Lai Incident*, 49 OR. L. REV. 260, 261, 264 (1970) (discussing the United States’ international obligations raised by the incident).

50. Rome Statute, *supra* note 47, art. 8(2)(b)(i).

51. First Additional Protocol, *supra* note 47, arts. 51.5(b), 57(2)(a)(iii); Rome Statute, *supra* note 47, art. 8(2)(b)(v).

52. First Additional Protocol, *supra* note 47, art. 48.

53. *Id.* arts. 57, 58.

54. Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49 VAND. J. TRANSNAT’L L. 1, 20-21 (2016).

55. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27). There is no state obligation to provide reparations for unlawful victims of internal armed conflict. I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 549 (2005). Nor is there an obligation or expectation for armed groups to provide reparations. Ron Dudai, *Closing the Gap: Symbolic Reparations and Armed Groups*, 93 INT’L REV. RED CROSS 783, 785 (2011).

### 1. *Traditional Approach: No Individual Enforcement Rights*

States have traditionally understood the international law obligation to provide reparations for breaches of IHL as flowing from sovereign to sovereign, not to individuals.<sup>56</sup> In other words, individuals injured by a foreign state must subordinate their claims to their state of citizenship,<sup>57</sup> meaning that an individual who is killed or wounded by foreign military forces would not generally have a direct claim for compensation or non-repetition or satisfaction under international law. Many states have been reluctant to view the compensation provisions of Article 3 of the Hague Convention of 1907 and Article 91 of Additional Protocol I as specifically creating individual rights.<sup>58</sup> In particular, the United States does not recognize either the Hague or Geneva Conventions as self-executing and thus precludes individuals from pursuing reparations for violations of IHL.<sup>59</sup>

### 2. *New Developments*

While the traditional approach forecloses individually pursued claims for reparations, states and international actors have innovated their approaches to amends in a number of ways. First, the emergence of mass claims processing holds some hope for victims of IHL violations seeking reparations. The earliest such example was the U.N. Claims Commission (UNCC) for Iraq. In the wake of Iraq's invasion and occupation of Kuwait, the U.N. Security Council passed a resolution demanding that Iraq accept liability for all losses and injuries resulting from the invasion.<sup>60</sup> The Secretary General of the U.N. created a compensation fund that provided lump sum payments to non-Iraqis injured during the period of conflict. While some of the claimants might have suffered lawful harm under IHL, the UNCC presumed that since the invasion was unlawful, so too were any acts taken by Iraq during the conflict and that,

56. Paola Gaeta, *Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 305, 308 (Oma Ben-Naftali ed., 2011) (citing *Factory at Chorzow* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13)).

57. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 325-26 (4th ed. 1990); Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation*, 58 *LAW & CONTEMP. PROBS.* 139, 144 (1995).

58. While Article 3 of the Hague Convention of 1907 (“[A] belligerent party which violates the provisions . . . 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.”) and Article 91 of Protocol I might be understood as creating an individual right to compensate for IHL violations, states have been reluctant to accept this understanding. Convention II, *supra* note 24, art. 3; see Micaela Frulli, *When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Marcović Case*, 1 *J. INT’L CRIM. JUST.* 406, 409, 422-25 (2003) (discussing Italy’s rejection of such a right but arguing in favor of one); Toni Pfanner, *Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims*, 91 *INT’L REV. RED CROSS* 279, 288-89 (2009); Elke Schwager, *The Right to Compensation for Victims of an Armed Conflict*, 4 *CHINESE J. INT’L L.* 417, 438 (2005); Liesbeth Zevgeld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 *INT’L REV. RED CROSS* 497, 497 (2003); Liesbeth Zevgeld, *Victims’ Reparations Claims and International Criminal Courts*, 8 *J. INT’L CRIM. JUST.* 79, 84 (2010).

59. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425-26 (C.D. Cal. 1985).

60. S.C. Res. 686, ¶ 2(b), U.N. Doc. S/RES/686 (Mar. 2, 1991).

therefore, any damages resulting from the invasion and occupation were eligible for compensation.<sup>61</sup> Rather than assess all aspects of an individual claim, the UNCC used mass claims settlement techniques, including a standardized damages schedule, to resolve over two million claims and award more than eleven billion dollars in compensation.<sup>62</sup>

Another prominent example of mass claims for IHL victims is the Eritrea-Ethiopia Claims Commission (EECC). This Commission allowed both Eritrea and Ethiopia to act on behalf of their nationals to seek compensation for violations of IHL stemming from their two-year border conflict.<sup>63</sup> Notably, it focused on “persistent and widespread patterns of misconduct, rather than individual acts,”<sup>64</sup> and concluded that only violations of core rights from the Geneva Conventions were compensable.<sup>65</sup> Somewhat dispiritingly, though, the EECC found numerous violations, awarded damages, and helped develop the approach to mass claims processing in this setting, neither state ultimately paid any compensation to the other, leaving the victims uncompensated.<sup>66</sup>

Second, the traditional view limiting reparation enforcement to states may be eroding somewhat, such that IHL may now be more accepting of individualized claims for reparations for harm arising out of unlawful foreign state conduct.<sup>67</sup> For instance, several scholars now believe that customary international law recognizes a responsibility to compensate individuals for certain IHL violations.<sup>68</sup> In addition, the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, while non-binding, states that the obligation to protect, respect, and implement IHL includes the duty to provide effective remedies, including reparation,<sup>69</sup> to victims of unlawful state conduct.<sup>70</sup> These reparations

61. Merritt B. Fox, *Imposing Liability for Losses from Aggressive War: An Economic Analysis of U.N. Compensation Commission*, 13 EUR. J. INT’L L. 201, 202 (2002).

62. Linda Taylor, *The United Nations Compensation Commission, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING* 198, 214 (Carla Ferstman & Alan Stephens eds., 2009); *The Claims*, U.N. COMP. COMM’N, <http://www.uncc.ch/claims> (last visited Sept. 30, 2016).

63. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eri.-Eth., arts. 5(1), (8), (9), Dec. 12, 2000, 40 I.L.M. 260.

64. Eritrea’s Civilian Claims 15, 16, 23 and 27-32, Partial Award, 26 R.I.A.A. 195, 213 (Eri. Eth. Cl. Comm’n 2004).

65. Ethiopia’s Damages Claims, Final Award, 26 R.I.A.A. 631, 715-16, 747 (Eri. Eth. Cl. Comm’n 2009).

66. SEAN D. MURPHY ET AL., *LITIGATING WAR: MASS CIVILIAN INJURIES AND THE ERITREAN ETHIOPIAN CLAIMS COMMISSION* 93-94 (2013).

67. HENCKAERTS & DOSWALD-BECK, *supra* note 55.

68. Roger Alford, *Recent Books on International Law*, 109 AM. J. INT’L L. 234, 238 (2015) (reviewing MURPHY ET AL., *supra* note 66 (concluding that the authors “suggest[] that international law requires compensation for *jus ad bellum* and *jus in bello* violations”)); Gaeta, *supra* note 56, at 308; Comm. on Reparation for Victims of Armed Conflict, Int’l L. Ass’n, *The Hague Conference on Reparation for Victims of Armed Conflict*, 14-19 (2010) (noting that the new dominant position in the literature, and perhaps in practice as well, is that IHL does provide an individual right to reparation).

69. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex at art. 3(d), U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

70. G.A. Res. 60/147, *supra* note 69, at Annex ¶¶ 15-23.

are to be “adequate, effective and prompt,” given with the intent to “promote justice,” and “include compensation for any economically assessable damage.”<sup>71</sup> Appropriate remedies might include measures aimed at the cessation of continuing violations; verification and public disclosure of the facts; a declaration restoring the dignity of the victim; and public apology, including acknowledgement of the facts, acceptance of responsibility,<sup>72</sup> and guarantees of non-repetition.<sup>73</sup>

Some courts are now providing access for individuals to seek reparations. For instance, the Rome Statute of the International Criminal Court (ICC) created a trust fund for victims of crimes within the court’s jurisdiction, which encompasses war crimes.<sup>74</sup> This is the first international criminal tribunal to allow victims to directly pursue reparations<sup>75</sup> from individual perpetrators.<sup>76</sup> The ICC statute focuses on compensation, restitution, and rehabilitation, mentioning neither satisfaction nor non-repetition as possible reparative measures.<sup>77</sup> The ICC has now issued reparations for the conscription and use of children in armed hostilities<sup>78</sup> and is considering them for war crimes in the Democratic Republic of the Congo.<sup>79</sup> While the United States is not subject to the ICC’s jurisdiction,<sup>80</sup> the ICC’s recognition of individual claims for reparations may signal the growing acceptance of such claims among the international community.<sup>81</sup> For instance, several countries have passed legislation allowing for individual compensation for the war crime of rape<sup>82</sup>

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71. *Id.* ¶¶ 15, 20.

72. *See id.* ¶¶ 22(a), (b), (d), (e).

73. *See id.* ¶ 23.

74. Rome Statute, *supra* note 47.

75. *See id.* art. 75(1).

76. *Id.* arts. 75, 79; David Donat-Cattin, *Commentary on the Rome Statute of the International Criminal Court* art. 75, n.1 (Otto Triffterer, ed., 1999); Nancy Armoury Combs, *From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus*, 36 MICH. J. INT’L L. 219, 241 (2015).

77. Megret, *supra* note 41, at 133.

78. ICC Press Release, Trust Fund for Victims Welcomes First ICC Reparations Decision, Ready to Engage, ICC-CPI-20120808-PR832 (Aug. 8, 2012), <https://www.icc-cpi.int/Pages/item.aspx?name=pr832>.

79. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order Instructing the Parties and Participants to File Observations in Respect of the Reparations Proceedings (Apr. 1, 2015).

80. The United States has not ratified and is not a party to the Rome Statute. *International Criminal Court*, U.S. DEP’T STATE (2010), <http://www.state.gov/j/gcj/icc>.

81. While the ECCC does not allow individual monetary reparations to victims, it has adapted the civil party participation system to allow victims to seek collective and moral reparations. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 3), Rules 23, 100(2), 110(3), 113(1) Internal Rules of Extraordinary Chambers in the Courts of Cambodia (Rev. 3) as revised on Mar. 6, 2009.

82. Kosovo and Croatia have recently passed legislation including compensation for women raped during war. Darko Bandic, *Croatian Lawmakers Approved Law That Compensates Rape Victims from War in 1990s*, U.S.N.W.R. (May 29, 2015), <http://www.usnews.com/news/world/articles/2015/05/29/croatia-passes-law-compensating-rape-victims-from-1990s-war>. Libya has passed similar legislation. Zoe Schlanger, *Libya Set to Pay Reparations to Victims of Rape as a War Crime*, NEWSWEEK (June 12, 2014), <http://www.newsweek.com/libya-set-pay-reparations-victims-rape-war-crime-254717>.

with Bosnian courts granting compensation to rape victims as part of domestic criminal prosecutions of war criminals.<sup>83</sup>

### 3. The “Unlawfulness” Limitation on Reparations

These innovations in reparations expand access to individual claimants, but they do not directly benefit victims of lawful harm. By definition, reparations are not currently understood to encompass victims of state behavior who have suffered no legal violation.<sup>84</sup> In drafting the Articles on State Responsibility for Internationally Wrongful Acts,<sup>85</sup> for instance, the International Law Commission found the term “wrongful” to be understood to mean unlawful, not simply harmful.<sup>86</sup> Relatedly, those provisions of IHL that contemplate remedies, such as Article 3 of the Hague Convention and Article 91 of Additional Protocol I are expressly limited to legal violations. Those courts willing to entertain individual claims for compensation have followed suit and have limited them to violations of IHL.<sup>87</sup>

This limitation is a meaningful one as IHL permits the death of innocent civilians in two broad categories. First, IHL allows collateral damage or the incidental loss of civilian life when it is not excessive given the “concrete and

83. *Bosnia-Herzegovina: Court Grants Compensation to War Crimes Victim*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/25/world/europe/bosnia-herzegovina-court-grants-compensation-to-war-crimes-victim.html>; see also Julian Borger, *Bosnian Rape Victims May Claim Compensation for the First Time*, GUARDIAN (June 30, 2015), <http://www.theguardian.com/world/2015/jun/30/bosnia-victims-compensation-landmark-ruling> (describing a second case in which compensation was awarded to war crime victims).

84. Pfanner, *supra* note 58, at 290.

85. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

86. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2 Y.B. INT'L L. COMM'N pt. 2, 31 (2001) (noting that “[t]he articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited and may even be expressly permitted, by international law . . . . These requirements of compensation or restoration would involve primary obligations . . . . Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law.”); ALPHONSE MULEEFU, REPARATION FOR VICTIMS OF COLLATERAL DAMAGE: A NORMATIVE AND THEORETICAL INQUIRY 131 (2014). While the 1973 Special Rapporteur on state responsibility acknowledged that states might hypothetically be responsible also for internationally lawful acts, *Introduction by the Special Rapporteur*, [1993] 1 Y.B. INT'L L. COMM'N 5, U.N. Doc. A/CN.4/SER.A/1977, the ILC decided not to address such acts in a comprehensive fashion. Instead, it has crafted other draft articles reflecting strict liability in discrete areas like transboundary harms from hazardous activities. See Int'l Law Comm'n, Rep. on the Work of its Fifty-Eighth Session, U.N. Doc. A/61/10 at 106-182 (2006); Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

87. BVerfG, 2BvR 2660/06 – 2BvR 487/07, Aug. 13, 2013, [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/08/rk20130813\\_2bvr266006.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/08/rk20130813_2bvr266006.html) (rejecting a constitutional claim for compensation arising out of a 2009 airstrike, concluding the German colonel that ordered the strike did not violate the laws of war); GHAMS 06 juli 2000, NJ 2003, 759/99 m.nt. Skh (Dedovic/Kok) (Neth.), <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2000:AO0070> (ruling by a Dutch court that IHL does not provide a remedy for persons who suffer from air strikes but have not personally suffered an IHL rule or norm violation); Carla Bleiker, *Appeal by Kunduz Airstrike Victims' Families Fails*, DEUTSCHE WELLE (Apr. 30, 2015), <http://www.dw.com/en/appeal-by-kunduz-airstrike-victims-families-fails/a-18420262>; Sabrina Toppa, *Yemeni Drone Victims Still Waiting for Accountability*, WARSCAPES (May 17, 2016), <http://www.warscapes.com/opinion/yemeni-drone-victims-still-waiting-accountability>.

direct military advantage anticipated.”<sup>88</sup> In other words, if a military target is important enough, then anticipated civilian deaths, perhaps even extensive civilian deaths,<sup>89</sup> are allowed. Proceeding with an attack given mere awareness of the risk of civilian deaths is not a per se violation of IHL.<sup>90</sup> If troops seek to engage, for example, in a bombing raid of a high value military site, the presence of civilians who will be killed does not automatically render the strike unlawful.

Second, IHL permits reasonable mistakes<sup>91</sup> that may result in civilian casualties. For instance, if a commander takes sufficient precautions to verify a target’s identity and classification as a legitimate target,<sup>92</sup> but is mistaken and the target turns out to be an innocent civilian, the death of the civilian is lawful. Likewise, if a commander complies with requirements related to identifying a legal target, but is still reasonably unaware of the presence of civilians, civilian deaths resulting from attacks on the target are similarly lawful.

In those circumstances that involve the military’s invocation of self-defense, whether at a national, unit, or individual level, a reasonable invocation is a lawful one. So, for instance, either an actual imminent threat or a reasonable belief that an imminent threat exists would be sufficient to immunize an action. To take one example, if a state actor reasonably believed that a civilian at a check-point outside active hostilities presented an immediate threat because the civilian appeared to be reaching for a weapon, the state would not be liable for reparations even if it turned out the civilian was unarmed.

In sum, IHL currently contains no requirement for compensation, responsibility-taking, or apologies for those civilians who are affected by lawful combat activities. Nor, at this time, are such responses an emerging norm.<sup>93</sup> While several scholars have focused on the need to provide

88. First Additional Protocol, *supra* note 47, art. 51(5)(b).

89. See Samuel Estreicher, *Privileging Asymmetric Warfare (Part II): The “Proportionality” Principle Under International Humanitarian Law*, 12 CHI. J. INT’L L. 143, 152-53 (2011) (arguing Protocol I does not mandate proportionality between the expected civilian loss and “the extent of casualties and other damage inflicted by the enemy’s assault,” but rather that the former is not ‘excessive,’ relative to “the ‘military advantage anticipated.’”).

90. While some courts may be beginning to challenge this understanding of IHL, the United States continues to hold this view. See Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 89-90 (2013).

91. It is worth noting the difficulties that military personnel, like other decision makers, are likely to have in determining whether a particular act was justified or proportional, including complications related to confirmation bias, self-serving bias, in-group effects, and other psychological phenomena. See JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* (2016) (discussing the difficulty people have in assessing risks and making judgments of “reasonableness”). On the difficulties of these assessments, see also Gregory D. Johnsen, *Nothing Says “Sorry Our Drones Hit Your Wedding Party” Like \$800,000 and Some Guns*, BUZZFEED (Aug. 7, 2014), <http://www.buzzfeed.com/gregorydjohnsen/wedding-party-drone-strike>.

92. First Additional Protocol, *supra* note 47, art. 57(2)(a)(i).

93. Sophie van Dijken et al., *Monetary Payments for Civilian Harm in International and National Practice*, CENTER FOR CIVILIANS IN CONFLICT 11-31 (Oct. 2013), [http://civiliansinconflict.org/uploads/files/publications/Valuation\\_Final\\_Oct\\_2013pdf.pdf](http://civiliansinconflict.org/uploads/files/publications/Valuation_Final_Oct_2013pdf.pdf) (providing a comprehensive listing of the few states providing payments).



compensation to victims of lawful harm during armed conflict,<sup>94</sup> the international community is not yet ready to transform such need into an obligation to provide reparations.<sup>95</sup> Indeed, the Center for Civilians in Conflict (CIVIC), the nongovernmental organization that has spearheaded the campaign for international law to demand amends for all war victims, seems to have reoriented toward other ways to attend to civilian needs. To the extent that the organization has still emphasized mandatory compensation, such efforts were largely aimed at the United States prior to President Obama's Executive Order on civilian casualties.<sup>96</sup> Given the ongoing difficulties in getting states to recognize the need for reparations for unlawful victims,<sup>97</sup> we think arguing for such an international obligation for lawful victims might be putting the cart well ahead of the horse.<sup>98</sup> We are not per se hostile to such an obligation, but one might more readily persuade states such as the United States, who already have condolence and solatia programs, to adopt amends programs without the additional overlay of binding international law obligations.

Instead, we suggest that encouraging voluntary adoption of domestic amends programs might in turn lay the groundwork for a norm shift. Amends fit with emerging international and domestic practices to respect the needs of those adversely affected by human rights abuses and armed conflicts. For instance, our call for information regarding the events surrounding a civilian casualty stems from the same spirit as the newly emerging right to truth in the

94. MULEEFU, *supra* note 86, at 131; Ronen, *supra* note 38, at 12; Minako Ichikawa Smart, *Compensation for Civilian Casualties in Armed Conflict and Theory of Liability*, in *ECONOMICS OF WAR AND PEACE: ECONOMIC, LEGAL, AND POLITICAL PERSPECTIVES* 243, 243-59 (Benjamin E. Goldsmith & Jurgen Brauer eds., 2010); Sarah Holewinski, *Do Less Harm: Protecting and Compensating Civilians in War*, 92 *FOREIGN AFFS.* 14 (2013).

95. For instance, the International Law Association in considering reparations for victims of armed conflict noted that "the right to reparation – in whatever form – presupposes a violation of international law." Rainer Hofmann, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, reprinted in *THE HAGUE CONFERENCE (2010): REPARATION FOR VICTIMS OF ARMED CONFLICT*, INT'L L. ASS'N, art. 3, cmt. 1, at 6 (2010). Yet it left the door open to such an obligation when it theorized that "incidental losses might be caused by lawful conduct according to the rules of international law applicable in armed conflict, given that not every injury to civilians constitutes a violation of international law. It is as yet unclear whether a right to reparation is triggered in such a situation. Care should be taken not to render the distinction between lawful and unlawful conduct meaningless. The fact that victims may be entitled to reparation for harm caused by lawful conduct does not mean that responsible parties are to be equally liable for consequences of lawful and unlawful conduct." *Id.* art. 4, cmt. 3, at 9.

96. See CIVIC, ANNUAL REPORT 2015 9-14 (2016) (mentioning compensation in Annual Report only for victims of the U.S. military in Iraq, Syria, and Afghanistan).

97. The vast majority of states do not provide monetary payments for any type of civilian harm in armed conflict. Menno T. Kamminga, *Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law*, 25 *WINDSOR Y.B. ACCESS TO JUST.* 23, 25 (2007) (noting that the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law has not led to much change in domestic practices regarding individual requests for reparations); van Dijken et al., *supra* note 93, at 11-31 (providing a comprehensive listing of the few states providing payments).

98. This may be particularly so given the President-Elect's vocal disdain for the existing legal limitations of the Geneva Conventions. See Spencer Ackerman, *Trump Attack on Geneva Conventions Denounced by Ex-Officers and Advocates*, *GUARDIAN* (Mar. 31, 2016), <https://www.theguardian.com/us-news/2016/mar/31/donald-trump-geneva-conventions-the-problem-military-foreign-policy>.

human rights context.<sup>99</sup> Yet it considers the need for truth within the existing IHL framework that approaches human rights concerns, such as the right to life and the right to human dignity, with the notion that such rights flow from a state which maintains the authority to use force and thus possesses the ability to abridge or limit those human rights in times of armed conflict.<sup>100</sup> Our proposed amends fit with this notion of IHL as a compromise: an imperfect system which generally provides protections to noncombatants and some dignity to combatants in return for shielding the “essence of war,” that is, killing and confining combatants without due process.<sup>101</sup> As we demonstrate in Part II, amends making simply expands upon how the notion of dignity and humanity might be fulfilled in a setting that permits the lawful killing of civilians.

Tables 1 and 2 highlight the difference between existing individual reparations and our proposed amends making approach.

*Table 1: Required International Law Reparations*

	<b>Emerging International Law Position</b>	<b>Traditional International Law Position (held by United States)</b>
<b>For grave IHL breaches?</b>	Yes	Yes
<b>To individuals for grave IHL breaches?</b>	Yes	No
<b>To individuals for lawful, but awful IHL harms?</b>	No	No

*Table 2: Recent Payment Practices for Harmdoing During Armed Conflicts*

<b>Characteristic</b>	<b>UNCC</b>	<b>EECC</b>	<b>ICC</b>	<b>Judicially ordered reparatio ns in state courts</b>	<b>Condolence &amp; Solatia payments</b>

99. See generally Office of the U.N. High Commissioner for Human Rights, *Study on the Right to Truth: Promotion and Protection of Human Rights*, ¶ 34, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) (concluding the right to truth might be invoked for grave breaches of IHL as well as gross violations of human rights). The right to truth, often invoked in response to enforced disappearances, “implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.” *Id.* ¶ 3.

100. Oscar Schachter, *The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1621 (1984); Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. REV. 259 (1989).

101. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFFS. 148, 166 (2005) (quoting Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges From the “War on Terror,”* 27 FLETCHER FORUM WORLD AFFS. 55, 57).

	No	No	Possibly	Possibly	Yes
<b>Direct participation and payment to affected individual?</b>					
<b>Triggering condition</b>	Breach of jus ad bellum	Breach of jus in bello (or ad bellum)	Finding of war crime	Finding of war crime	Direct and serious harm caused by armed conflict
<b>Who pays</b>	Violating state (Iraq)	Violating state (Eritrea or Ethiopia)	Individual or International Trust Fund	Varies by state	Causal state
<b>Legal status</b>	Required by UN	Required by PCIJ Commission	Required under Rome Statute	State may consider it required under international law; Required by domestic practice	Not required under international law; Discretionary under domestic practice (varies by state) (U.S. executive order strongly encourages)

### B. Domestic Provision of Condolence and Solatia

As we have seen so far, international law does not require individualized amends for military conduct abroad. In addition to general sovereign immunity principles precluding suits against states,<sup>102</sup> friendly visiting armed forces often negotiate status of forces agreements that often explicitly provide immunity for both criminal prosecutions and civil suits related to their non-combat activities.<sup>103</sup> Under such agreements, neither recognition of wrongdoing nor compensation is required from the armed forces for wrongdoing.<sup>104</sup> The United

102. United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1847).

103. HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 593 (3d ed. 2013); *Final Report on Status of Forces Agreements*, U.S. DEP'T STATE 5, 13, 16, 19 (2015), <https://www.state.gov/documents/organization/236456.pdf>. Even when the United States cannot get immunity, it may seek concurrent jurisdiction in which it will usually secure jurisdiction in individual cases. *Id.* at 17-18.

104. U.S. DEP'T STATE, *supra* note 103, at 17-18.

States, and many other states,<sup>105</sup> however, have created domestic mechanisms to compensate for the harm they cause.<sup>106</sup> We look here at how U.S. statutes and military programs provide for payments in both the non-combat and combat settings.

### 1. *Non-combat activities*

Acts taken during armed conflict in a foreign country are outside the general scope of U.S. tort law. While Congress created the Federal Torts Claims Act to overcome sovereign immunity regarding torts committed by persons acting on behalf of the United States, the Act specifically excludes both “any claim arising in a foreign country”<sup>107</sup> and “any claim arising out of the combatant activities of the military . . . during time of war.”<sup>108</sup>

Under the Foreign Claims Act (FCA), however, the United States voluntarily allows claims for compensation against its armed forces acting abroad when they engage in tortious non-combat activity.<sup>109</sup> Congress initially enacted the statute with the purpose of “maintaining and promoting friendly relations” with other countries,<sup>110</sup> though the process has since been made available in countries that might not be considered allies.<sup>111</sup> If the United States chooses to create a Foreign Claims Commission (FCC) in another country where it has armed forces, then local individuals may bring claims against the U.S. government for injuries incurred during non-combat activities.<sup>112</sup> Such claims are cognizable only if the underlying act or omission causing an injury is “considered negligent or wrongful.”<sup>113</sup> The paradigmatic example is an American service member stationed in France who tortuously injures a French civilian in an automobile accident while driving on an official, but non-combat-related mission.<sup>114</sup> In theory, an FCC, comprised of military officers or other

105. Sarah Holewinski, *Making Amends: A New Expectation for Civilian Losses in Armed Conflict*, in CIVILIANS AND MODERN WAR: ARMED CONFLICT AND THE IDEOLOGY OF VIOLENCE 317, 324-25 (Daniel Rothbart et al. eds., 2012).

106. At least one state, Iraq, has passed a national compensation law that allows payments for death or injuries caused by military errors and operations. Rep. of the Working Grp. on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, 18th Sess., U.N. Doc. A/HRC/18/32/Add.4 (Aug. 12, 2011).

107. 28 U.S.C. § 2680(k) (2012).

108. 28 U.S.C. § 2680(j) (2012).

109. Foreign Claims Act, 10 U.S.C. § 2734(a) (2012). Some have argued for the extension of the FCA for criminal acts occurring during armed conflict. Bullock, *supra* note 57, at 157-58.

110. Bullock, *supra* note 57, at 157-58.

111. John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1468 (2008) (discussing implementation of FCA claims system in the Vietnam War).

112. *Id.*

113. U.S. DEP'T ARMY, PAMPHLET 27-162, CLAIMS PROCEDURES 10-3(c)(1) (2008), [http://www.apd.army.mil/jw2/xmldemo/p27\\_162/main.asp#ch10](http://www.apd.army.mil/jw2/xmldemo/p27_162/main.asp#ch10). So, for instance, the Yangju highway incident in which a U.S. military officer killed two Korean school girls while driving a tank on a civilian road for a military exercise would likely not be eligible for an FCA claim as the driver was found not to be at fault (albeit in a criminal proceeding). Yoon Jeong Huh, *The Staying Power of Personal Contact in the South Korean Public Diplomacy*, in THE PRACTICE OF PUBLIC DIPLOMACY: CONFRONTING CHALLENGES AHEAD 109, 109-10 (William A. Hugh ed., 2011).

114. For a recent example, see Helene Cooper, *Vehicle in Convoy of U.S. Ambassador to U.N. Kills Boy in Cameroon*, N.Y. TIMES (Apr. 18, 2016), <http://www.nytimes.com/2016/04/19/world>

employees of the armed forces, would evaluate such a claim according to local tort law.<sup>115</sup> Claims above \$10,000 require additional approval and the statute caps payouts at \$100,000.<sup>116</sup> The process includes an investigation of the facts with claimant and witness interviews, assessment of documents,<sup>117</sup> as well as a determination of the applicable law and, where relevant, an acknowledgement of responsibility.<sup>118</sup>

This may initially seem similar to the resolution of domestic tort cases. In many respects, however, the administration of the FCA has more in common with the voluntary payments systems described below than with a judicial resolution.<sup>119</sup> Notably, both the creation of the FCC and the decision to award compensation in any individual claim is discretionary. In addition, the “law” applied does not seem to closely mirror local custom and excludes some claims and damages that would be allowed under local tort law.<sup>120</sup> Awards tend to cluster within a given range—a range that is significantly lower than what the statute allows.<sup>121</sup> And interestingly, wrongful death claims are exceptionally rare under the FCA.<sup>122</sup>

In rare instances, the United States has offered amends in the absence of a legal finding of wrongdoing. In perhaps the most notable example, a U.S. military officer accidentally ran over two high school girls while conducting a peacetime military training exercise in South Korea.<sup>123</sup> For many reasons, including a failure to quickly apologize, the incident sparked massive protests against the United States’ presence in South Korea. The United States

/africa/vehicle-in-convoy-of-samantha-power-kills-boy-in-cameroon.html?\_r=0, which discusses an incident in which U.S. Ambassador Samantha Powers’ motorcade ran over a child in Cameroon.

115. U.S. DEP’T ARMY, Reg. 27-20, CLAIMS 52 (2008) [hereinafter AR 27-20] (“In determining an appropriate award, the law and custom of the country in which the incident occurred will be applied to determine which elements of damages are payable and which individuals are entitled to compensation.”).

116. 10 U.S.C. § 2734(a) (2002). Meritorious claims above \$100,000 may be reported to the Secretary of Treasury for payment.

117. Rochelle M. Howard, *Foreign Claims Training* 18-30 (2009), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1674171/fcc-training-oct-09.pdf>.

118. Jon Tracy, *Sometimes in War, You Can Put a Price on Life*, N.Y. TIMES (May 16, 2007), <http://www.nytimes.com/2007/05/16/opinion/16tracy.html> (claiming that “[o]fficial compensation under the Foreign Claims Act acknowledges wrongdoing”).

119. Witt, *supra* note 111, at 1466. The FCA does not mandate that a payment be made at all, even if the claim is meritorious. Instead, claim payment is left entirely to the discretion of the FCCs. Witt weighs these facts and determines that “[d]espite its legal armature, the FCA is instead a system of administrative authority exercised at the discretion of American armed forces.” *Id.*

120. *Id.* at 1465.

121. For instance, during Operation Restore Hope in Somalia, the FCCs capped wrongful death claims at \$10,000 in an attempt to match local custom. FREDERIC BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 212 (2001). However, most claims paid were between \$3,000 and \$5,000 per individual. *Id.* at 225. In Operation Uphold Democracy, U.S. forces found the Haitian legal system’s calculation of wrongful death damages too perplexing and ultimately allowed a range of \$5,000 to \$14,000. *Id.* at 253. More recently, between 2003 and 2006, FCCs paid out about \$4,200 per death claim in Iraq and Afghanistan. American Civil Liberties Union, *Documents Received from the Department of the Army in Response to ACLU FOIA Request* 837-39 (Oct. 31, 2007), <http://www.aclu.org/natsec/foia/log.html> [hereinafter FOI Documents].

122. Tracy, *supra* note 118.

123. Erik Slavin, *Military’s Driving Record in South Korea Improving*, STARS & STRIPES (June 13, 2007), <http://www.stripes.com/news/military-s-driving-safety-record-in-south-korea-improving-1.65290>.

ultimately responded with a new strategy to “apologize first and determine the details later,”<sup>124</sup> multiple efforts to minimize the risk of a similar incident,<sup>125</sup> on the spot compensation for military harms,<sup>126</sup> and ongoing amends, with members of the responsible infantry division helping the affected families with their planting every year.<sup>127</sup>

## 2. *Combat activities and use of force outside areas of active hostilities*

For civilian victims of combat activities during armed conflict, the United States similarly provides no judicially mandated remedy.<sup>128</sup> While the Federal Torts Claims Act waives the government’s immunity for tortious activities, it excludes combatant activities during times of war and claims arising out of acts in places not subject to U.S. sovereignty.<sup>129</sup> Nor does a finding of criminal liability trigger any mandatory financial payments to the victims.<sup>130</sup> Even if one

124. Erik Slavin, *Errant Shell Puts U.S. Military’s Lessons Learned in Korea To the Test*, STARS & STRIPES (Apr. 3, 2005), <http://www.stripes.com/news/pacific/errant-shell-puts-us-military-s-lessons-learned-in-korea-to-the-test-1.338245> (suggesting that lessons learned from the Yangju Highway incident have led to quick responses to similar subsequent incidents, such as when the military responded to the harm caused by an errant training round by sending “a two-star general . . . to the village to make amends, [and] the army cut a check for the homeowner’s inconvenience on the spot, while South Korean soldiers fixed the roof”). More generally, the United States seems to be much quicker to apologize for harms caused by the U.S. military, whether lawful or not, since the incident. Jon Rabirow & Yoo Kyong Chang, *U.S. Military Makes Partial Apology for S. Korea Subway Incident*, STARS & STRIPES (Feb. 7, 2013), <http://www.stripes.com/news/pacific/korea/us-military-makes-partial-apology-for-s-korea-subway-incident-1.206871> (noting the recent trend of “U.S. commanders in South Korea . . . making apologies immediately after alleged wrongdoing by servicemembers”).

125. Slavin, *supra* note 124.

126. *Id.*; see also Erik Slavin, *Army Suspends Rodriguez Range Operations as Errant Shell Inquiry Continues*, STARS & STRIPES (Apr. 3, 2015), <http://www.stripes.com/news/pacific/army-suspends-rodriguez-range-operations-as-errant-shell-inquiry-continues-1.338244>.

127. Erik Slavin, *2nd ID Hasn’t Forgotten Family of Girl Killed by Military Vehicle*, STARS & STRIPES (Oct. 23, 2006), <http://www.stripes.com/news/2nd-id-hasn-t-forgotten-family-of-girl-killed-by-military-vehicle-1.55778>.

128. Bullock, *supra* note 57, at 126. Nor would a family be able to pursue a tort claim in the domestic courts where the civilian casualty occurred as states have sovereign immunity in foreign courts. BROWNLEE, *supra* note 57, at 325-36.

129. 28 U.S.C. § 2680(j) (2012).

130. For instance, the U.S. military provided \$2000 to each of the families of those intentionally killed by Sargent Bales during the Kandahar massacre in Afghanistan and informed them that the compensation was wholly independent of any outcome at trial. Matthew Rosenberg & Sanghar Rahimi, *U.S. Pays Families of Afghan Victims in Massacre by Soldier*, N.Y. TIMES (Mar. 25, 2012), <http://www.nytimes.com/2012/03/26/world/asia/us-compensates-afghan-villagers-for-soldiers-attack.html> (reporting also that families of Afghan victims received Afghan government payments of \$2,000). In a similar incident, the U.S. military offered the victims of a shooting in Haditha \$2,500 per family member killed. Nick Broomfield, *For the Families of Haditha, This Is a Matter of Honor*, GUARDIAN (Jan. 13, 2012), <http://www.theguardian.com/commentisfree/2012/jan/13/bush-my-lai-haditha-massacre-fund>. No apology or additional offer of compensation was made even after a guilty plea in the criminal case. Raheem Salman & Patrick J. McDonnell, *In Iraq, Haditha Case is Reminder of Justice Denied*, L.A. TIMES (Jan. 25, 2012), <http://articles.latimes.com/2012/jan/25/world/la-fg-iraq-haditha-20120125>. The family members slain by Afghanistan’s kill team received no compensation and it seems as though they were expected to submit the same claim as those with lawfully killed relatives. Lesley Wexler, *The Vietnamization of the Long War on Terror: An Ongoing Lesson in International Humanitarian Law Non-Compliance*, 30 B. U. INT’L L. J. 575, 582 (2012); Jason Motlagh, *Afghanistan: Victims’ Families Denounce ‘U.S. Kill Team,’* TIME (Oct. 12, 2010), <http://content.time.com/time/nation/article/0,8599,2025091,00.html>.

could find a substantive law that could plausibly be read to provide some remedy to victims, American courts often decline to reach the substance of these matters on justiciability grounds.<sup>131</sup>

Moreover, attempts to force the government to provide information on individual drone strikes have been largely unavailing. For instance, none of the suits surrounding the targeting of Yemeni cleric and high level al Qaeda operative, Anwar al-Awlaki, yielded much new information about the controversial strike itself and they were all dismissed on justiciability grounds.<sup>132</sup> Nor is a suit regarding the Yemeni civilian casualties incurred in the same strike that killed Warren Weinstein and Giovanni Lo Porto likely to succeed.<sup>133</sup> Most recently, a federal appeals court dismissed an ACLU suit seeking specific statistics on drone strikes, including details about civilian casualties, concluding such information could reasonably be expected to damage national security.<sup>134</sup> While such litigation might have motivated President Obama to release information about civilian casualties in counterterrorism strikes in areas outside of active hostilities, such information was not disaggregated and provided no details about individual strikes.<sup>135</sup>

Instead, the United States employs *ex gratia* practices for victims of armed conflict known as *solatia* or *condolence* payments. *Solatia* payments are distinct from foreign claims as they are discretionary payments given “in accordance with local custom as an expression of sympathy toward a victim or his or her Family.”<sup>136</sup> *Condolence* payments are understood a bit more broadly as they “can be paid to express sympathy and to provide urgent humanitarian relief” to individual victims or to the relevant community. Like *solatia* payments, *condolence* payments are “different from claims and are not an admission of fault” by the United States and are “not an acknowledgement of any moral or legal responsibility for someone’s death, injury, or damaged property. *Condolence* payments are symbolic gestures and are not paid to compensate someone for a loss.”<sup>137</sup>

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131. Lesley Wexler, *The Role of the Judicial Branch during the Long War: Drone Courts, Damage Suits, and FOIA Requests*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* (Derek Jinks ed., 2014) (noting the courts are, however, more willing to provide information about the legal architecture governing drone strikes); see also Declaration of John Bradford Wiegmann at 9, *ACLU v. Dep’t of Justice* (S.D.N.Y. Oct. 3, 2015) (No. 1:15-cv-01954-CM).

132. Lesley Wexler, *Litigating the Long War on Terror: The Role of al-Aulaqi v. Obama*, 159 *LOY. INT’L L. REV.* 159, 166 (2011).

133. Scott Shane, *Families of Drone Strike Victims in Yemen File Suit in Washington*, N.Y. TIMES (June 9, 2015), <http://www.nytimes.com/2015/06/09/world/middleeast/families-of-drone-strike-victims-in-yemen-file-suit-in-washington.html>; *Why is Obama Trying to Kick Drone Strike Victims Out of U.S. Courts*, REPRIEVE, <http://www.repriev.org.uk/why-is-obama-trying-to-kick-drone-strike-victims-out-of-us-courts/> (last visited Oct. 21, 2016).

134. *ACLU v. Dep’t of Justice*, 690 Fed. Appx. 9 (D.C. Cir. 2016) (per curiam).

135. *Summary of Information Regarding U. S. Counterterrorism Strikes Outside Areas of Active Hostilities*, Dir. of Nat’l Intelligence (July 1, 2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> [hereinafter *Summary of Information*].

136. AR 27-20, *supra* note 115, at 55 (identifying the Federated States of Micronesia, Japan, Korea, and Thailand as countries with *solatia* payment custom).

137. See MAAWS-A, *supra* note 35, at 13-14; see also *U.S. Military to Train Iraq Troops in Values*, NPR (June 2, 2006, 6:00 AM), <http://www.npr.org/templates/transcript/transcript.php?>

Until quite recently, in countries where the United States has not acknowledged its use of military force, it did not formally offer condolence or solatia payments to civilians affected by combat operations, though it might funnel payments to civilians through the local government. For instance, when the United States has engaged in unacknowledged drone strikes in Pakistan, it has had no formal program for solatia payments,<sup>138</sup> but has created a conflict victims support program to assist local governments in Pakistan.<sup>139</sup> This U.S.-initiated program helped to develop a mechanism to provide payments to victims of terrorism,<sup>140</sup> including those killed in military operations.<sup>141</sup> By 2011, the program was being applied in an ad hoc way to civilian victims of drone strikes.<sup>142</sup> Similarly, the Defense Department has not acknowledged its role in drone activity in Yemen and Somalia and has denied making solatia payments there.<sup>143</sup> But some suspect that local government payments made to victims' families have been funded by the United States,<sup>144</sup> including in such high-profile examples as the payment of \$750,000 and 105 rifles to members of a Yemeni wedding party for a strike that killed 12 individuals<sup>145</sup> and the payment of \$55,000 to Yemeni families following an Easter weekend drone strike.<sup>146</sup> This may have changed since President Obama's July 1 Executive Order directed agencies "as appropriate and consistent with mission objectives" to offer payments in "U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense."<sup>147</sup> Yet the flexible nature of this directive and the pending change in the

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storyid=5446623 (interviewing Lt. Gen. Peter Chiarelli).

138. See NETA CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA'S POST-9/11 WARS 374 (2013).

139. See *Conflict Victims' Support Program in Pakistan*, DEVEX (Mar. 7, 2012), <https://www.devex.com/projects/grants/conflict-victims-support-program-in-pakistan/2167>.

140. *Civilian Victims Support Program Newsletter*, U.S. AGENCY FOR INT'L DEV. (Mar. 2015), <https://docs.google.com/viewer?a=v&pid=forums&srcid=MTMxNTIwMDYyNjQyMDgxNDQ0MjkBMDU2NDI4MDMMyMzI1MjY1MDkxNzgBZzJwZGg2cDVlUndKATAuMQEBdjl>.

141. DEVEX, *supra* note 139.

142. Press Release, Center for Civilians in Conflict, Pakistan: Compensation Promised to Civilian Drone Victims (Mar. 28, 2011), <http://civiliansinconflict.org/resources/pr/pakistan-compensation-promised-to-civilian-drone-victims>; see also *Drone Attack: Victims' families to get \$50,000 each*, EXPRESS TRIB. (Mar. 26, 2011), <http://tribune.com.pk/story/138047/pakistan-to-compensate-us-drone-strike-families-official/>.

143. Currier, *supra* note 19.

144. 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://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); see also Chris Woods, *Analysis: Holding U.S. to Account for Civilian Drone Deaths in Yemen*, BUREAU OF INVESTIGATIVE JOURNALISM (Sept. 7, 2012), <https://www.thebureauinvestigates.com/2012/09/07/holding-the-us-to-account-for-civilian-drone-deaths-in-yemen/>.

145. Johnsen, *supra* note 91.

146. Press Release, Yemeni Government Pays out \$55k to Civilian Victims of Easter Drone Strikes, REPRIEVE (Aug. 23, 2014), [http://www.reprive.org.uk/press/2014\\_04\\_23\\_pub\\_yemeni\\_government\\_drones\\_victims](http://www.reprive.org.uk/press/2014_04_23_pub_yemeni_government_drones_victims).

147. Exec. Order No. 13,732, *supra* note 27, § 2. Of course, the question here is whether future administrations will find that such payments are consistent with mission objectives in areas where the United States wants to downplay its involvement. That said, the Executive Order's mandate of an annual report of civilian casualties in areas outside active hostilities already cuts against some of the secrecy concerns that might arise in such settings.

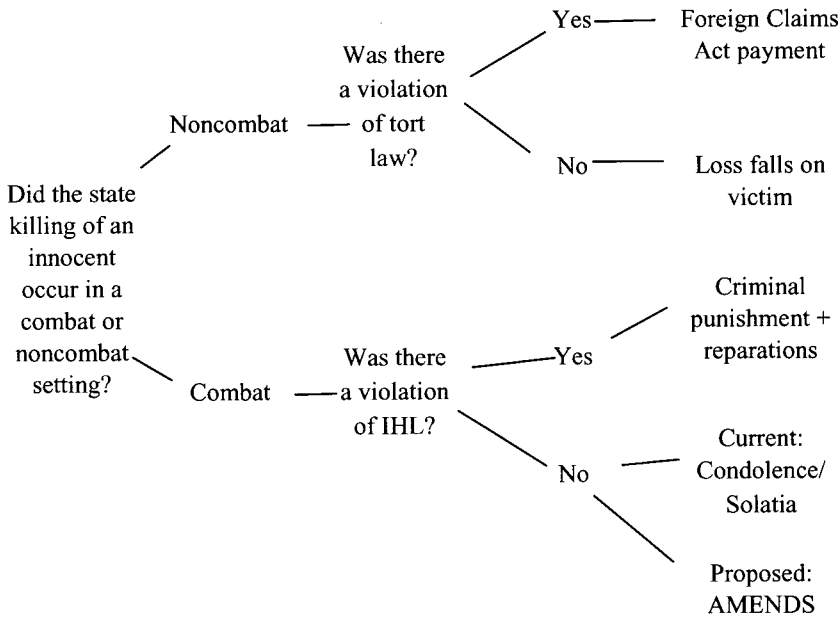


Administration makes it hard to predict whether such payments will become standard practice.<sup>148</sup>

The U.S. military’s post-9/11 activities have resulted in a significant number of civilian deaths.<sup>149</sup> While some contest the applicability of the IHL framework to particular U.S. activities in the war on terror, the United States itself claims that it is bound by and abides by these rules when engaging in activities such as ground fighting in Iraq and Afghanistan as well as when making drone strikes in these and other locations.<sup>150</sup> The United States often prefers this body of law as it contemplates the possibility of lawful civilian deaths by acknowledging the use of force and not criminalizing certain types of civilian casualties.

The approaches that the United States takes to responding to civilian deaths are summarized in Figure 1 and Table 3.

Figure 1: Legal Framework for State Harmdoing



148. Knuckey, *supra* note 31 (noting concern about the carve-out language).

149. For a discussion of various counts and methodology issues, see Neta C. Crawford, *Assessing the Human Toll of the Post 9/11 Wars: The Dead and Wounded in Afghanistan, Iraq, and Pakistan, 2001-2011* (Mar. 2015), <http://watson.brown.edu/costsofwar/costs/human/civilians>. The United States itself acknowledges between 64 and 116 civilian deaths from U.S. attacks against terrorists in areas outside active hostilities between 2009 and 2015. See sources cited *supra* note 135.

150. Lesley Wexler, *International Humanitarian Law Divergence*, 42 PEPP. L. REV. 102, 106 (2015) (“[T]he Obama administration has publicized a basic legal framework that describes the United States as being in an armed conflict with al-Qaeda governed by IHL.”).

Table 3: Payments Offered when U.S. Armed Forces Kill Foreign Civilians

LEGAL SETTING	LEGAL STATUS	EXAMPLES	OUTCOME
<b>Noncombat (Tort law)</b>	Conduct violates local tort law	U.S. military negligently runs over French civilian during noncombat mission <sup>151</sup>	Eligible for FCC payment
	Conduct does <i>not</i> violate local tort law	U.S. military non-negligently runs over South Korean civilian during noncombat mission <sup>152</sup>	Loss usually falls on victim Discretionary payments and ad hoc amends possible
<b>Armed Conflict: (IHL)</b>	Conduct violates international and U.S. criminal law	U.S. military targets and kills civilian during conflict in Afghanistan <sup>153</sup>	Eligible for state-level, but not individual, reparations
		U.S. military violates proportionality and collateral damage exceeds permissible levels <sup>154</sup>	Eligible for condolence or solatia payment
		U.S. servicemember exceeds scope of self-defense in Iraq <sup>155</sup>	

151. Major William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 MIL. L. REV. 59, 63 (1966) (describing purpose of precursor FCA as being to defuse tensions arising out of damage claims raised by French civilians).

152. Jinwung Kim, *Ambivalent Allies: Recent South Korean Perceptions of the United States Forces Korea (USFK)*, 30 ASIAN AFF. 268, 278 (2004) (describing public backlash to the lack of a criminal finding for the Yangju Highway incident).

153. See e.g., Wexler, *supra* note 130, at 576-82.

154. We were unable to locate a domestic judicial proceeding holding an attack to be disproportionate.

155. *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012) (upholding conviction for the shooting and killing of a detainee during an unauthorized interrogation and concluding that defendant had lost the right to act in self-defense).

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Conduct does <i>not</i> violate international or U.S. criminal law	U.S. military satisfies proportionality but knowingly causes death of civilians as collateral damage <sup>156</sup>	Status quo: Eligible for condolence or solatia payment
	U.S. military makes reasonable mistake of fact about civilians' status and targets them <sup>157</sup>	Status quo: Rare ad hoc amends
	U.S. military makes reasonable mistake of fact about need to exercise self-defense <sup>158</sup>	<b>Proposed: Amends for all in this category</b>
	U.S. military takes required precautions but unintentionally kills civilians while targeting combatants <sup>159</sup>	

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### 3. Process

Financial payments made as a result of injuries caused by either combat or non-combat activities generally go through the same early stage processing. Soldiers may seek out surviving family members following an operation, particularly when they do not anticipate “armed resistance.”<sup>160</sup> Sometimes they leave cards that explain how families can make claims. In other instances the victims must act on their own accord to bring their claims.<sup>161</sup> In Iraq, for

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156. William Branigin & Debbi Wilgoren, *Zarqawi Did Not Die Instantly, U.S. General Says*, WASH. POST (June 9, 2006), <https://www.washingtonpost.com/archive/business/technology/2006/06/09/zarqawi-did-not-die-instantly-us-general-says/4c35f129-b590-4e17-8313-ccb0f01db1/> (describing the strike on Zarqawi that killed five others as “very appropriate and proportional to the fact that Zarqawi is the number one terrorist in Iraq”).

157. LAURA KASINOF, DON’T BE AFRAID OF THE BULLETS: AN ACCIDENTAL WAR CORRESPONDENT IN YEMEN 260 (2014) (suggesting that the targeting of Abdulrahman al-Awlaki may have been a case of mistaken identity).

158. Suzanne Goldenberg & Michael Howard, *U.S. Military Backs Marine over Filmed Falluja Mosque Shooting*, GUARDIAN (May 5, 2005), <https://www.theguardian.com/world/2005/may/06/iraq.michaelhoward> (reporting that in an analogous situation the United States had declined court martial charges after an investigation concluded that the the defendant believed a wounded man was committing a hostile act and thus lawfully invoked the right to self-defense).

159. See, e.g., Nick Baumann, *The American Teen Whose Death-by-Drone Obama Won’t Explain*, MOTHER JONES (Apr. 23, 2015), <http://www.motherjones.com/kevin-drum/2015/04/abduhrahman-al-awlaki-obama-drone> (describing the Administration’s position that the attack that killed Abdulrahman al-Awlaki, son of Anwar al-Awlaki, was not specifically targeting the victim); Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html>.

160. Jason Lyall et al., *Explaining Support for Combatants During Wartime: A Survey Experiment in Afghanistan*, 107 AM. POL. SCI. REV. 679, 693 (2013).

161. Currier, *supra* note 19; ROGERS, *supra* note 19, at 4. This is true with regard to amends payments made by the United States as well as those made by other countries. *Id.* at 8 (“The U.K.

example, individuals could make claims at Civilian Military Action Centers located in various neighborhoods, an Iraqi Assistance Center in Baghdad, or brigade headquarters.<sup>162</sup> For many families, their only avenue was as part of the military's mass processing of claims, a process that requires extreme perseverance.<sup>163</sup> This process can be prohibitive for those who do not have safe passage or the resources to travel.<sup>164</sup>

Once a claim is submitted, a judge advocate reviews the evidence, including the claims card and the "significant activity reports" that are completed after a field incident, to determine whether the party is eligible for a FCA payment and, if not, "whether a condolence payment is appropriate."<sup>165</sup> Because of the combat exclusion, FCA claims have been rare in Afghanistan and Iraq,<sup>166</sup> with most payments coming in the form of condolence or solatia. The review process often takes approximately a month,<sup>167</sup> though mass claim processing or high profile claims can occasionally unfold substantially faster, with some determinations even made on the spot.<sup>168</sup>

Once approved, payments can be made during personal visits or at Civil Military Operation Centers.<sup>169</sup> Soldiers tasked with disbursing solatia or condolence payments receive guidance on the amount to be disbursed, the process to be followed, and their roles and responsibilities.<sup>170</sup> In practice, training is limited and has "focused almost solely on the procedural and

primarily relies on civilians to bring claims to the attention of military personnel by approaching bases.").

162. See HEARTS AND MINDS: POST-WAR CIVILIAN DEATHS IN BAGHDAD CAUSED BY U.S. FORCES, HUM. RTS. WATCH 48 (2003), <http://www.hrw.org/sites/default/files/reports/iraq1003full.pdf> [hereinafter *Hearts and Minds*].

163. See Bryan Bender, *Condolence Payments to Iraqis Soar*, BOS. GLOBE (June 8, 2006), [http://archive.boston.com/news/world/articles/2006/06/08/condolence\\_payments\\_to\\_iraqis\\_soar/](http://archive.boston.com/news/world/articles/2006/06/08/condolence_payments_to_iraqis_soar/) (mentioning the distribution of more than \$570,000 condolence payments in a single day in Iraq); Darrin Mortensen, *Persistence Pays - Mother, Brother Push for Payments for Woman's Death*, SAN DIEGO UNION-TRIBUNE (Jan. 25, 2005), <http://www.sandiegouniontribune.com/sdut-persistence-pays-mother-brother-push-for-payments-2005jan25-story.html> (describing solatia process in Iraq).

164. See Cora Currier, *Our Condolences: How the U.S. Paid for Death and Damage in Afghanistan*, THE INTERCEPT (Feb. 27, 2015), <http://www.theintercept.com/2015/02/27/payment-civilians-afghanistan/>; Nick Turse, *Blood Money: Afghanistan's Reparations Files*, THE NATION (Sept. 19, 2013), <https://www.thenation.com/article/blood-money-afghanistans-reparations-files/> (discussing conversation with Afghanistan's former ambassador to the United States).

165. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 32 (May 2007), <http://www.gao.gov/new.items/d07699.pdf>; CTR. FOR LAW & MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 185 (Aug. 1, 2004), <https://fas.org/irp/doddir/army/clamo-v1.pdf> [hereinafter LEGAL LESSONS].

166. *Newly Released Documents Reveal Details of Civilian Casualty Claims in Afghanistan and Iraq*, ACLU (Apr. 1, 2010), <https://www.aclu.org/news/newly-released-documents-reveal-details-civilian-casualty-claims-afghanistan-and-iraq> (reporting that many of the 800 claims submitted for compensation or condolence payments were denied based on the so-called "combat exemption" of the FCA).

167. *Hearts and Minds*, *supra* note 162, at 48.

168. GOV'T ACCOUNTABILITY OFFICE, *supra* note 165, at 33.

169. *Id.*

170. LEGAL LESSONS, *supra* note 165, at 181-85.

bureaucratic processes of paying compensation rather than any interpersonal or cultural aspect” of the condolence interaction.<sup>171</sup>

In sum, while the status quo demands reparations for illegal acts, when international and domestic law permit the imposition of harm, states choose whether to distribute monetary payments or otherwise respond to the harm at their discretion. As we will see, however, existing solatia and condolence practices are inadequate in serving either the needs of those harmed or of the harm-doers.

## II. ROLE OF AMENDS

Amends consist of the reparative measures undertaken by an individual or group that has caused harm. It is tempting to focus narrowly on financial and other material compensation as the key elements of amends.<sup>172</sup> But while monetary amends are surely important, other mechanisms for making amends are also vital. These important reparative measures might consist of other material assistance, service, expressions of remorse or sympathy, apologies, accounts or other information about what happened, and promises of forbearance.<sup>173</sup>

Amends in some forms could be required as a consequence of a legal proceeding when harm has been caused by unlawful conduct. But amends need not be limited to those remedies ordered by a court or other tribunal or those offered in the shadow of such legal liability. Indeed, in the context of the military’s *lawful* killing of civilians, neither the desire for, nor the offering of amends, is necessarily grounded in any legal claim. Instead, amends are more likely to flow from the needs of affected civilians and the needs of the military and the soldiers involved in the relevant incidents.

Before approaching a possible redesign that incorporates a more robust notion of amends into the military’s existing responses to lawful killings, it is essential to know what functions might be served by making amends in this context. In furtherance of that end, we identify both demand-side and supply-side justifications for the provision of amends via condolence and solatia payments. Basic emotional and pragmatic considerations counsel for both financial and emotional recognition of the harm done. Both directly affected

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171. E-mail from Nick Dubaz, to Lesley M. Wexler (Sept. 12, 2015, 5:36 PM).

172. See generally Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOT. J. 219, 224-25 (2007) (noting that existing compensation practices in Iraq contain “no systematic, policy-level attempt to engage the individual Iraqis in meaningful dialogue or to express actual sympathy on a personal level”).

173. LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS 5 (2009); MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 191 (2006); Jerry Goodstein et al., *Moral Repair in the Workplace: A Qualitative Investigation and Inductive Model*, 138 J. BUS. ETHICS 17 (2015); Holewinski, *supra* note 105, at 320. Apologies, in particular, are central to the content and process of making amends. See, e.g., Goodstein et al., *supra* note 173 (finding that apologies are frequently included in amends). At their simplest, apologies are thought to include “acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done.” NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 3 (1991); see also Craig W. Blatz et al., *Government Apologies for Historical Injustices*, 30 POL. PSYCHOL. 219 (2009) (articulating elements of government apologies for past injustices).

individuals and their communities may benefit in a variety of ways from these payments. In turn, such benefits may allow the armed forces to more successfully win the hearts and minds of the relevant community, or to at least avoid encouraging people to align with forces on the other side.<sup>174</sup> A carefully developed process of making amends may also satisfy the emotional needs of military personnel, addressing the moral injuries of troops who have inflicted injuries on others and reinforcing the professional ethics of the armed forces.

#### A. *Demand-Side*

Desire for amends might come from affected individuals, their families, and their communities. But given the impossibility of making people whole after they have lost a family member to military action, what might victims want? In the wake of a loss, family members might seek acknowledgement of their injury as well as an indication that the injurer accepts responsibility for that loss. These desires may be amplified in societies that have existing cultural expectations about the acknowledgement of responsibility for having caused harm. Families may wish to have an explanation of the events, actions, and decisions leading to the loss. In addition, families may be forward-looking and desire promises of forbearance that might prevent future casualties. And, of course, families may seek financial payments to pay for short-term costs, to help with other expenses, or as another mechanism for signaling recognition and respect.

##### 1. *Acknowledgement*

First, affected family members may want their losses acknowledged.<sup>175</sup> Those grieving a family member often seek recognition that they are suffering a terrible loss.<sup>176</sup> Acknowledgment of that suffering and loss respects their dignity.<sup>177</sup> It treats the injured as humans deserving of having their emotions known and responded to.<sup>178</sup>

174. Lyall et al., *supra* note 160.

175. See E.L. Gaston & Rebecca Wright, *Losing the People: The Costs and Consequences of Civilian Suffering in Afghanistan*, CIVIC (2009); Christopher Rogers, *Civilian Harm and Conflict in Northwest Pakistan*, CIVIC (2010). The U.S. military has internalized this knowledge in practices such as in-person notification of death as well as condolence letters to the family of service members who die during service. Paul T. Bartone & Morten G. Ender, *Organizational Responses to Death in the Military*, 18 DEATH STUDIES 25, 29 (1994); see also SUSAN F. HIRSCH, IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE 46 (2006) (noting that after the embassy bombings in Nairobi, Kenya and Dar es Salaam, Tanzania, an affected family member expressed that "receiving U.S. government assistance was important to me. My persistence in seeking it emerged . . . from a desire for the government to acknowledge my loss").

176. Empirical evidence suggests that those grieving losses incurred in war settings are particularly prone to suffer from major depressive disorders and post-traumatic stress disorders. Pål Kristensen et al., *Bereavement and Mental Health after Sudden and Violent Losses: A Review*, 75 PSYCHIATRY 76, 79-80 (2012).

177. Sahr Muhammedally, *Making Amends*, in ACKNOWLEDGE, AMEND, ASSIST: ADDRESSING CIVILIAN HARM CAUSED BY ARMED CONFLICT AND ARMED VIOLENCE 11, 12 (Harv. L. Sch. Hum. Rts. Program & Violence, eds., 2015).

178. One might draw a parallel to the condolence letters the United States provides to service members' families. These letters acknowledge the soldier's humanity.

As part of this acknowledgement, victims may desire those who played a causal role in the deaths to accept responsibility for having caused harm.<sup>179</sup> In some instances, recognition of responsibility for having caused harm might come in the form of punishment handed down following legal procedures. Others have used litigation not to seek judicially ordered punishment or compensation, but to obtain public acknowledgement and an apology for mistaken drone strikes.<sup>180</sup> But in the case of *lawfully* caused harm, acknowledgement of responsibility will likely need to come in a different form. It might come in the form of an apology. Or it might simply consist of an acknowledgment of the actor's role in causing the death.

Acceptance of responsibility for having caused harm is the central feature of an apology—the element that distinguishes, for many, a true apology from other forms of accounting for a transgression—such as denial, excuse, or justification.<sup>181</sup> Empirical research demonstrates that accepting responsibility for having caused harm tends to contribute significantly to positive assessments of and reactions to an apology and the transgression itself,<sup>182</sup> though an expression of sympathy without a concomitant taking of responsibility can also have positive, though smaller, effects as well.<sup>183</sup>

Much of the existing research on the effects of taking responsibility for having caused harm has been done in the context of apologies offered following negligent behavior. Acknowledgement in the case of lawful killing of civilians in armed conflict differs somewhat from this paradigmatic case. Many cases of harm lawfully caused by a state do not fit neatly into the negligence model, as lawful killing of civilians can occur in the absence of negligence. In some instances, the risk to civilians is known, but determined to be justified.

179. In the tort context, see for example Gerald B. Hickson et al., *Factors That Prompted Families To File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992); and Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994). Motives related to accountability were at play in one family's decision not to accept settlement with the September 11th Victim Compensation Fund set up by the U.S. Congress. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645, 661 (2008) (reporting that the family wanted a trial so that the defendants could be held accountable for their decisions).

180. Shane, *supra* note 133.

181. See ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 113 (1971); TAVUCHIS, *supra* note 173, at 3; Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 ANN. REV. PSYCHOL. 133, 162 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46, 59 (1968).

182. See, e.g., Kristin M. Pace et al., *The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression*, 15 CORP. COMM. 410, 420 (2010); Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 486-89, 495-97 (2003) [hereinafter, Robbenolt, *Apologies and Legal Settlement*]; Jennifer K. Robbenolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 359-365 (2006) [hereinafter Robbenolt, *Settlement Levers*]; Steven J. Scher & John M. Darley, *How Effective Are the Things People Say To Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134-36 (1997); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 476 (2004).

183. Robbenolt, *Settlement Levers*, *supra* note 182; see also Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009 (1999); Arie Nadler & Ido Liviatan, *Intergroup Reconciliation: Effects of Adversary's Expressions of Empathy, Responsibility, and Recipients' Trust*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 459 (2006); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

This distinction is important because these decisions might strike victims as more intentional than negligent and perceptions of intentionality are particularly important to attributions of blame.<sup>184</sup> Victims tend to perceive the harm as more severe, tend to be angrier, and tend to be less likely to forgive when a transgression is perceived as being intentional.<sup>185</sup> At the same time, victims are also more likely to desire an apology when the harm is viewed as having been intentionally inflicted.<sup>186</sup>

In addition, we might separately be concerned with a more general sense of the ways in which the injurer acts to cause additional injury following the infliction of the original harm. In particular, the notion of “reactive fault” focuses on how the injurer responds to the injured party *after* the injury.<sup>187</sup> Consider our reactions to a “hit-and-run” driver: “The problem with ‘hit-and-run’ driving is not just the colliding . . . but with the fleeing.”<sup>188</sup> As described by one commentator,

While inadvertent harms, as noted, lack the feature of being objectively insulting in themselves, that status begins to change once the injurer, aware now of what he’s done, ignores it, acting as though nothing untoward had happened. In particular, if he inflicts the harm and makes no effort to redress or apologize for it, *that* behavior or set of behaviors, unlike the mere harmful action alone, *does* arguably constitute an objective form of insult or slight or disrespect. . . . Harming someone and then not attempting to redress it treats the victim as though one is free to harm her in that way. And this treatment, or mistreatment, is objectively insulting and disrespectful, even if the initial harmful behavior was not.<sup>189</sup>

Taking responsibility for having caused harm can help to mitigate this secondary, after-the-fact, injury.

## 2. *Respect, Culture, and Ritual*

As the literature on reactive fault suggests, the way in which injured parties are treated in the aftermath of an injury communicates something about

184. See John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY & SOC. PSYCHOL. REV. 324 (2003); ROBBENOLT & HANS, *supra* note 91.

185. See, e.g., Daniel L. Ames & Susan T. Fiske, *Intentional Harms Are Worse, Even When They’re Not*, 24 PSYCHOL. SCI. 1755 (2013); John M. Darley & Charles W. Huff, *Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act*, 29 BRIT. J. SOC. PSYCHOL. 181 (1990); Kurt Gray & Daniel M. Wegner, *The Sting of Intentional Pain*, 19 PSYCHOL. SCI. 1260 n.12 (2008); Joost M. Leunissen et al., *The Apology Mismatch: Asymmetries Between Victim’s Need for Apologies and Perpetrator’s Willingness To Apologize*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 315 (2013).

186. Leunissen et al., *supra* note 185, at 319.

187. See Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 931 (2005) [hereinafter Cohen, *The Immorality of Denial*]; Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CALIF. L. REV. 1141, 1195-1200 (1983); Jeffrey S. Heimreich, *Does “Sorry” Incriminate? Evidence, Harm, and the Protection of Apology*, 21 CORNELL J. L. PUB. POL’Y 567, 583-84 (2012).

188. Cohen, *The Immorality of Denial*, *supra* note 187, at 931; see also John Braithwaite & Declan Roche, *Responsibility and Restorative Justice*, in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 63, 72 (Gordon Bazemore & Mara Schiff eds., 2001) (noting the “intuition that with hit-and-run driving, the running is the greater evil than the hitting”).

189. Heimreich, *supra* note 187, at 600.



their social identity—that is, it communicates something about the way that they are valued by others. “[T]reatment with dignity and respect are important because they tell people that they have status within the group.”<sup>190</sup> Not surprisingly, then, research on procedural justice has found that people care about being treated with respect—by institutions, in legal proceedings, by those with whom they negotiate, and by those who have harmed them.<sup>191</sup> Appropriate amends making can demonstrate to individual victims and their communities a respect for their humanity.<sup>192</sup>

The observation of ritual can be significant in this regard. Consider, for example, the response of Jordan’s King Hussein after a Jordanian soldier opened fire on a group of Israeli schoolgirls, killing seven of them. Importantly, the King met with mourning parents in a way that respected their rituals: “Wearing a red-checked kaffiyeh with his dark suit and accompanied by two of his children . . . the King knelt before each of the families in their separate homes as they sat on the floor in the Jewish custom for the seven-day mourning period.”<sup>193</sup> This response, including its recognition of ritual, went a long way toward easing tensions between the two countries: “[c]ries for revenge simply vanished.”<sup>194</sup>

Or consider the aftermath of the collision between a U.S. submarine and the Japanese fishing boat *Ehime Maru*, a collision that resulted in the sinking of the *Ehime Maru* and a number of deaths:

The Japanese were unmoved by a presidential letter, official visits from the U.S. Ambassador and the Admiral of the Fleet, and an anguished editorial in *Time* by the submarine’s commander, Scott Waddle. Waddle “should get on his knees and bow his head to the floor,” insisted one of the victims’ fathers.<sup>195</sup>

It was not until the appropriate rituals were respected that Waddle’s apologies began to have any meaning for the affected families.<sup>196</sup> While the

190. Tom R. Tyler, *Procedural Strategies for Gaining Deference: Increasing Social Harmony or Creating False Consciousness?*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 69, 80 (John M. Darley et al. eds., 2001).

191. See generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (describing procedural justice); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (exploring aspects of authorities that influence perceptions of procedural justice); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 L. & SOC. INQUIRY 473 (2008) (exploring the role of procedural justice in negotiation); Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 538 (2001) (reviewing research on people’s reactions to injustice).

192. See generally Miller, *supra* note 191.

193. Roger Conner & Patricia Jordan, *Never Being Able To Say You’re Sorry: Barriers to Apology by Leaders in Group Conflicts*, 72 L. & CONTEMP. PROBS. 233, 233-34 (2009) (quoting Serge Schmemmann, *A Time To Mourn: King Hussein Comforts Israelis*, N.Y. TIMES (Mar. 17, 1997), <http://www.nytimes.com/1997/03/17/world/a-time-to-mourn-king-hussein-comforts-israelis.html>).

194. Conner & Jordan, *supra* note 193, at 234.

195. *Id.* at 258 (quoting David J. Jefferson, *Searching the Depths*, NEWSWEEK (Feb. 26, 2001), <http://www.newsweek.com/searching-depths-155665>).

196. Conner & Jordan, *supra* note 193, at 258; see also RADZIK, *supra* note 173, at 103-05 (describing atonement rituals).

harm in both of these instances was caused unlawfully,<sup>197</sup> consideration for expectations and ritual are no less important when the harm is brought about lawfully.

Relatedly, victims may wish to be treated in ways that are consistent with and respectful of the cultural practices of their society. Failure to treat them in this way may be felt as an additional harm.<sup>198</sup> Respect for cultural practice can be reflected in the rituals that are observed: “Different rituals signal that an apology is being delivered for different cultural groups.”<sup>199</sup> In addition, for some societies, making amends for accidental deaths and injuries is deeply rooted in cultural traditions.<sup>200</sup> The nature of the amends varies, but often includes compensation as one of many components. For instance, the Islamic doctrine of *fiqh* has an “underlying and fundamental concept of compensation for life, limb, and property.”<sup>201</sup> Under the Pashtunwali legal code,<sup>202</sup> Pashtuns often provide compensation for someone accidentally killed to ensure the honor of the victim.<sup>203</sup> Under traditional Somali law, clans will offer so-called “blood money” to address the loss of a loved one.<sup>204</sup> These varied practices share the absence of a state-based legal requirement to pay and generally do not specifically assign fault, though they often establish the facts of the injury. These practices often also include rituals to emphasize reconciliation.<sup>205</sup>

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197. After a Pentagon inquiry and non-judicial punishment, the U.S. military decided not to court-martial Commander Waddle on negligent homicide charges. He did commit lesser violations of the UCMJ: dereliction of duty and subjecting a vessel to hazard. John Kifner, *Captain of Sub is Reprimanded and Will Quit*, N.Y. TIMES (Apr. 24, 2001), <http://www.nytimes.com/2001/04/24/us/captain-of-sub-is-reprimanded-and-will-quit.html>. The Jordanian soldier who shot the school girls is currently serving a life sentence. Associated Foreign Press, *Jordanian Who Killed Israeli Schoolgirls Goes on Hunger Strike*, TIMES OF ISRAEL (Mar. 15, 2014), <http://www.timesofisrael.com/jordanian-who-murdered-israeli-schoolgirls-on-hunger-strike>.

198. See generally Erica Gaston, *Kabul Notebook: Searching for More than Just Talk on Civilian Casualties*, HUFFINGTON POST (Mar. 2, 2009), [http://www.huffingtonpost.com/erica-gaston/kabul-notebook-searching\\_b\\_170966.html](http://www.huffingtonpost.com/erica-gaston/kabul-notebook-searching_b_170966.html). For instance, an Afghani who lost 47 community members to an airstrike in July 2008 described the failure to acknowledge or apologize for loss as “pour[ing] salt in the wound.” Erica Gaston, *Salt in the Wound: The Case for Compensation*, HUFFINGTON POST (Apr. 5, 2009), [http://www.huffingtonpost.com/erica-gaston/salt-in-the-wound-the-cas\\_b\\_172312.html](http://www.huffingtonpost.com/erica-gaston/salt-in-the-wound-the-cas_b_172312.html).

199. Conner & Jordan, *supra* note 193, at 257.

200. The United States has long recognized Japan, Korea, and Thailand as countries with such a local custom. Air Force Instruction 51-501, *Tort Claims*, ¶ 5.27 (Sept. 13, 2016); see also George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, 20 ARAB STUD. Q. 53 (1998).

201. Wael B. Hallaq, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 309 (2009).

202. See generally Lesley Wexler, *Beyond Literacy: A Response to Tom Ginsburg's An Economic Interpretation of the Pashtunwali*, 2011 U. CHI. LEGAL F. 115 (2011).

203. Holewinski, *supra* note 105, at 318.

204. NIKOLAUS GRUBECK, *CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, CIVILIAN HARM IN SOMALIA: CREATING AN APPROPRIATE RESPONSE* 26-29 (2011), [http://civiliansinconflict.org/uploads/files/publications/Somalia\\_Civilian\\_Harm\\_2011.pdf](http://civiliansinconflict.org/uploads/files/publications/Somalia_Civilian_Harm_2011.pdf).

205. *Id.*

### 3. Explanation

Victims may also desire information.<sup>206</sup> Sudden unexpected and violent deaths can be particularly traumatic<sup>207</sup> with family members often having questions about the circumstances of their loved one's death.<sup>208</sup> Relatives may want to know details surrounding the cause and nature of such deaths,<sup>209</sup> including why the military chose a particular target, what precautions it took, and how, if at all, the military plans to change its behavior going forward. Victims often believe that knowing such information can help make sense of the death. As Susan Hirsch explains in her account of the effects of the terrorist bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania,

As the acute trauma abated, the urgency of questions grew about who had carried out these horrific acts and how. I found myself increasingly preoccupied by another question: Why? Why had the embassies been attacked? I began a quest to answer this and other related "why" questions, for myself, my husband, our families, and everyone else affected.<sup>210</sup>

Apologies and other avenues for providing amends are valued to the extent that they provide an explanation to a victim or a victim's family about what has happened. For instance, in some types of tort cases, one reason why claimants bring lawsuits is to obtain an explanation for how their injuries occurred.<sup>211</sup> Claimants in medical malpractice lawsuits, for example, often assert that they filed suit to get information about what happened to them. Once they obtain that information, many claimants drop their claims.<sup>212</sup> In addition, medical malpractice claimants who are promptly provided with information about their medical care, any problems, and their condition, are less likely to file lawsuits.<sup>213</sup> Similarly, employees who receive explanations for adverse

206. See HIRSCH, *supra* note 175 (describing desire for information in the aftermath of the bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania); Hadfield, *supra* note 179 (describing 9/11 victims' desire for information); Hickson et al., *supra* note 179 (describing a desire for information in the tort context); Vincent et al., *supra* note 179 (describing a desire for information in the tort context); see also Rachel Abrams & Danielle Ivory, *G.M. Secrecy on Crashes Adds to Families' Pain*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/03/business/barriers-wall-off-the-facts-of-gm-car-crashes.html>.

207. Stacey Kaltman & George A. Bonanno, *Trauma and Bereavement: Expanding the Impact of Sudden and Violent Deaths*, 17 J. ANXIETY DISORDERS 131, 132 (2003).

208. William Dubin & Jeffrey Sarnoff, *Sudden Unexpected Death: Intervention with the Survivors*, 15 ANNALS OF EMERGENCY MED. 54, 55 (1985).

209. Els Merleverde, *Perceptions, Needs and Mourning Reactions of Bereaved Relatives Confronted with a Sudden Unexpected Death*, 61 RESUSCITATION 341, 346 (2004).

210. HIRSCH, *supra* note 175, at 2.

211. See, e.g., Hickson et al., *supra* note 179; Vincent et al., *supra* note 179; see also Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1004-05 (2003) (finding that injured patients want and expect to receive information about what happened, what will be done, and their medical condition; and that "explanations of the error that were incomplete or evasive would increase their distress" and that they wanted such information to be provided without having to ask for it).

212. See, e.g., Dwight Golann, *Dropped Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 HEALTH AFFS. 1343, 1345-46 (2011).

213. See Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision To File a Medical Malpractice Claim*, 29 L. & SOC'Y REV. 413, 427 (1995).

employment decisions (for example, firings or layoffs) are less likely to file claims against their employers.<sup>214</sup>

Information or explanations may be beneficial in and of themselves as people independently value understanding what happened to them. For instance, when Yemeni Faisal al Jaber received \$100,000 in cash after a drone strike killed two relatives, he lamented: “How can it be that money is given in this way without any paperwork and in this secretive manner. One thinks the U.S. believes it can silence the families of the victims with money” rather than giving “an apology [for the drone strike] and an explanation.”<sup>215</sup> He has since filed suit in the United States, seeking a declaration from the U.S. courts that the strike was unlawful, noting that “[t]he president has now admitted to killing innocent Americans and Italians with drones” and asking “why are the bereaved families of innocent Yemenis less entitled to the truth?”<sup>216</sup> Similarly, in response to the U.S. strike on the Kunduz hospital in 2015, the president of Doctors Without Borders sought information. She demanded an independent investigation, noting that “[w]e have received apologies and condolences, but this is not enough. We are still in the dark about why a well-known hospital full of patients and medical staff was repeatedly bombarded for more than an hour. We need to understand what happened and why.”<sup>217</sup>

In addition, provision of information to a victim can “convey respect for the victim and affirm his or her status. The very fact that the perpetrator thinks that the victim is due an explanation signals respect for the victim and tends to diminish the victim’s anger.”<sup>218</sup> Providing an explanation about what happened can be valuable, therefore, whether or not it is coupled with the taking of responsibility.

#### 4. *Non-Repetition*

Information is often sought so that sense can be made of what has happened. But information is also often sought in service of the hope that things will be different going forward. Thus, another component identified by many as a key element of amends is a promise by or commitment from the

214. See, e.g., E. Allan Lind et al., *The Winding Road From Employee to Complainant: Situational and Psychological Determinants of Wrongful-Termination Claims*, 45 ADMIN. SCI. Q. 557, 576 (2000) (finding that “whereas claims were filed by less than one fiftieth (1.8 percent) of those who felt they were given a very complete explanation of the reason they were losing their jobs, claims were filed by nearly one-fifth (19.5 percent) of those who reported being given no explanation at all”). See generally John C. Shaw et al., *To Justify or Excuse? A Meta-Analytic Review of the Effects of Explanations*, 88 J. APPLIED PSYCHOL. 444 (2003) (reporting a meta-analysis finding that explanations influence justice perceptions).

215. Michael Isikoff, *After an Errant Drone Strike in Yemen, A Trail of Secret Meetings and U.S. Cash*, YAHOO NEWS (Nov. 11, 2014), <https://www.yahoo.com/news/an-errant-drone-strike-in-yemen—a-secret-white-house-meeting-and-a-bag-of-cash-213034643.html> (quoting Faisal bin Ali Jaber, whose nephew and brother in law were killed by a U.S. strike in Yemen).

216. Shane, *supra* note 133.

217. MSF: *Global Body Asked To Probe U.S. Bombing of Afghan Hospital*, AL JAZEERA AMERICA (Oct. 14, 2015), <http://america.aljazeera.com/articles/2015/10/14/msf-ihffc-asked-to-probe-kunduz-hospital-bombing.html>; see also Shear & Sengupta, *supra* note 6.

218. Miller, *supra* note 191.

injurer not to cause similar harm in the future.<sup>219</sup> Indeed, reform or behavioral change is often one of the goals of injured parties in dispute resolution.<sup>220</sup> People want to be assured that the person or institution that caused their harm has learned from the experience and want steps to be taken so that the same thing does not happen to them or to others in the future.<sup>221</sup> Accomplishing such change may be a way for people to begin to regain a sense of safety,<sup>222</sup> to make sense of or give meaning to the loss that they have experienced, or to ensure that their family member did not die in vain.<sup>223</sup>

One reason why apologies, in particular, may be effective at resolving disputes and repairing relationships is that they tend to convey that the complained of behavior will not be repeated. This is so, even when such a promise is not explicitly included in the words of the apology.<sup>224</sup> This desire for a change of behavior in the future may also be one reason why the acceptance of responsibility is central to apologies—such responsibility-taking tends to convey that the transgressor understands and will not repeat the complained-of behavior.<sup>225</sup>

### 5. Repair and Compensation

As with promises of forbearance, offers of repair or compensation are also thought to be important components of amends.<sup>226</sup> Both the immediate victims and victimized communities may seek financial assistance to cope with

219. See, e.g., GOFFMAN, *supra* note 181, at 113; Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 469-70 (1986).

220. In the tort context see Gallagher et al., *supra* note 211, at 1004; Hickson et al., *supra* note 179, at 1361; Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 415 (2004); Kathleen M. Mazor et al., *More Than Words: Patients' Views on Apology and Disclosure When Things Go Wrong in Cancer Care*, 90 PATIENT EDUC. & COUNS. 341, 345 (2013); and Vincent et al., *supra* note 179, at 1611.

221. Gallagher et al., *supra* note 211, at 1004; Mazor et al., *Health Plan Members*, *supra* note 220, at 415; Mazor et al., *More Than Words*, *supra* note 220, at 345; Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 723 (2007); Vincent et al., *supra* note 179, at 1611.

222. AARON LAZARE, ON APOLOGY 59-60 (2004).

223. See, e.g., Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 BARRY L. REV. 89, 117-23 (2011) (describing how one family found meaning in the wake of their son's death).

224. See James R. Davis & Gregg J. Gold, *An Examination of Emotional Empathy, Attributions of Stability, and the Link Between Perceived Remorse and Forgiveness*, 50 PERSONALITY & INDIVIDUAL DIFFERENCES 392, 394 (2011); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291, 294, 296 (2000); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 221 (1989); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressions*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246, 248 (1999); Robbenolt, *Apologies and Legal Settlement*, *supra* note 182, at 487, 495; Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 293 (1991).

225. Scher & Darley, *supra* note 182.

226. See, e.g., NICK SMITH, I WAS WRONG: THE MEANINGS OF APOLOGIES 80-91 (2008) (detailing the components of apologies); Goffman, *supra* note 181, at 113 (same).

the economic consequences of an injury.<sup>227</sup> They may need short-term relief to provide for burial and other immediate costs associated with death. They may seek to be made whole: to receive money that would replace the financial contributions of the deceased or injured person. Alternatively, in light of collective suffering and hardship, they might want resources to facilitate rebuilding and promote economic opportunity in their community.

The idea that harm repair is fundamental to amends was usefully articulated by Bishop Desmond Tutu as follows: “If you take my pen and say you are sorry, but don’t give me the pen back, nothing has happened.”<sup>228</sup> Consistent with this intuition, research has found that offers of repair contribute to the effectiveness of amends.<sup>229</sup> And offers of repair or compensation can imply other components of amends, such as expressing remorse or taking responsibility,<sup>230</sup> though it is unclear how well this finding generalizes to the sorts of relatively modest payments that are offered for purposes of condolence (rather than compensation) with which we are concerned here.

But research does offer some evidence that symbolic monetary awards for emotional harm can have positive effects. An example comes from an exploration of symbolic payments for emotional harm in the Netherlands and Belgium.<sup>231</sup> Researchers assessed reactions to a legislative proposal in the Netherlands and a law in Belgium that provided for a financial award to be paid by the wrongdoer to the family members of those who are killed or severely injured as a result of a criminal act or accident.<sup>232</sup> These payments are specifically described as *not* offering “real compensation” and are not accompanied by apologies or expressions of sympathy, but are modest monetary payments intended to have symbolic value in recognizing emotional harm.<sup>233</sup> Despite these limits, potential recipients of such payments in the Netherlands reacted positively to the possibility of such awards, and saw the payments as acknowledging responsibility for the harm-causing incident and as signaling fair treatment of victims.<sup>234</sup> Interestingly, the more blame respondents attributed to the offender, the more they recognized a need for and anticipated a greater appreciation for such a symbolic award.<sup>235</sup>

227. *Will I Be Next? US Drone Strikes in Pakistan*, AMNESTY INT’L 39-40 (2013), <https://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>.

228. NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 61-62 (2005).

229. See e.g., William P. Bottom et al., *When Talk Is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 *ORG. SCI.* 497 (2002); Scher & Darley, *supra* note 182; Schmitt et al., *supra* note 182; Jeanne S. Zechmeister, *Don’t Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 *J. SOC. & CLINICAL PSYCHOL.* 532 (2004).

230. Schmitt et al., *supra* note 182.

231. Liesbeth Hulst & Arno J. Akkermans, *Can Money Symbolize Acknowledgment? How Victims’ Relatives Perceive Monetary Awards for Their Emotional Harm*, 4 *PSYCHOL. INJ. & L.* 245 (2011).

232. Per the legislation, a fixed amount would be paid to the family member(s) by the offender, but “[i]n practice, these costs would almost always be borne by the harm-doer’s insurer, or by a violent crime victim compensation fund.” *Id.* at 247.

233. *Id.* at 246.

234. *Id.* at 251.

235. *Id.* at 254.

Actual recipients of such payments in Belgium also reacted positively, but criticized the impersonal way in which the financial offers had been made in practice.<sup>236</sup> They noted, for example,

- (1) The letter was “written in cold rationalistic terms. . . . The letter was the same as the letter for the damage to the car.”
- (2) “The letter referred to a file number, just a file number. Not a person. And nothing emotional. A ‘cold fish’ letter.”
- (3) “The letter included wording such as ‘with reference to’ rather than something like ‘in view of the murder of your daughter on that date, we have decided to issue a payment in satisfaction, of this and that amount.’ It could also be done in more humane, warm wording. They ought to mention the name of the child rather than ‘Re: file number.’”<sup>237</sup>

Similar complaints have been heard from the families of civilians killed in armed conflict settings.<sup>238</sup> Thus, symbolic monetary payments can be welcome and effective, but the way in which they are distributed matters to victims.

### B. *Supply-Side*

Amends serve a variety of purposes for injured persons, but injurers may find it very difficult to offer amends. Consider apologies. Apologizing is uncomfortable, creates vulnerability, and is hard to do effectively.<sup>239</sup> In the context of armed conflict, security concerns may also inhibit comfort with making amends. But even though there are barriers, there are also a variety of countervailing considerations that justify the offering of amends from the perspective of the offeror. In particular, offering amends has the potential to further important military objectives, address soldiers’ moral injuries, and contribute to the professionalization of the military.

#### 1. *Hearts and Minds*

From the perspective of the supplying state, making amends can assist with the state’s ultimate military objectives by helping to win the hearts and minds of the local population. In counterinsurgencies, gaining and maintaining

236. *Id.* at 255.

237. *Id.*

238. Spencer Ackerman, *After Drones: The Indelible Mark of America’s Remote Control Warfare*, GUARDIAN (Apr. 21, 2016), <https://www.theguardian.com/us-news/2016/apr/21/drone-war-obama-pakistan-cia> (reporting that for one family member, “[a]n official letter came, acknowledging the tragedy, but “the names of [his] family were not fully right”).

239. See, e.g., CAROL TAVRIS & ELIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* (2007). On the other hand, *not* apologizing can allow the individual to preserve feelings of greater control, a greater sense of value integrity, and more positive self-esteem. Tyler G. Okimoto et al., *Refusing To Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for this Research Finding)*, 43 EUR. J. SOC. PSYCHOL. 22 (2013); Brent T. White, *Saving Face: The Benefits of Not Saying I’m Sorry*, 72 L. & CONTEMP. PROBS. 261 (2009); see also Andrew Molinsky & Joshua Margolis, *Necessary Evils and Interpersonal Sensitivity in Organizations*, 30 ACAD. MGMT. REV. 245, 247 (2005) (noting that the mix of roles necessary evils entail—“catalyst of good, source of harm, witness, and potential source of aid—create psychological ambivalence”). Individuals vary in their proclivity to offer apologies. Andrew J. Howell et al., *The Disposition To Apologize*, 51 PERSONALITY & INDIVIDUAL DIFFERENCES 509 (2011).

the support of the local population is essential to the overall mission; such support increases information flow about the behavior and membership of the insurgency, while simultaneously slowing information flow to and recruitment by the insurgency.<sup>240</sup> To prevail under such an approach, the local population must believe that the military serves their interests better than the insurgents do.<sup>241</sup> Enhancing security is important, but often not enough to achieve counterinsurgency goals.<sup>242</sup> Similarly, mere compliance with the laws of war may be a necessary but not sufficient effort.<sup>243</sup> Even lawful collateral damage can increase support for insurgencies and result in higher levels of insurgent attacks.<sup>244</sup> Because foreign militaries are, by definition, outsiders, locals will respond to their bad behavior much more harshly than to similar acts committed by local insurgencies.<sup>245</sup> But the legitimacy of an authority is judged, in part, by the ways in which the authority treats those whom it affects, both during and after the encounter.<sup>246</sup> Thus, adherence to both law and the principle of humanity, as well as basic morals and ethics,<sup>247</sup> can help create legitimacy and may provide a valuable contrast to insurgent behavior.<sup>248</sup>

240. See STATHIS KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 128 (2006); Luke Condra & Jacob Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. POL. SCI. 167, 169 (2012).

241. Toward that end, U.S. counterinsurgency manuals direct troops to minimize civilian casualties, demonstrate restraint, satisfy community needs, mobilize support, as well as show “genuine compassion” and act with “kindness” and empathy towards the locals. U.S. ARMY AND MARINE CORPS, *COUNTERINSURGENCY* §§ 1-138, 3-2, 3-8, 3-19, 5-2, 7-10, 7-11, 7-21, 7-23, 7-30, 7-32, 7-33, 7-48, A-7 (2006); U.S. ARMY AND MARINE CORPS, *INSURGENCIES AND COUNTERING INSURGENCIES* § 1-38 (2014); JOHN A. NAGL, *THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL* 294-95 (2007).

242. See Nicholas Sambanis, *Parochialism as a Central Challenge in Counterinsurgency*, 336 SCIENCE 805, 807 (2012) (discussing the mechanism by which violence can harden group identities).

243. Gregory McNeal, *New Approaches To Reducing and Mitigating Harm to Civilians, in SHAPING A GLOBAL LEGAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE* 127, 128 (2012).

244. Condra & Shapiro, *supra* note 240, at 168, 177; Andrew Shaver & Jacob Shapiro, *The Effect of Civilian Casualties on Wartime Informing: Evidence from the Iraq War* (Households Conflict Network, Working Paper No. 210, 2016), [http://scholar.princeton.edu/sites/default/files/jns/files/shaver\\_shapiro\\_2016\\_tips.pdf](http://scholar.princeton.edu/sites/default/files/jns/files/shaver_shapiro_2016_tips.pdf) (finding that “information flow goes down after government forces inadvertently kill civilians and it goes up when insurgents do so”). Assessments of ISAF data have revealed that in Afghanistan there is a relationship between civilian casualties and an increase in future violent incidents—consistent with the revenge hypothesis. Luke Condra et al., *The Effect of Civilian Casualties in Afghanistan and Iraq* 22 (Nat’l Bureau of Econ. Research, Working Paper No. 16152, 2010). But see Alexander Downes, *Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy*, 9 CIV. WARS 420, 427, 438, 440 (2007) (discussing historical examples in which indiscriminate civilian violence have helped states defeat insurgencies); Jason Lyall, *Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya*, 53 J. CONFLICT RES. 331, 338 (2009) (concluding that indiscriminate government violence did not cause an increase in insurgent violence).

245. Lyall et al., *supra* note 160, at 679.

246. See generally Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006). For an example, see Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople View Good Policing* (Yale Law Sch., Pub. Law Working Paper No. 255, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2116645](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116645) (describing the dynamics of this interplay in the context of domestic policing).

247. Sam Sarkesian & Thomas Gannon, *Professionalism: Problems and Challenges, in WAR, MORALITY, AND THE MILITARY PROFESSION* 127, 131 (Malham Wakin ed., 1979).

248. GANESH SITARAMAN, *THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* (2013); see also Goodstein, Butterfield & Neale, *supra* note 173, at 31-32 (finding that amends can result in increased “goodwill” from the target).



Recent empirical research on the effects of U.S. attempts to win hearts and minds has been mixed and strongly suggests that implementation matters a great deal. For instance, aid, one of the components of a counterinsurgency strategy, often fails to improve attitudes toward foreign military actors.<sup>249</sup> In fact, poorly designed aid programs can increase, rather than ameliorate, grievances and reduce, rather than enhance, support for the state.<sup>250</sup> Context may matter as well. One study concluded that while development aid may not generally reduce violence, small, well-tailored projects did do so in Iraq but not Afghanistan.<sup>251</sup> While the evidence on existing condolence and solatia payments is scant, a recent study found that while such efforts did not increase support for the combatants offering the aid, they were associated with a decrease in support for rival combatants.<sup>252</sup>

## 2. Soldiers' Moral Injuries

Amends might also address the moral injury of individual soldiers responsible for civilian deaths. A "moral injury" is a violation of an individual's belief and expectation that he and others will behave "in a just and ethical manner."<sup>253</sup> Killing civilians, even if done lawfully or accidentally, may create a significant moral injury<sup>254</sup> by transgressing fundamental personal beliefs such as: "the world is just";<sup>255</sup> "people get what they deserve";<sup>256</sup> military service "creates a better world";<sup>257</sup> and killing innocents is wrong.<sup>258</sup>

249. Jan Rasmus Bohnke & Christoph Zurcher, *Aid, Minds and Hearts: The Impact of Aid in Conflict Zones*, 30 CONFLICT MGMT. & PEACE SCI. 411, 427 (2013).

250. Steven A. Zyck, *How To Lose Allies and Finance Your Enemies: The Economisation of Conflict Termination in Afghanistan*, 12 CONFLICT, SECURITY, & DEV. 249, 249 (2012).

251. Tiffany Chou, *Does Development Assistance Reduce Violence? Evidence from Afghanistan*, 7 ECON. PEACE & SECURITY J. 5, 5 (2012).

252. Lyall et al., *supra* note 160, at 693.

253. Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*, 17 TRAUMATOLOGY 8, 9 (2011). Moral injury can be more fully defined as "disruption in an individual's confidence and expectations about one's own or others' motivation or capacity to behave in a just and ethical manner." *Id.* This sort of injury should not be unexpected as moral traits and morality are considered to be central to personal identity. Nina Strohminger & Shaun Nichols, *The Essential Moral Self*, 131 COGNITION 159, 168 (2014); see also Karl Aquino & Americus Reed II, *The Self-Importance of Moral Identity*, 83 J. PERSONALITY & SOC. PSYCHOL. 1423, 1436 (2002) (discussing "the relevance of moral identity as a predictor of moral cognition and behavior").

254. Shira Maguen & Brett Litz, *Moral Injury in Veterans of War*, 23 PTSD RES. Q. 1, 1 (2012); Jonathan Shay, *Moral Injury*, 16 INTERTEXTS 57, 59 (2012); Maria M. Steenkamp et al., *How Best To Treat Deployment-Related Guilt and Shame: Commentary on Smith, Dauz, and Rauch (2013)*, 20 COGNITIVE & BEHAV. PRAC. 471, 471 (2013); Alison Flipse Vargas et al., *Moral Injury Themes in Combat Veterans' Narrative Responses from the National Vietnam Veterans' Readjustment Study*, 19 TRAUMATOLOGY 243, 248 (2013).

255. Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1030 (1978).

256. Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCH. REV. 695, 699 (2009).

257. A. Nazarov et al., *Role of Morality in the Experience of Guilt and Shame Within the Armed Forces*, 132 ACTA PSYCHIATRICA SCANDINAVICA 4, 13 (2015).

258. Flipse Vargas et al., *supra* note 254, at 248. This is consistent with psychological evidence suggesting that individual battle failure is most commonly attributed to "fear of killing rather than fear of being killed." Captain Gordon B. Baldwin, *A New Look at the Law of War: Limited War and Field Manual 27-10*, 4 MIL. L. REV. 1, 12 (1959).

Soldiers are particularly at risk for moral injuries in non-traditional conflicts where distinguishing combatants and civilians is difficult.<sup>259</sup> Empirical research on the war on terror suggests both that a significant percentage of American soldiers have killed civilians<sup>260</sup> and that many soldiers seem to be suffering from moral injuries.<sup>261</sup>

Moral injuries can have a devastating impact on individuals. While not every soldier who kills a civilian will experience a moral injury, those who do may believe their behavior is “immoral, irredeemable, and unrepairable”<sup>262</sup> or more generally that the world itself is immoral.<sup>263</sup> These soldiers may experience extreme shame and guilt,<sup>264</sup> with consequences including alcohol and drug abuse,<sup>265</sup> domestic violence,<sup>266</sup> as well as suicide.<sup>267</sup> As more soldiers’ lives are lost each year to suicide than to combat,<sup>268</sup> this problem of moral injury merits sustained attention and resources.

Feelings of guilt are not limited to unlawful killing or injuries—instances in which one would be held legally responsible for a particular harm. Simply having caused harm to another can result in feelings of guilt,<sup>269</sup> even if it is clear that one would not be held legally liable. The notion of “agent regret”

259. Litz et al., *supra* note 256, at 696; Flipse Vargas et al., *supra* note 254, at 248.

260. Twenty percent as of 2004 for Iraq and Afghanistan. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 N. ENG. J. MED. 13, 18 (2004).

261. Jacob K. Farnsworth et al., *The Role for Moral Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. GEN. PSYCHOL. 249, 250 (2014) (noting that the percentage is about 20%). For an individual example, see Dexter Filkins, *Atonement: A Troubled Iraq Veteran Seeks Out the Family He Harmed*, NEW YORKER (Oct. 9, 2012), <http://www.newyorker.com/magazine/2012/10/29/atonement>.

262. Litz et al., *supra* note 256, at 698.

263. See Filkins, *supra* note 261 (quoting a psychiatrist as saying that soldiers “hate it when they have killed somebody they didn’t need to kill. . . . It’s a scar on their soul”).

264. Erin R. Smith et al., *Perceived Perpetration During Traumatic Events: Clinical Suggestions From Experts in Prolonged Exposure Therapy*, 20 COGNITIVE & BEHAV. PRAC. 461, 461-62 (2013); see also Molinsky & Margolis, *supra* note 239, at 251 (2005) (discussing how the need to perform “necessary evils” can result in feelings of guilt).

265. Shira Maguen et al., *The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq War Veterans*, 23 J. TRAUMATIC STRESS 86, 89 (2010); Shira Maguen & Brett Litz, *Moral Injury in the Context of War*, U.S. DEP’T VETS. AFFS. (Feb. 23, 2016), [http://www.ptsd.va.gov/professional/co-occurring/moral\\_injury\\_at\\_war.asp](http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp).

266. Shay, *supra* note 254, at 184.

267. Kent D. Drescher et al., *Morality and Moral Injury: Insights from Theology and Health Science*, REFLECTIVE PRAC.: FORMATION & SUPERVISION MINISTRY 50, 58 (2013); Shira Maguen, *Killing in Combat May Be Independently Associated with Suicidal Ideation*, 29 DEPRESSION & ANXIETY 918, 921 (2012); Nakashima Brock & Herman Keizer, *Moral Injury: The Crucial Missing Piece in Understanding Soldier Suicides*, HUFFINGTON POST (July 23, 2012), [http://www.huffingtonpost.com/rita-nakashima-brock-ph-d/moral-injury-the-crucial-missing-piece-in-understanding-soldier-suicides\\_b\\_1686674.html](http://www.huffingtonpost.com/rita-nakashima-brock-ph-d/moral-injury-the-crucial-missing-piece-in-understanding-soldier-suicides_b_1686674.html).

268. William P. Corr, *Suicides and Suicide Attempts Among Active Component Members of the U.S. Armed Forces, 2010-2012: Methods of Self-Harm Vary by Major Geographic Region of Assignment*, 21 MED. SURVEILLANCE MONTHLY REP. 2, 2 (2014).

269. Roy F. Baumeister et al., *Guilt: An Interpersonal Approach*, 115 PSYCHOL. BULL. 243, 245 (1994) (defining guilt as “an individual’s unpleasant emotional state associated with possible objections to his or her actions, inaction, circumstances, or intentions” and that is “based on the possibility that one may be in the wrong or that others may have such a perception”). Feelings of guilt can motivate the offering of an apology, a change in behavior, or the making of amends in other ways. *Id.* at 257. Alternately, feelings of guilt can lead to the derogation (and avoidance) of victims. *Id.* at 251, 258.

recognizes that an individual can experience a “special sort of negative reaction on account of being the one who inflicted the damage, even if he did so blamelessly.”<sup>270</sup> Similarly, research on “necessary evils” in business suggests that causing harm—even justified harm—can “elicit intense and potentially disruptive thoughts and emotions in the doer.”<sup>271</sup>

Moral injury relating to civilian deaths might result from a variety of situations. For instance, face-to-face contact is not necessary to experience a moral injury. Drone operators who never enter the physical space of a combat zone still suffer from post-traumatic stress and moral injury.<sup>272</sup> Even those with no causal role may suffer as a result of witnessing or learning of a violation of their belief system.<sup>273</sup>

The nascent research on both moral injury treatment and self-forgiveness more broadly provides some important preliminary insights. First, self-forgiveness is important to overcoming shame and guilt. The kind of self-forgiveness that can alleviate symptoms includes “acknowledging the event, [and] accepting responsibility for it,” along with devoting energy to heal and committing to living differently.<sup>274</sup> Second, helpful early interventions for those with moral injuries include therapy<sup>275</sup> and making amends.<sup>276</sup> Examples of activities that have been used in the therapeutic context include imagined conversations with and letter writing to victims.<sup>277</sup> Moral repair is easier to achieve for those individuals who can come to expect that “justice is balanced

270. Helmreich, *supra* note 187, at 583. “Survivor’s guilt” offers another example in which guilty feelings can exist simultaneously with recognition that the survivor is not to blame. See Baumeister et al., *supra* note 269, at 251-52.

271. Joshua Margolis & Andrew Molinsky, *Navigating the Bind of Necessary Evils: Psychological Engagement and the Production of Interpersonally Sensitive Behavior*, 51 ACAD. MGMT. J. 847, 847 (2008) (reviewing studies); see also Molinsky & Margolis, *supra* note 239, at 247 (“Necessary evils have three distinguishing characteristics: (1) a valued objective requires that they be done, hence making them necessary; (2) they inflict ineradicable harm, and they therefore entail evil; and (3) they are integral to the role the performer occupies, thus making them mandatory.”).

272. While the empirical data on such injuries in this setting is new, military psychologists endorse the application of this concept. Herman Keizer Jr., *Stop Drone Strikes and the Moral Injury of Their Pilots*, STAR-TELEGRAM (Feb. 10, 2015, 5:36 PM), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article9702050.html> (describing the work of the “Soul Repair Center” in leading research and public education on war-related trauma as moral injury).

273. Take, for example, the experience of Ron Ridenhour who was not present at the My Lai massacre, but exposed the event after learning of it. He “remained bitter and disillusioned,” about what he considered to be a whitewash of the event. John H. Cushman Jr., *Ronald Ridenhour, 52, Veteran Who Reported My Lai Massacre*, N.Y. TIMES (May 11, 1998), <http://www.nytimes.com/1998/05/11/us/ronald-ridenhour-52-veteran-who-reported-my-lai-massacre.html>.

274. Litz et al., *supra* note 256, at 700; see also Michael Wenzel et al., *No Genuine Self-Forgiveness Without Accepting Responsibility: Value Reaffirmation as a Key to Maintaining Positive Self-Regard*, 42 EUR. J. SOC. PSYCHOL. 617, 624 (2012). See generally Julie H. Hall & Frank D. Fincham, *Self-Forgiveness: The Stepchild of Forgiveness Research*, 24 J. SOC. & CLINICAL PSYCHOL. 621 (2005) (reviewing research on self-forgiveness). Believing that others forgive their transgression can also aid self-forgiveness, though it is not a necessary condition. Nazarov, *supra* note 257, at 14; see also Filkins, *supra* note 261 (describing a soldier who “wanted to know that the survivors understood why he had done what he had, even if it was not entirely defensible. And he wanted them to know that he felt their suffering in his own”).

275. Litz et al., *supra* note 256, at 701.

276. Steenkamp et al., *supra* note 254, at 474; Everett L. Worthington, Jr. & Diana Langberg, *Religious Considerations and Self-Forgiveness in Treating Complex Trauma and Moral Injury in Present and Former Soldiers*, 40 J. PSYCHOL. & THEOLOGY 274, 282-83 (2012).

277. Smith et al., *supra* note 264, at 468.

(i.e., that transgressions have consequences *and* redress and repair are possible).<sup>278</sup> Thus, in the wake of a moral injury, an “equally intense real-time encounter with a countervailing experience” can be helpful.<sup>279</sup> Finally, making amends in a way that reaffirms values that the individual holds dear—values related to respect for humanity, honorable military service, or the protection of innocent civilians—can enable individuals to reconcile their role in having caused harm with their own sense of positive self-regard.<sup>280</sup>

Amends, therefore, including apologies and victim compensation, could be justified as part of a self-forgiveness process for soldiers with moral injuries. Well-designed amends processes could allow soldiers to know that their victims’ injuries have been acknowledged and addressed, even if those victims cannot be made whole. Depending on the design of the amends making process, soldiers might have an opportunity to directly express their remorse and participate in amends making events.<sup>281</sup>

### 3. Reinforce Military Professionalism

The United States and many other states embrace military professionalism as a way to discipline soldiers, achieve their military ends, and promote restraint in conflict and other settings.<sup>282</sup> States grant militaries a near monopoly over the “management of violence” in armed conflict.<sup>283</sup> In exchange, they rely on military culture<sup>284</sup> and military codes<sup>285</sup> to ensure

278. Litz et al., *supra* note 256, at 701.

279. *Id.*

280. Wenzel et al., *supra* note 274; see also Thomas P. Carpenter et al., *Tipping the Scales: Conciliatory Behavior and the Morality of Self-Forgiveness*, 9 J. POSITIVE PSYCHOL. 389 (2014) (finding that conciliatory behavior—including apologizing, making amends, offering restitution, and seeking forgiveness—increases self-forgiveness); Goodstein et al., *supra* note 173, at 26, 30 (finding that making amends can result in the maintenance or enhancing of “values, character, and standards,” self-forgiveness, self-respect, and self-improvement). Research has also found that people tend to regret instances in which they have failed to apologize more than they regret instances in which they have offered apologies. Julie Juola Exline et al., *Is Apology Worth the Risk? Predictors, Outcomes, and Ways to Avoid Regret*, 26 J. SOC. & CLINICAL PSYCHOL. 479, 488-90, 497-99 (2007).

281. See *infra* text accompanying notes 381-383.

282. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 6 (1992) (noting that militaries’ professionalization was partially a response to the governance problems raised by those militaries that “lived off the land and disrupted the lives of civilians in the lands they occupied”). States have ever-increasing reasons to care about professionalism as militaries often perform a variety of other functions besides their traditional combat role. Samuel Huntington, *Keynote: Non-Traditional Roles for the U.S. Military*, in NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA 1, 5 (James R. Graham ed., 1994); Alan Vick et al., *Preparing the U.S. Airforce for Military Operations Other than War*, RAND 10 (1997), [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/MR842/MR842.chap2.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR842/MR842.chap2.pdf) (noting that the United States Air Force has participated in 338 military operations other than wars between 1916 and 1996). In fact, during emergencies, soldiers may be asked to move quickly between combat and noncombat roles. John R. Galvin, *Final Thoughts: Non-Traditional Roles for the U.S. Military*, in NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA 114 (James R. Graham ed., 1994).

283. Samuel Huntington, *Officership as a Profession, in WAR, MORALITY, AND THE MILITARY PROFESSION* 11, 16 (Malham Wakin ed., 1979) (attributing this phrase to Harold Lasswell).

284. See SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL MILITARY RELATIONS* 9 (1957). For all professions, this includes the belief that “to be a professional is to make a moral commitment, a commitment to use one’s skills and knowledge, in part at least for the society’s wellbeing.” Paul R. Camenisch, *On Being a Professional, Morally Speaking*, in

soldiers respect this deep societal responsibility.<sup>286</sup> The ensuing military professionalism serves a vital function—it binds individual soldiers to the collective interest.<sup>287</sup> In so doing, it enables soldiers to cooperate with and trust one another in the most difficult of circumstances<sup>288</sup> and encourages them to follow rules even when those rules seem counterintuitive or counterproductive.<sup>289</sup>

Part of what constitutes modern military professionalism is a belief that military careers are honorable<sup>290</sup> and that the moral underpinning of soldiers' killings distinguishes their acts from "mere butchery."<sup>291</sup> In order to maintain this worldview, soldiers must believe that their rules are rooted in an ethical humanity and a culture of civilian protection.<sup>292</sup> The principle of distinction which allows intentional targeting of combatants, but forbids the targeting of non-combatants is an example. The principle of distinction makes killing less repugnant<sup>293</sup> because it is restrained.<sup>294</sup> But as non-traditional conflicts bring an increasing number of civilian deaths, soldiers need to know they are acting not just lawfully, but also ethically.

Making amends for lawful harm may reinforce this sense of professionalism. In particular, making amends is consistent with the principle of humanity embodied in IHL.<sup>295</sup> While humanity in armed conflict is an

MORAL RESPONSIBILITY IN THE PROFESSIONS 42, 49 (Bernard Baumrin & Benjamin Freedman eds., 1983).

285. See Ernest Greenwood, *Attributes of a Profession*, in MORAL RESPONSIBILITY IN THE PROFESSIONS 20, 23 (Bernard Baumrin & Benjamin Freedman eds., 1983).

286. See HUNTINGTON, *supra* note 284, at 9; see also Camenisch, *supra* note 284, at 49.

287. See Emile Durkheim, *Professional Ethics and Civic Morals*, in MORAL RESPONSIBILITY IN THE PROFESSIONS 33, 38-39 (Bernard Baumrin & Benjamin Freedman eds., 1983).

288. MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 89 (1991); see also John Winthrop Hackett, *Society and the Soldier*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 79, 81 (Malham Wakin ed., 1979).

289. Kutz, *supra* note 101, at 167.

290. MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER* 107 (1960).

291. See DAVID KENNEDY, *OF WAR AND LAW* 102 (2006) ("Military professionals the world over are emboldened by the confidence that what they do on the battlefield, in war, should be judged by different standards, tested by different rules, than what they do at home with their families, when their communities are at peace . . . For the military, legitimacy and virtue are measured by the law in war alone."); MICHAEL WALZER, *JUST AND UNJUST WAR* 45 (1977) (noting military personnel see the laws of war as "limits and restraints that distinguish their life's work from mere butchery").

292. KENNEDY, *supra* note 291, at 103 ("[T]he traditional law continues to be useful to cabin and channel the effort, discipline the troops, and preserve the boundaries of professional expertise and responsibility . . . The classic law continues to express—and channel—ethical sensibility. There may be no military reason for wanton violence, but human sentiment also calls out for humane treatment when one is no longer able to pursue the professional mission to destroy the enemy."); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 *DUKE J. COMP. & INT'L L.* 11, 76 (1995).

293. Baldwin, *supra* note 258, at 12.

294. Michael Newton contends that "[t]he law of armed conflict emerged as the benchmark for military professionalism because its precepts restrain the application of raw power and bloodlust even in the midst of chaos, mind-numbing fear and overwhelming uncertainty. The law of war is integral to the very notion of professionalism because it defines the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity." Michael Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 *ROGER WIL. U. L. REV.* 877, 902 (2007).

295. The Convention respecting the Laws and Customs of War on Land provides: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient

amorphous concept, in practice, it has meant that the means and methods of warfare are not unlimited, combatants must distinguish between combatants and civilians, and civilians should be protected as such.<sup>296</sup> Amends might be viewed as minimizing the effects of warfare on civilians when the population cannot be wholly spared from military operations. In this sense, amends could be characterized as an *ex post* protection to add to the existing range of mostly *ex ante* protections of civilians.<sup>297</sup>

Moreover, making amends could signal to soldiers that their institution behaves, not just legally, but also with honor and compassion. They could distinguish themselves from murderous thugs, because they and their institutions recognize the impact of their behavior on innocent parties and take some action to redress it. Responses to civilian casualties could serve as a source of and reinforcement for the military's shared morality by expiating the immorality of unlawful killings and the moral taint of lawful killings. Even more broadly, taking responsibility for having caused harm provides an opportunity for learning for both individuals and organizations.<sup>298</sup> And apologizing can have positive effects on group morale more generally.<sup>299</sup>

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to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Convention II, *supra* note 24, Preamble.

296. See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 83 (2000).

297. See generally Holewinski, *supra* note 105, at 318 (describing amends as "a logical extension of civilian protection mores").

298. Cohen, *The Immorality of Denial*, *supra* note 187, at 944; see also Jonathan R. Cohen, *Apology and Organizations: Exploring an Example From Medical Practice*, 27 FORDHAM URB. L. J. 1447, 1464-68 (1999) [hereinafter Cohen, *Apology and Organizations*].

299. Cohen, *Apology and Organizations*, *supra* note 298, at 1473-74 (describing the pride experienced by employees of a hospital that responds to medical error with apology).

Table 4: Potential Justifications for Amends

BENEFICIARY	CONCERN	MECHANISM
Foreign Victims	Suffering	Acknowledge Loss
	Desire for Information	Provide Explanation
	Financial Needs	Give Compensation
	Prevent Future Harm	Facilitate Learning
	Dignity	Respectful Treatment
Foreign Communities	Anger/Injustice	Demonstrate Respect
Perpetuating Soldiers	Moral Injury	Facilitate Self-Forgiveness
Military	Hearts and Minds	Reinforce Moral Position
	Military Professionalism	Embrace Humanity Principle
		Embrace Principle of Distinction

### III. AMENDS DESIGN

We propose a redesign of condolence and solatia efforts that aims to better satisfy the broad range of supply and demand-side needs. In particular, we offer some preliminary suggestions in the areas of acknowledgment of harm and promises of forbearance and non-repetition. We emphasize that designers must account for the cultures of both the providers and the recipients as well as concerns related to who offers and who receives amends.

A few preliminary matters are worth nothing. We propose amends as an extension of or a reimagining of the existing condolence or solatia program. As with these existing programs, the focus of amends is on civilians, not combatants nor the IHL category of “civilians directly participating in hostilities.”<sup>300</sup> This may place the state in the unenviable position of offering

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300. Combatants, by virtue of their status, and civilians directly participating in hostilities, by virtue of their current behavior, present a direct risk to service members. *See supra* note 51. Civilians, by contrast, present no direct threat. Amends, therefore, ought to be offered regardless of whether harm to civilians was a known risk, a certainty, or the result of a mistake in identity. For instance, if a soldier mistakenly, but reasonably, invoked his right to self-defense, believing a civilian was a combatant or participating in hostilities though the person was not, such a person would be entitled to amends. If a civilian was confused by a checkpoint and continued to drive through and was killed but subsequent investigation revealed the driver to be a civilian, amends would be paid. In contrast, a civilian who decided to act as a lookout for an armed group and was killed as part of an attack on an armed group’s

amends to the families of civilians who are not directly participating in hostilities, but who are nonetheless supportive of the enemy.<sup>301</sup> This is appropriate and not a departure from the status quo. Such persons are considered to be civilians under IHL and should be treated as such.<sup>302</sup>

Similarly, nothing about our proposed amends design would alter a soldier's right to self-defense or a commander's lawful range of actions,<sup>303</sup> as a requirement to provide amends does not change the legal framework governing the military behavior that leads to the need for amends. Of course, one of the purposes of amends is to reduce harm in situations in which the use of force is necessary. It is possible that knowledge of an amends program could cause soldiers to voluntarily restrict their exercise of force or for commanders to adopt rules of engagement restricting their exercise of force.<sup>304</sup> Such limitations are appropriate. "[S]ervicemembers executing military operations act in a public, not a personal, capacity. As such, defensive use-of-force rules for the military should be grounded in the domestic and human rights law governing the use of force by state actors, reflected in the public authority doctrine, not general principles of individual self-defense."<sup>305</sup>

It is also worth noting that condolence payments or solatia should not be viewed as the exclusive effort to address the needs of individuals and communities. Larger scale efforts may be needed as well. Accordingly, we do not view this proposed form of amends making as a substitute for other counterinsurgency efforts. Relatedly, amends ought not be limited to those instances in which militaries possess counterinsurgency goals. While the supply-side needs may be lessened in such instances, the moral injury and professionalism concerns are present in all types of conflicts, and the demand-side needs are just as significant.

Finally, redesigned condolence or solatia programs ought not be used as an alternative to legal redress for *unlawful* civilian deaths.<sup>306</sup> While amends might be a preferable second best to no response at all, they are not an effective

compound is a civilian directly participating in hostilities and not entitled to amends. *See, e.g.*, U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 8.2.2 (July 2007).

301. For instance, financiers and propagandists are not classified as combatants and would, therefore, be entitled to amends. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS 34 (May 2009).

302. In such situations, the appropriate sanction, if any, for sympathizing with the enemy is criminal prosecution, to the extent that such support rises to the level of a crime. *See supra* note 17.

303. *See* Exec. Order No. 13,732, *supra* note 27, § 5(a).

304. Empirical research is needed to more carefully assess the potential impacts of making amends on service member attitudes and behavior. It is possible that amends might lead to an increased use of force if service members view the compensation part of amends as a tax that drains the act of civilian killing of its moral stigma. *See* Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000). The expectation that amends will be made could also serve to license less moral conduct. *See* Jessica Cascio & E. Ashby Plant, *Prospective Moral Licensing: Does Anticipating Doing Good Later Allow You To Be Bad Now?*, 56 J. EXPERIMENTAL SOC. PSYCHOL. 110, 111 (2015); Benoit Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001). However, we suspect that the other components of amends, such as personal apologies and data assessment, would tip the balance toward a decreased use of force.

305. *Corn, supra* note 54, at 7.

306. *See supra* note 17.



alternative to a functional military criminal justice system that punishes wrongdoers in appropriate instances.<sup>307</sup>

#### A. Systematization and Reporting

The first wave of suggestions for reforming amends practices in the military setting focused on recognizing a duty to compensate, systematizing the provision of payments, providing adequate compensation, and improving reporting and transparency. Some scholars and non-governmental organizations have argued that international law ought to make state payments mandatory for all civilians injured by foreign armed forces—even when those injuries are caused lawfully.<sup>308</sup> They root these arguments in morality, the logic of tort law, and pragmatic concern that the needs of victims might not be satisfied in the absence of a binding legal duty. States, including the United States,<sup>309</sup> however, have thus far strongly resisted efforts any efforts to make such payments obligatory under international law.<sup>310</sup> Given the existing reluctance of states to accept such a duty under international law, some NGOs have reframed their objectives away from required cash payments toward measures that focus on “ensuring greater attentiveness and recognition of civilian concerns and harm, making apologies, and providing other forms of assistance as necessary and according to what is deemed culturally appropriate.”<sup>311</sup>

Others, rather than focusing on any international legal duty, have emphasized the importance of more uniform provision of payments and more consistency in the amounts paid to those who qualify.<sup>312</sup> For instance, one study

307. United Nations Secretary-General Ban Ki-moon, for example, cautioned against condolence payments as a substitute for adjudicating and repairing harm caused in ways that contravene legal strictures:

I note the emerging practice of several States, one that other parties to armed conflict might consider, of acknowledging the harm they cause to civilians and compensating victims. The practice of making amends may be provided to individuals, families and communities. *This practice must not be seen, however, as an alternative to prosecuting those responsible for violations of international humanitarian and human rights law and delivering justice to the victims and their families and communities.*

U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 93 U.N. Doc S/2010/579 (Nov. 11, 2010) (emphasis added).

308. For instance, in 2011, CIVIC called on the U.S. Department of Defense (DoD) and Central Intelligence Agency (CIA) to count and compensate civilians harmed by drones. Press Release, CIVIC, *Civilian Drone Victims Deserve to Be Counted and Compensated* (Mar. 24, 2011). See generally Scott T. Paul, *The Duty to Make Amends to Victims of Armed Conflict*, 22 TUL. J. INT'L & COMP. L. 87, 106 (2013) (arguing for compensation and recognition); W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397-98 (1997) (describing how a tort liability might be structured in this context including the possibility of strict liability); Ronen, *supra* note 38 (describing the benefits of a strict liability approach to compensation in this setting).

309. OFFICE OF GENERAL COUNSEL DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 269 (2015).

310. CHARLI CARPENTER, *LOST CAUSES: AGENDA VETTING IN GLOBAL ISSUE NETWORKS AND THE SHAPING OF HUMAN SECURITY* 57 (2014).

311. Gilbert, *The Gift of War: Cash, Counterinsurgency, and 'Collateral Damage'*, SECURITY DIALOGUE 1, 11 (2015).

312. Rogers, *supra* note 19, at 13-14; see also Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 AIR FORCE L. REV. 227, 238-39 (1997) (suggesting solatia should always be paid when locals have a tradition of payment); Hillel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 IND. L. J. 335, 362-64 (2003)

found that the Taliban did a far better job approaching those who self-identified as suffering Taliban victimization than the coalition forces did in approaching its victims.<sup>313</sup> Moreover, there is evidence that even when the United States approves a payment, it often fails to disburse the funds.<sup>314</sup> And for those who receive payments, the amount of money provided for similar harms can vary significantly across potentially irrelevant dimensions like gender and geographic location.<sup>315</sup> While caps on payments exist, “the valuation of amounts is determined on an ad hoc basis with no clear valuation calculus.”<sup>316</sup> In order to facilitate improvements here, some have argued for improved casualty reporting<sup>317</sup> and greater transparency of payments.<sup>318</sup>

Though we support efforts to expand coverage and provide more consistent and coherent payments,<sup>319</sup> and hope that President Obama’s Executive Order may prompt improvement in this regard, we caution that the overwhelming focus on standardization might obscure or even undermine other aspects of amends. As explained above, amends are about the recognition of a relationship between the injurer and the injured, the acknowledgement of the significance of the individual who was injured, and the reinforcement of a shared set of values or norms. Thus, conceiving of the endeavor to systematize the amends making process as striving to provide a standardized insurance-like type of payment risks limiting the process’s ability to achieve either its supply- or demand-side objectives. We noted earlier the reactions of recipients to the impersonal letters that accompanied symbolic emotional harm payments in Belgium and the concern that routinization of condolence payments can lead to a lack of sensitivity to victim needs, undermining responsiveness in a way that can be counterproductive.<sup>320</sup>

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(discussing the merits of permanent versus ad hoc systems of state-based compensation for victims of terrorism); Witt, *supra* note 111, at 1477; *Ex-gratia Payments in Afghanistan: A Case for Standing Policy for the U.S. Military*, CIVIC (2015) [hereinafter *Ex gratia Payments*].

313. Lyall et al., *supra* note 160, at 693 (observing over 60% of those identifying as Taliban victims reported being approached as compared to only 16% of those identifying as victims of coalition forces).

314. *Ex gratia Payments*, *supra* note 312.

315. *Id.* at 3-5.

316. van Dijken et al., *supra* note 93, at 5.

317. The Count Every Casualty campaign, which emphasizes the importance of “recognition of victims,” suggests that mandatory casualty accounting might be used to facilitate compensation. Jacob Beswick & Elizabeth Minor, *Casualty Recording*, in ACKNOWLEDGE, AMEND, ASSIST: ADDRESSING CIVILIAN HARM CAUSED BY ARMED CONFLICT AND ARMED VIOLENCE 4, 7 (Apr. 2015), <https://aoav.org.uk/wp-content/uploads/2015/04/AcknowledgeAmendAssist.pdf>.

318. GOV’T ACCOUNTABILITY OFFICE, *supra* note 165, at 54-55 (requesting improved reporting practices to allow better assessment of payments and the Department of Defense’s affirmative response).

319. An additional “standardization” issue may arise when multiple states’ forces are present and have different amends practices. For a general discussion of how states might cope with divergence, see Wexler, *supra* note 150.

320. See *supra* notes 236-238 and accompanying text. Consider, too, the context of “necessary evils” in business settings. Margolis & Molinsky, *supra* note 271, at 867-68. Joshua Margolis and Andrew Molinsky find that because engaging in tasks that are thought of as necessary evils is so difficult, “organizations tend to focus on standard operating procedures and carefully scripted routines.” These strict protocols can be helpful, they argue, in helping individuals to weather the unpleasantness of the required task and in ensuring attention to certain aspects of interpersonal understanding. At the same time, however, such routinization can be a barrier to the kind of engaged, personalized interaction that

The measures that can best communicate the recognition that victims seek, for example, may vary from case to case:

But exactly what constitutes recognition for those who have been harmed varies tremendously. Is it satisfied by pressing the hand of a dignitary? Receiving an official condolence letter? Hearing an apology? Can money or medical treatment be sufficient? Do victims require press coverage? Information? An explanation? What about a name on a commemorative plaque? A monument? A place of honor at a memorial service? Victims might find any or all these constructive and appropriate recognition at one time or another, and might also find that each offering fails to fulfill the deep need to have one's loss and self acknowledged.<sup>321</sup>

Processes that allow for some individual variation in what constitutes fitting amends and that allow for responsiveness to victims' individual situations might best serve the underlying need for appropriate acknowledgement held by victims, communities, and military personnel. The challenge, of course, is achieving such individuation within the military's economic, expediency, and competency constraints. While a high degree of tailoring may be infeasible, we identify some important components that should inform the process.

Though it is unlikely that compensation will be made compulsory under international law in this context, the U.S. policy decision to make condolence payments mandatory under domestic rules provides an opportunity to influence the ways in which the United States responds to lawful harm as well as the practices of other states that look to the United States for guidance. We therefore stress the importance of conceptualizing these programs as amends and constructing them as such, rather than viewing them as a means by which to make a gift or provide charity to the victims.<sup>322</sup> As we emphasized in Part II, much of what drives the desire for amends is a need for respect and fair treatment and the notion of some measure of equality. Conceiving of amends as acts of pure beneficence may drain them of their needed meaning.<sup>323</sup> Providing amends as part of a binding domestic process may help to ensure this distinction.<sup>324</sup>

### B. *Substance of Amends*

Given the needs of both victims and the military, an effective amends program should provide more than a monetary condolence payment.<sup>325</sup>

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might make amends the most effective. *Id.* (arguing that “[e]ven as companies provide the standard policies and practices for ensuring a basic level of sensitive interpersonal treatment, they might also find ways to enable personalized responses”).

321. HIRSCH, *supra* note 175, at 44.

322. See Gilbert, *supra* note 311, at 415.

323. Whether, how, and to what extent conceiving of amends as purely beneficent changes the meaning ascribed to them by victims, military actors, or the public are empirical questions that are worth further study.

324. This is particularly so if the domestic rules require acknowledgement of the state's causal responsibility and processes to prevent repetition. See *infra* Sections III.C-D.

325. Yet the recent Executive Order says nothing about the process by which condolence payments are to be made nor does it emphasize the individual-level need to give and receive amends. See Exec. Order No. 13,732, *supra* note 27; Office of the Press Secretary, *Fact Sheet: Executive Order on the U.S. Policy on Pre & Post Strike Measures to Address Civilian Casualties in the U.S. Operations*

Reparative measures that also focus on the provision of acknowledgment, information, sympathy, and concern for future behavior may be able to more effectively address victims' desire for acknowledgement, respect, explanation, and meaning. At the same time, a broader conception of amends may better address the needs of the military for support in the relevant local community, the easing of moral suffering among military personnel, and the emphasis of professionalism.<sup>326</sup> The challenge for designers, of course, is how to ensure a robust system of amends, while simultaneously recognizing practical concerns such as safety, security, expediency, and competency.

In particular, the design of programs for making amends ought to accommodate victims' desire for acknowledgement and accountability.<sup>327</sup> In the context of harm to civilians occasioned by lawful military conduct, however, we would not expect the military to accept legal responsibility for having caused the harm or to make a statement that the behavior that led to the harm was unlawful.<sup>328</sup> We might, however, plausibly expect the taking of causal responsibility—that is, an acknowledgement that the military has acted in a way that has caused harm.<sup>329</sup> Intuitively recognizing some aspect of this distinction, one veteran who struggled with the need to make amends for having killed civilians noted that “I want to apologize, but not for my actions . . . . It’s not an apology for my actions. I just want to show them that I recognize the sacrifice that they put up.”<sup>330</sup> Obama’s Executive Order suggests a willingness for the U.S. government to acknowledge its role,<sup>331</sup> but offers no implementation guidance. We suggest that acknowledgment should be explicit and provided directly to family members.

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*Involving the Use of Force and the DNI Release of Aggregate Data on Strike Outside Area of Active Hostilities*, WHITE HOUSE (July 1, 2016); *Press Briefing by Press Secretary Josh Earnest*, WHITE HOUSE (July 1, 2016), <https://www.whitehouse.gov/the-press-office/2016/07/01/press-briefing-press-secretary-josh-earnest-712016>.

326. See generally Alfred Allan et al., *Apologies Following an Adverse Medical Event: The Importance of Focusing on the Consumer’s Needs*, 98 PATIENT EDUC. & COUNSELING 1058, 1060-61 (2015) (finding that more complex apologies were perceived as more sincere and as expressing more sorrow); Scher & Darley, *supra* note 182 (finding that each component of an apology contributes to a more effective apology with more elaborate apologies generating more positive effects); Schmitt et al., *supra* note 182 (supporting the same proposition).

327. See *supra* Section II.A.1.

328. Indeed, claims cards used by the army in Iraq “assert that ‘this information is NOT an admission of liability by the soldiers involved and will be used only to substantiate a claim against the US Army’, and caution ‘Do not promise them anything.’” Gilbert, *supra* note 311, at 411. For discussions of whether to provide legal protection for apologies in the domestic setting and, if so, to what extent, see Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Heimreich, *supra* note 187; Benjamin Ho & Elaine Liu, *What’s an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, 8 J. EMPIRICAL LEGAL STUD. 179 (2011); John C. Kleefeld, *Thinking Like a Human: British Columbia’s Apology Act*, 40 U.B.C. L. REV. 769 (2007); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L. J. 1135 (2000); Prue Vines, *Apologising To Avoid Liability: Cynical Civility or Practical Morality?*, 27 SYDNEY L. REV. 483 (2005).

329. While the recent Executive Order does require the United States to “acknowledge U.S. government responsibility,” there is no current requirement that the United States explain the cause of a death or injury to the family or to the public. Knuckey, *supra* note 31.

330. Filkins, *supra* note 261, at 13.

331. See Exec. Order No. 13,732, *supra* note 27.

Similarly, processes aimed at making amends ought to take into account victims' and soldiers' need to believe that appropriate steps will be taken to avoid unnecessary harm in the future. Even if the civilian deaths were legally permissible, self-criticism and reflection are appropriate when one has harmed another.<sup>332</sup> Approaching the review of a situation in which civilians are killed or injured with a mindset focused on growth—the desire to improve and learn from mistakes—can communicate respect for those who are injured as well as for the community in which the incident took place.<sup>333</sup> While a promise to eliminate future civilian casualties may not be feasible,<sup>334</sup> the military can reasonably promise to learn from its actions.

Such review efforts might be rooted in the existing practice of engaging in individual “after action reports.” The U.S. military already conducts individual assessments of civilian casualty incidents for internal purposes<sup>335</sup> and President Obama’s Executive Order requires a review or investigation of all incidents involving civilian casualties.<sup>336</sup> We recommend such reports include a discussion of why the civilian casualties occurred. In turn, when possible, the amends process might include informing parties about what happened and if circumstances permit,<sup>337</sup> what, if anything, went amiss, as well what efforts might be taken to avoid similar casualties in the future.<sup>338</sup> The

332. See Heimreich, *supra* note 187, at 582 (arguing that “self-criticism is an appropriate way to assess having harmed someone else, even blamelessly” and that “expressing self-criticism, including to the victim, does not imply that one takes oneself to be legally or morally culpable in the harm done”). *But see id.* at 588 n.86 (“This characterization may invite an obvious counterexample: the case of justified harms, in which the efforts succeeded, and are above reproach even in hindsight (such as an operation that caused a minor injury to save a life). In these cases, even if apologies are due, I find it less clear that they would appropriately be self-critical.”).

333. See generally Karina Schumann & Carol S. Dweck, *Who Accepts Responsibility for Their Transgressions?*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 1598 (2014) (finding that people who believe that personal characteristics and abilities are malleable and can be changed—that is, they hold a growth mindset—are more likely to view the accepting of responsibility for having caused harm as an opportunity for learning and are more likely to apologize).

334. That said, the Obama Administration has publicly manifested an aim for zero civilian casualties in the War on Terror. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (stating that “before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.”). At least some evidence suggests its implementation in the context of drone strikes. Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will: Taking a Personal Role in War on Al Qaeda*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> (discussing Obama’s personal oversight of the war with Al Qaeda); Kristina Wong, *US Aim for ‘Zero Civilian Casualties’ Draws Criticism*, THE HILL (June 24, 2015, 06:00 AM), <http://thehill.com/policy/defense/policy-strategy/245932-us-aims-for-zero-civilian-casualties-in-war-vs-isis> (discussing significant limitations on ISIS targets to avoid any civilian casualties).

335. For instance, in Afghanistan, civilian casualty events generate two information reports to the regional command and a third investigation information report for the legal adviser if the incident resulted in a civilian death. Condra et al., *supra* note 244, at 9 n.10.

336. Exec. Order No. 13,732, *supra* note 27, § 2(b)(i).

337. Commanders or others in the military may be best situated to make a determination of the level of detail that can be shared without compromising strategies, future missions or intelligence sources. Designers may, however, want to provide some sort of standard against which such practical concerns can be measured.

338. The United States already conducts such assessments, but it does not seem that anything about them, including their existence, is conveyed to the families. For instance, did the operation rely on faulty intelligence or would a better pattern of life assessment have avoided the civilian casualties; could the weapon chosen have been more discriminate or could force have been avoided entirely? See

United States has shown itself willing to share this level of detail in high profile cases,<sup>339</sup> but we suggest that this reporting become the norm. That said, the cause(s) of civilian casualties and possible efforts to avoid a repeat of similar casualties will not always be clear even after a single individual after action report. Used in isolation, such reports cannot always reveal patterns or systematic problems.

Therefore, we also recommend that the U.S. military utilize more systematic tracking. The U.S. military has already successfully deployed fairly basic tracking methods to address escalation of force issues in Iraq, reducing casualties from night raids and traffic stops.<sup>340</sup> Civilian Casualty Tracking Analysis and Response (CCTAR) cells, which are used to enhance operations in Afghanistan<sup>341</sup> and Somalia and are recommended as a best practice,<sup>342</sup> present an even more sophisticated approach.<sup>343</sup> Rather than relying solely on internal sources of data such as formal and informal reporting chains among troops, CCTAR cells also gather data from “external sources such as civil society, hospitals, and the media” as well as from an incident assessment team that can gather additional data from the field.<sup>344</sup> CCTAR can help identify both potential recipients of amends and concrete steps for minimizing future casualties through training, escalation of force protocols, and rules of engagement.<sup>345</sup> We recommend that such tracking efforts be incorporated into the Obama Executive Order’s call for periodic consultation among high-level

generally LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT 472-73 (2013) (criticizing the United States’ reliance on satellite phones that produced inaccurate coordinates and did not guarantee the identity of the user); Cora Currier & Peter Maass, *Firing Blind: Flawed Intelligence and the Limits of Drone Technology*, THE INTERCEPT (Oct. 15, 2015, 7:58 AM), <https://theintercept.com/drone-papers/firing-blind/> (discussing “critical shortfalls” in the technology and intelligence used in drones).

339. For example, after the Kunduz hospital bombing, the United States identified a combination of factors that contributed to the bombing, including difficulty with the gunship’s targeting instruments and the failure to provide a full prestrike briefing that could have included a no-strike list. Joseph Goldstein & Eric Schmitt, *Report Cites Human Error in Airstrike on Hospital*, N.Y. TIMES (Nov. 25, 2015), <http://www.nytimes.com/2015/11/25/world/asia/doctors-without-borders-hospital-kunduz-afghanistan.html>.

340. General Stanley McChrystal, a former commander in Afghanistan, focused on identifying trends and setting new policies to reduce civilian casualties. This resulted in policies such as directing soldiers to stop driving aggressively in traffic and limiting the use of night raids. While McChrystal implemented two separate sets of enhanced escalation of force measures, data reveal that the second set (which standardized procedures to stop vehicles including the use of laser dazzler, and reiterated that warning and disabling shots were to be used only as a last resort) were effective in reducing casualties. LARRY LEWIS, REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS, JOINT & COALITION OPERATIONAL ANALYSIS 2 (2013); Marla B. Keenan, *Operationalizing Civilian Protection in Mali: The Case for a Civilian Casualty Tracking, Analysis, and Response Cell*, 2 STABILITY: INT’L J. SEC. & DEV. 1, 3-4 (2010).

341. Forces were able to decrease the civilian casualties including those caused by air strikes. John Bohannon, *Counting the Dead in Afghanistan*, 331 SCI. 1256, 1257 (2011). JENNIFER KEENE, CIVILIAN HARM TRACKING: ANALYSIS OF ISAF EFFORTS IN AFGHANISTAN (2014), <http://www.youblisher.com/p/937087-Civilian-Harm-Tracking-Analysis-of-ISAF-Efforts-in-Afghanistan/>.

342. Jacob Beswick & Elizabeth Minor, *The U.N. and Casualty Recording: Good Practice and the Need for Action*, OXFORD RES. GRP. 5 (2014) (advocating casualty tracking for all military forces in conflict settings).

343. Keenan, *supra* note 340, at 5.

344. *Id.* at 2; Bohannon, *supra* note 341, at 1257-60.

345. KEENE, *supra* note 341, at 8-9; Keenan, *supra* note 340, at 8.

agency officials on civilian casualty trends,<sup>346</sup> that they become normal practice and part of mission planning,<sup>347</sup> and that the existence of such assessments be conveyed to affected parties, including victims, communities, and military personnel.

For such assessments to be truly effective, the military must follow up on them by designing policies around the lessons of the individual and systematic information gathered. For instance, after the incident in which the U.S. military ran over two girls in a training exercise,<sup>348</sup> the military increased safety by briefing all soldiers on the incident as well as “inspect[ing] vehicles, add[ing] safety mirrors and develop[ing] new planning and operating procedures.”<sup>349</sup> To the extent that it would not compromise security or effectiveness, such efforts should be communicated back to the victims and their communities.

### C. Culture

In the context of military condolence payments, U.S. actors are almost always operating across cultural divides of varying degrees that can complicate the offering and receiving of payments, apologies, and other aspects of amends. Cultures may differ across a variety of dimensions, such as the extent to which members of the culture see themselves as independent or interdependent,<sup>350</sup> the extent to which members of the culture define their worth by what others think (face cultures), whether self-worth is intrinsic (dignity cultures), or whether self-worth is defined both internally and externally (honor cultures);<sup>351</sup> the extent to which communication is indirect and highly dependent on context for meaning (high-context) or explicit, direct, and understandable without reference to the context in which the communication occurs (low-context);<sup>352</sup> the comfort that members of the culture have with hierarchical authorities as compared to more consultative authority,<sup>353</sup> and the degree to which members

346. Exec. Order No. 13,732, *supra* note 27, § 4.

347. KEENE, *supra* note 341, at 22.

348. See *supra* notes 123-127.

349. Slavin, *supra* note 123.

350. See Marilyn B. Brewer & Masaki Yuki, *Culture and Social Identity*, in HANDBOOK OF CULTURAL PSYCHOLOGY 307, 311 (Shinobu Kitayama & Dov Cohen eds., 2007); Joseph A. Vandello & Dov Cohen, *Patterns of Individualism and Collectivism Across the United States*, 77 J. PERSONALITY & SOC. PSYCHOL. 279 (1999).

351. Soroush Aslani et al., *Dignity, Face, and Honor Cultures: Implications for Negotiation and Conflict Management*, in HANDBOOK OF RESEARCH ON NEGOTIATION 249 (Mara Olekalns & Wendi L. Adair eds., 2013); Young-Hoon Kim & Dov Cohen, *Information, Perspective, and Judgments About the Self in Face and Dignity Cultures*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 537, 537-38 (2010); Angela K.-Y. Leung & Dov Cohen, *Within- and Between-Culture Variation: Individual Differences and the Cultural Logics of Honor, Face, and Dignity Cultures*, 100 J. PERSONALITY & SOC. PSYCHOL. 507 (2011).

352. EDWARD T. HALL, BEYOND CULTURE 105 (1976); see also Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 12 (2005).

353. This dimension is referred to as “power distance.” GEERT HOFSTEDÉ, CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 65 (1989); Tom R. Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 PSYCHOL. PUB. POL’Y & L. 1138, 1140 (2000).

of the culture focus on reactive fault.<sup>354</sup> Cultures also differ in their language rules, emotional display rules, and facework rules in ways that can affect conflict and amends interactions.<sup>355</sup> Thus, in cross-cultural contexts, amends processes should account for the differing roles of family, kinship, community, and tribal structures; approaches to conflict and conflict resolution; communication styles; religion; conceptions of forgiveness; orientations toward honor or shame; and rituals.<sup>356</sup>

Cultural differences in views of the self may influence the relative importance that amends recipients place on different components of the interaction. For example, one recent study found that those who emphasized an independent self cared more about compensation; those who emphasized a relational self cared more about expressions of empathy; and those who emphasized the collective self cared more about acknowledgement of rule violation.<sup>357</sup> Understanding these differences can help draw attention to divergences in views about the need to focus on each of these components.

In addition, the components of amends may elicit differing responses from recipients across cultures. Take, for example, apologies. Overall, evidence demonstrates that apologies are useful across cultures.<sup>358</sup> At the same time, however, while there is much underlying similarity, different cultures tend to construct and interpret apologies in different ways. As one set of researchers has noted, when it comes to apologies, “it seems that virtually every culture has its own rules.”<sup>359</sup> For example, apologies offered by Arabic and Persian speakers tend to be more elaborate and are more likely to include intensifiers,

354. Braithwaite & Roche, *supra* note 188, at 72-73 (arguing that “[w]estern criminal justice systems (such as that of the United States) are at the causal end of the continuum; Asian systems (such as that of Japan) tend to be at the reactive end”).

355. See David Matsumoto, *Cultural Similarities and Differences in Display Rules*, 14 MOTIVATION & EMOTION 195 (1990) (discussing emotional display rules); David Matsumoto et al., *Mapping Expressive Differences Around the World: The Relationship Between Emotional Display Rules and Individualism vs. Collectivism*, 39 J. CROSS-CULTURAL PSYCHOL. 55 (2008); Hong Ren & Barbara Gray, *Repairing Relationship Conflict: How Violation Types and Culture Influence the Effectiveness of Restoration Rituals*, 34 ACAD. MGMT. REV. 105 (2009) (discussing cultural influences on conflict resolution); Saba Safdar et al., *Variations of Emotional Display Rules Within and Across Cultures: A Comparison Between Canada, USA, and Japan*, 41 CAN. J. BEHAV. SCI. 1 (2009) (discussing emotional display rules).

356. George E. Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 3 MIDDLE E. REV. INT’L AFFS. 2 (1999); Irani & Funk, *supra* note 200 (describing the ritual of *suhl* and ceremony of reconciliation (*musalaha*) as “forms of interaction that are both culturally legitimate and symbolically powerful”); Wagatsuma & Rosett, *supra* note 219.

357. See Blatz et al., *supra* note 173, at 237 (“What matters . . . is not incorporating every element of an apology, but rather addressing the specific demands and psychological needs of those receiving the apology.”); Ryan Fehr & Michele J. Gelfand, *When Apologies Work: How Matching Apology Components to Victims’ Self-Construals Facilitates Forgiveness*, 113 ORG. BEHAV. & HUM. DECISION PROCESSES 37, 40 (2010).

358. See, e.g., Ritsui Itoi et al., *A Cross-Cultural Study of Preference of Accounts: Relationship Closeness, Harm Severity, and Motives of Account Making*, 26 J. APPLIED SOC. PSYCHOL. 913 (1996) (comparing U.S. and Japanese participants and finding that apology was most preferred by both groups); Andy J. Merolla et al., *Forgiveness in the United States and China: Antecedents, Consequences, and Communication Style Comparisons*, 40 COMM. RES. 595 (2012); Ohbuchi et al., *supra* note 224; Seiji Takaku, Bernard Weiner, & Ken-Ichi Ohbuchi, *A Cross-Cultural Examination of the Effects of Apology and Perspective Taking on Forgiveness*, 20 J. LANGUAGE & SOC. PSYCHOL. 144 (2001).

359. William W. Maddux et al., *Why “I’m Sorry” Doesn’t Always Translate*, HARV. BUS. REV. (June 2012), <https://hbr.org/2012/06/why-im-sorry-doesnt-always-translate>.



requests for pardon or forgiveness, repetition of apologetic elements, expressions of self-deficiency, expressions of shame, and more references to religious concepts as well as proverbs.<sup>360</sup>

Similarly, there are cultural differences in whether and what sort of an apology is expected and how apologies are understood.<sup>361</sup> One key difference is the extent to which an apology is seen as an admission of guilt, with some cultures (like the United States) tending to focus on culpability and to interpret apologies as admissions and other cultures tending to focus more on amends for the consequences of the injurious event. One study, for example, found that U.S. participants were more likely to interpret an apology as implying guilt as compared to Japanese participants who were less likely to think that the apology would result in blaming.<sup>362</sup> To take one real-world example, consider the following:

[I]n a recent military dispute between the U.S. and China, an expression of remorse by the United States government for the death of a Chinese pilot was interpreted by the Chinese government as an apology; however, the U.S. government vehemently denied an apology had been made, with then-Secretary of State Colin Powell remarking, "There is nothing to apologize for. To apologize would have suggested that we have accepted responsibility for having done something wrong. And we did not do anything wrong."<sup>363</sup>

Taking into account these cultural differences in the meaning of apologies is crucial for the success of amends. This is particularly important in light of the Obama Executive Order's pledge to maintain and promote civilian casualty

360. Abdul W. Al-Zumor, *Apologies in Arabic and English: An Inter-Language and Cross-Cultural Study*, 23 J. KING SAUD UNIV. – LANG. & TRANSLATION 19 (2011); Rula Fahmi Bataineh & Ruba Fahmi Bataineh, *A Cross-Cultural Comparison of Apologies by Native Speakers of American English and Jordanian Arabic*, 40 J. PRAGMATICS 792 (2008); Sohreh Eslami-Rasekh, *Face-Keeping Strategies in Reaction to Complaints: English and Persian*, 14 J. ASIAN PAC. COMM. 181 (2004); Riyad F. Hussain & Mamoun T. Hammouri, *Strategies of Apology in Jordanian Arabic and American English*, 49 GRAZER LINGUISTISCHE STUDIEN 37 (1998); see also Akbar Afghari, *A Sociopragmatic Study of Apology Speech Act Realization Patterns in Persian*, 49 SPEECH COMM. 177 (2007); Fatima Abdurahman Nureddeen, *Cross Cultural Pragmatics: Apology Strategies in Sudanese Arabic*, 40 J. PRAGMATICS 279 (2008); Mohammad Shariati & Fariba Chamani, *Apology Strategies in Persian*, 42 J. PRAGMATICS 1689 (2010). For comparisons across other cultures or languages see, e.g., Dean C. Barnlund & Miho Yoshioka, *Apologies: Japanese and American Style*, 14 INT'L J. INTERCULTURAL REL. 193 (1990); Xiaowen Guan et al., *Cross-Cultural Differences in Apology*, 33 INT'L J. INTERCULTURAL REL. 32 (2009) (comparing U.S., Chinese, and Korean apologies); Hee Sun Park & Xiaowen Guan, *Culture, Positive and Negative Face Threats, and Apology Intentions*, 28 J. LANGUAGE & SOC. PSYCHOL. 244 (2009) (comparing U.S. and Chinese apologies); Naomi Sugimoto, *A Japan-U.S. Comparison of Apology Styles*, 24 COMM. RES. 349 (1997); Fay Wouk, *The Language of Apologizing in Lombok, Indonesia*, 38 J. PRAGMATICS 1457 (2006).

361. See Etienne Mullet & Fabiola Azar, *Apologies, Repentance, and Forgiveness: A Muslim-Christian Comparison*, 19 INT'L J. PSYCHOL. RELIGION 275, 282-83 (2009) (finding differences in expectations and forgiveness between Muslim and Christian participants); Itoi et al., *supra* note 358 (finding that Japanese participants had greater expectations than an offender would apologize and lower expectations that the offender would use a justification than U.S. participants).

362. William W. Maddux et al., *Cultural Differences in the Function and Meaning of Apology*, 16 INT'L NEGOT. 405, 412 (2011).

363. *Id.* at 410 (quoting Peter H. Gries & Kaiping Peng, *Culture Clash? Apologies East and West*, 30 J. CONTEMP. CHINA 173 (2002)); see also HIRSCH, *supra* note 175, at 45 (recounting the reaction when she inquired about "compensation" following the embassy bombings in Africa: "The U.S. government is not going to provide compensation. Compensation connotes responsibility, and we are not responsible for the bombings. We can only offer 'assistance.'").

best practices.<sup>364</sup> In doing so, the United States must be sensitive to differences rather than simply replicating a single successful amends process in places with varying cultural expectations. The ways in which compensation and other forms of amends are coupled may also have different implications across cultures. In cultures in which blood revenge is of concern, for example, “the symbolic significance of compensation is at least as important as the substance of the payment. The exchange of money or goods substitutes for the exchange of death; the family that forsakes revenge gains in standing, while the family of the murderer is humbled and indebted by this act of forbearance and magnanimity.”<sup>365</sup> In the Japanese cultural context, “[w]hen compensation or damages are to be paid to the victim, it is extremely important that the person responsible expresses to the victim his feeling of deep regret and apologizes, in addition to paying an appropriate sum. If a person appears too willing to pay the damages, that willingness may be taken as the sign of his lack of regret. He may be regarded as thinking that money can settle anything and as not being sincerely interested in restoring a positive relationship with his victim.”<sup>366</sup>

Cultural differences may also have implications for who appropriately gives and receives apologies. In more interdependent cultures, indirect apologies given through or mediated by third parties—perhaps a tribal leader or village elder—may be more acceptable than they would be in more independent cultures.<sup>367</sup> In Arab-Islamic mediation, “the preferred ‘third party’ . . . is an unbiased insider with ongoing connections to the major disputants as well as a strong sense of the common good and standing within the community (e.g., age, experience, status, leadership).”<sup>368</sup>

Given the myriad ways in which culture can influence how amends are given and received, designers of amends processes ought to think carefully about the implications of culture for how condolence or solatia payments are made within a given conflict, and the military personnel who are charged with carrying out amends ought to be better trained in the nuances of amends, the intricacies of culture, and the importance of ritual. Existing training that focuses on the amount to be disbursed, process, roles, and responsibilities,<sup>369</sup> must be supplemented with an emphasis on the interpersonal and cultural aspects of making amends.<sup>370</sup>

The military has already started to show sensitivity to the important role of culture in counterinsurgencies. For instance, the U.S. military embedded human terrain teams of anthropologists and other social scientists in

364. Exec. Order No. 13,732, *supra* note 27, § 1.

365. Irani & Funk, *supra* note 200, at 66.

366. Wagatsuma & Rosett, *supra* note 219, at 472-73; *see also* LAZARE, *supra* note 222, at 34 (“[C]ommunicating and receiving effective apologies to and from people of different cultures and languages is a complex and challenging process that requires an understanding of a culture as well as the precise use of language.”).

367. *See* Ren & Gray, *supra* note 355, at 115.

368. Irani & Funk, *supra* note 200, at 63.

369. *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 32 (2007), <http://www.gao.gov/new.items/d07699.pdf>.

370. E-mail from Nick Dubaz, to Lesley M. Wexler (Sept. 12, 2015, 5:36 PM CST).

Afghanistan and Iraq.<sup>371</sup> Commanders have welcomed such experts and found them helpful in providing training on basic customs and to a lesser extent on tailoring message content as well.<sup>372</sup>

#### D. *Legitimate Agents to Give and Receive Amends*

A robust process of amends must also pay attention to who is engaged in the process of making amends and to whom amends are offered. In instances of civilians killed during armed conflict, many different people could be involved in the amends making process. Who would victims like to make amends to them? Who would value active engagement in the providing of amends? To whom should amends be made?

##### 1. *Offered by Whom?*

In many cases it is easy to identify the person who should properly make amends. But in other instances, it can be difficult. In the case of the military's lawful killing of a civilian, for example, amends could theoretically be offered by a ground-level member of the military (the person who pulled the trigger or the drone operator, for example), a commanding officer, the person who made the decision to execute the particular strike or other activity, or the President of the United States as the Commander in Chief. Given the nature of armed conflict, often no one person is singularly causally responsible for a lawful civilian death, but rather multiple persons all acting under the authority of the state might be identified as causally responsible.<sup>373</sup> Amends making may need to reflect that collective responsibility, even as aspects of amends—such as apologies—must be performed by individuals.

Apologies on behalf of groups can be more complicated than those offered by individuals.<sup>374</sup> But a number of studies have found that apologies

371. After seven years, this controversial program concluded in 2014. Whitney Kassel, *The Army Needs Anthropologists*, FOREIGN POL'Y (July 28, 2015), <http://foreignpolicy.com/2015/07/28/the-army-needs-anthropologists-iraq-afghanistan-human-terrain/>. The criticisms largely focused on the possible use of anthropologists' data to target suspected insurgents or to design propaganda campaigns or other efforts at social control. See generally Roberto J. González, *Embedded: Information Warfare and the "Human Terrain,"* in THE COUNTER-COUNTERINSURGENCY MANUAL: OR, NOTES ON DEMILITARIZING AMERICAN SOCIETY 97 (Network of Concerned Anthropologists et al. eds., 2009).

372. Christopher J. Lamb et al., *The Way Ahead for Human Terrain Teams*, 70 JOINT FORCES Q. 21, 26 (2013).

373. Take the Kunduz Hospital bombing as a possible instance of causal, but not legal, responsibility-taking. Spencer Ackerman & Sune Engel Rasmussen, *Kunduz Hospital Attack: MSF's Questions Remain as US Military Seeks No Charges*, GUARDIAN (Apr. 29, 2016), <https://www.theguardian.com/us-news/2016/apr/29/kunduz-hospital-attack-msf-us-military-charges> (noting the United States' conclusion that the strike was not a war crime). One might view the crew, the person who sent the crew out without a briefing, those who failed to match the crew's strike coordinate to the no-strike list at the operational headquarters, and those who failed to relay the hospital's call that it was under attack to the crew, among others, as causally responsible. See Andrew Tilghman, *C-130 Crew Blamed for Kunduz Hospital Attack, Top General Says*, MIL. TIMES (Nov. 25, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/11/25/us-troops-suspended-kunduz-hospital-attack-top-general-says/76371506/>. However, system and procedural failures may reach beyond these individuals. See *id.*

374. See generally, LAZARE, *supra* note 222, at 40 (noting the difficulties of identifying who should speak for the group in a public apology); SMITH, *supra* note 226, at 207-21 (asserting that

offered on behalf of groups or collective entities can be effective. In particular, several studies have explored apologies offered by or to countries. In one study, for example, researchers manipulated whether the United States apologized to soldiers' families and the Canadian military for the friendly-fire deaths of four Canadian soldiers in Afghanistan.<sup>375</sup> Participants—residents of the Canadian city in which the soldiers had been stationed prior to their deployment—felt less need for revenge and more support for ongoing U.S. efforts in Afghanistan following an apology.<sup>376</sup> In a similar study, researchers explored Australians' responses to apologies purportedly offered by several different offender groups.<sup>377</sup> Australian students who were told that the relevant group had apologized were more satisfied with the group's response and perceived the group to be more remorseful when an apology was offered as compared to when no apology was given, though they were not more likely to forgive.<sup>378</sup>

Anecdotal evidence, moreover, suggests that apologies given by group leaders can be effective.<sup>379</sup> And studies have found that leaders tend to be held more responsible than do followers,<sup>380</sup> suggesting that an officer or commander might effectively give an apology.

But there may be an appropriate role for ground-level soldiers to play in making amends as well. Some soldiers might welcome the chance to express sympathy to civilian victims or their families. As one veteran soldier noted, "I think a lot of us want to see them and say we are sorry. We don't get that chance."<sup>381</sup> Whether the interaction comes via a face-to-face meeting or, perhaps, though letters written by soldiers to victims,<sup>382</sup> such acknowledgement might be valued by victims and therapeutic for soldiers. For some soldiers who are suffering from moral injury, mere knowledge of an amends process might be sufficient; for others, some more direct participation might be valued.<sup>383</sup> Of

individuals must have "standing" to make collective apologies); NICHOLAS TAVRUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 96-98 (1993).

375. See Ryan P. Brown et al., *Taking Up Offenses: Secondhand Forgiveness and Group Identification*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 1406 (2008).

376. *Id.* at 1409-10.

377. Catherine R. Philpot & Matthew J. Hornsey, *What Happens When Groups Say Sorry: The Effect of Intergroup Apologies on Their Recipients*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 474, 474 (2008). Scenarios were based on offenses committed against Australian prisoners of war during WWII, harms committed by a corporation related to products liability in which eighteen Australians died, harms to Australian athletes due to other state-sponsored doping in sports, evidence that Saudi banks and other entities made financial contributions to terrorist organizations prior to a terrorist bombing in which eighty-eight Australians died, and nuclear testing by France in the South Pacific in the 1990s. *Id.* at 476.

378. *Id.* at 478-82. Another study explored the responses of members of one group to an apology offered by another group which had insulted them. The apology reduced anger, reduced the desire for retribution, prevented decreases in satisfaction and respect for the other group, and increased interest in the possibility of forgiveness. Diana J. Leonard, et al., *Emotional Responses to Intergroup Apology Mediate Intergroup Forgiveness and Retribution*, 47 *J. EXPERIMENTAL SOC. PSYCHOL.* 1198, 1200-02 (2011).

379. Cohen, *Apology and Organizations*, *supra* note 298, at 1452-53 (discussing apologies given by a hospital chief of staff).

380. See James L. Gibson & Amanda Gouws, *Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle Over Apartheid*, 93 *AM. POL. SCI. REV.* 501, 509 (1999).

381. Filkins, *supra* note 261, at 18.

382. For instance, it may be infeasible for highly mobile troops to attend ceremonies.

383. Empirical research on these questions would be useful.

course, this is another aspect of amends where appropriate deference needs to be paid to the military on questions of safety, expediency, and feasibility.

Finally, designers ought to consider whether and to what extent there is an appropriate role for third parties to play as mediators or intermediaries. As we have noted, there may be cultural differences in the degree to which amends offered through third parties are palatable, with members of more collectivist cultures being more likely to find indirect apologies useful.<sup>384</sup> In addition, third parties as mediators may be able to help identify and communicate the particular needs of the victims and their families.

## 2. *Offered to Whom?*

At the most fundamental level, the individuals who are injured and the families of those who are injured or killed would seem to be the most obvious recipients of amends, including apologies or expressions of sympathy or condolence. In recounting the impact of then-Secretary of State Madeline Albright's visit to victims in the hospital in Kenya following the bombing of the U.S. embassy there, Susan Hirsch notes that "the secretary knew well the importance and value of speaking directly to victims and their families, and expressing, officially, her condolences and sympathies."<sup>385</sup> If such relational acknowledgement was seen as important in a case, such as the bombings, in which the United States was not the actor who caused the harm, it would seem even more important—though likely more difficult—when the United States is the actor who directly, if lawfully, caused the harm.

But while victims and their families might be the most appropriate recipients of amends,<sup>386</sup> it may be inevitable that amends in this context have a wider audience. People in some cultures are more inclined to engage in group decision making, with families or villages closely involved in consultation. Similarly, people in some cultures are more likely to prefer communication such as apologies to come indirectly through intermediaries. And amends can have an effect on others who are in some way identified with the victims.<sup>387</sup> Thus, designers of amends processes ought to pay attention not only to appropriate interaction with civilian victims and their families, but to the broader audiences for amends as well.

## CONCLUSION

While IHL does not demand compensation or more broadly constituted amends processes as a response to lawful harm, a robust process of amends

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384. See Ren & Gray, *supra* note 355, at 115; see also Michael J. A. Wohl et al., *Why Group Apologies Succeed and Fail: Intergroup Forgiveness and the Role of Primary and Secondary Emotions*, 102 J. PERSONALITY & SOC. PSYCHOL. 306 (2012) (exploring difficulties in the communication of emotion between ingroups and outgroups and suggesting that apologies issued by proxy through an ingroup member can be beneficial).

385. HIRSCH, *supra* note 175, at 44.

386. This priority is reflected in Obama's Executive Order. Exec. Order No. 13,732, *supra* note 27, § 2(b)(ii).

387. See *supra* notes 374-377 and accompanying text.

making is consistent with and representative of IHL's humanitarian commitments. While many others have focused on possible amends for unlawful harms, this Article is a first step in the larger process of designing such amends processes for lawful harms. We began this work here by identifying the vital importance of the role of amends in responding to lawful harm including acknowledgment of the military's causal role in harmdoing, promises of forbearance, greater attention to cultural differences, and more inclusion of relevant stakeholders in the amends making process.

In identifying and addressing these design questions, we note the limited empirical literature on amends in armed conflict<sup>388</sup> and identify a number of interesting empirical questions that arise in this context. In doing so, we chart a path for future empirical studies. Much research still needs to be done in order to fully understand the needs for and effects of making amends in the context of armed conflict. For example, there is little existing research on how individuals in affected countries react to current efforts to make amends through condolence or solatia payments<sup>389</sup> or how they would react to a more relationship-oriented amends process. We have based our suggestions on the existing research on amends, but the differences between the contexts of much of the existing research and the settings and complications of armed conflict make it imperative that additional research be conducted to explore these nuances.<sup>390</sup>

Similarly, to our knowledge, no empirical research has explored the experiences of military personnel who are tasked with making condolence or solatia payments under the current system, or the relationships among amends, moral injury, and self-forgiveness.<sup>391</sup> Nor is there research specifically exploring what military personnel know about such amends programs, how the programs are viewed by various military actors, how condolence or solatia payments as currently practiced shape perceptions of harm caused or professional roles, or how a more relationship-oriented approach to amends might alter these perceptions. And, finally, additional research on how amends are perceived by broader audiences, including the U.S. public, foreign states, and others, would also be instructive.

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388. Only a single study tests the effect of amends on civilian populations. See Lyall et al., *supra* note 160. This literature generally focuses on the relationship between victimization and counterinsurgency goals. See Andrew Beath et al., *Winning Hearts and Minds? Evidence from a Field Experiment in Afghanistan* (MIT Working Paper No. 2011-14, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809677](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809677) (concluding that when sufficient initial levels of stability exist, development programs can reduce violence and improve attitudes toward the government); Eli Berman et al., *Can Hearts & Minds Be Bought? The Economics of Counterinsurgency in Iraq*, 119 J. POLI. ECON. 767, 799-802 (2011) (testing conflict data from Iraq to confirm hypothesis that improvements in material conditions in conflict zones will enhance social and economic order. This is particularly true when money is tailored to community needs); Condra et al., *supra* note 244 (concluding that in Afghanistan, but not Iraq, reducing civilian casualties could disrupt insurgent recruitment).

389. For one exception, see Lyall et al., *supra* note 160.

390. Our analysis identifies a broad set of questions for apology researchers more generally: the complexities of making amends when the underlying conduct is unacknowledged, the meaning and effects of apologies offered for lawfully caused harms, and the intricacies of making amends in cross-cultural contexts.

391. See Worthington & Langberg, *supra* note 276, at 275 (lamenting the lack of empirical studies on self-forgiveness in combat veterans and active military personnel).

A more robust understanding of the need for and reactions to amends for legal injuries or killings in armed conflict settings would also shed light on a broader set of questions about the meaning and functions of amends more generally. A better understanding of amends in armed conflict is likely to provide a clearer understanding of amends in other instances of lawfully caused harm; to shed light on the cultural interplay between attributions of responsibility, amends, and rituals; and to push our thinking forward about how different forms of responsibility (e.g., legal responsibility, causal responsibility) are understood.

In the meantime, we hope that states will work to design processes for making amends for lawful harm that recognize the humanity of both the injurers and the injured and that provide an effective mechanism for addressing the harm caused. Such action need not take place at the level of the executive branch or its equivalent. Militaries might themselves contemplate, design, and implement their own expansive vision of amends as a recommitment to the principle of humanity.<sup>392</sup> Such activity could reaffirm<sup>393</sup> the military's basic belief in the distinction between combatant and civilian casualties and the need to treat all persons, even lawful civilian casualties, with dignity and respect.

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392. For example, in the absence of active opposition from the new Administration, the U.S. military is itself free to broadly interpret President Obama's Executive Order or its underlying principles to generate and implement its own vision of amends.

393. The U.S. military, its allies, and its enemies might reasonably doubt the President-Elect's appreciation for the Geneva Conventions. The President-Elect and his advisors have considered reinstating waterboarding, other outlawed interrogation techniques, and the targeting of involuntary human shields such as the families of terrorists. *John McCain to Donald Trump: U.S. Won't Reinstate Waterboarding*, CBS (Nov. 19, 2016), <http://www.cbsnews.com/news/john-mccain-to-donald-trump-us-wont-reinstate-waterboarding/> (quoting President-Elect Trump as saying "Right now, basically, waterboarding is essentially not allowed as I understand it . . . I would certainly like it to be, at a minimum, at a minimum to allow that."); Alex Emmons, *General Advising Donald Trump Says Killing Terrorists' Families Might Be OK*, THE INTERCEPT (May 19, 2016), <https://theintercept.com/2016/05/19/general-advising-donald-trump-says-killing-terrorists-families-might-be-ok/> (discussing a statement from Gen. Michael Flynn, now the President-Elect's National Security Advisor). That said, the President-Elect may moderate his views on the Geneva Conventions as he seeks out more counsel on the issue. See Michael D. Shear, Julie Hirschfeld Davis & Maggie Haberman, *Trump, in Interview, Moderates Views but Defies Conventions*, N.Y. TIMES (Nov. 22, 2016), <http://www.nytimes.com/2016/11/22/us/politics/donald-trump-visit.html> (suggesting that the President-Elect "had changed his mind about the value of waterboarding after talking with James N. Mattis, a retired Marine Corps general, who headed the United States Central Command"). But see Fred Kaplan, *Trump Has Not Changed His Mind About Torture*, SLATE (Nov. 24, 2016), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2016/11/trump\\_says\\_was\\_impressed\\_by\\_mattis\\_torture\\_opposition\\_but\\_that\\_s\\_not\\_the.html](http://www.slate.com/articles/news_and_politics/war_stories/2016/11/trump_says_was_impressed_by_mattis_torture_opposition_but_that_s_not_the.html) (revealing that Trump is in fact still open to waterboarding).

