

COMPENSATING COLLATERAL DAMAGE IN ELECTIVE INTERNATIONAL CONFLICT

*Distinguished Lecture**

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Introduction

Article 2(4) of the United Nations Charter famously prohibits the threat or use of force against the territorial integrity or political independence of states. Yet armed conflict, whether international or non-international, continues, with a depressing regularity, to be a feature of world politics. Even more depressing is the fact that much of the misery that armed conflict entails is visited upon persons who are not combatants. I propose to address the death and injury which these innocent victims of war suffer – especially in elective international conflicts – and the remedies to which they should be entitled. I cannot promise you a simple solution, even though this is a problem for which legal—and moral—principles seem to me to be clear, but I believe that I can clarify the application of those principles and show that the United States and the world community can do better and that their own policies and interests compel it.

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I.

“A right without a remedy is no right at all.”¹ International law has framed this basic, indeed definitional, principle in terms of the *necessary* consequences of an *illegal* act. In a classic formulation in the *Chorzów Factory* case in 1928, the Permanent Court of International Justice declared:

The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.²

Numerous international instruments on the law of war reflect the *Chorzów* principle. Article 3 of the Fourth Hague Convention of 1907 states:

A belligerent party which violates the provisions of the Regulations shall, if the case demands, be liable to pay compensation.³

Article 91 of Additional Protocol I of 1977 provides, in similar terms, that

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

¹ Lord Denning in *Gouriet v. Union of Post Office Workers*, [1978] AC, p. 435, cited in Rosalyn Higgins, *The role of domestic courts in the enforcement of international human rights: The United Kingdom*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 38 (Benedetto Conforti & Francesco Francioni eds., Martinus Nijhoff Publishers, The Hague, 1997); see also *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

² *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

³ Hague Convention No. IV, Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539, <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&docume ntId=144930FB7D15DBF6C12563CD00516582>.

part of its armed forces.⁴

These arrangements are plainly animated by humanitarian motives, but they have two problematic features. First, in both of these provisions, it is not the injury suffered by the victim that is the key prerequisite to a remedy. It is the legal violation. Without that violation there is, apparently, no obligation to remedy the injury. Second, in both provisions, the victim who has suffered the injury is not the direct recipient of the remedy.

Both the *Chorzów* judgment and the law of war instruments make compensation conditional on an illegal act, but they often provide significantly less than they appear to promise. Consider a mundane but cruel example:

Lieutenant Smith and his platoon, in the course of a military action in a foreign country, injure and paralyze a local woman, guilty only of living where the belligerents decided to confront each other. If the platoon did not violate the law of war, their action was not illegal and the state, on whose behalf they were acting, has no obligation to provide a remedy.

None of the cited provisions addresses the possibility of compensation for injuries caused by acts which themselves were not wrongful. As perverse as it sounds, the operative legal principle here is the “irresponsibility for injuries.”

Now, there is certainly nothing remarkable in the notion that the consequences of an *illegal* action should be repaired by those causing them. But it does not follow, as a necessary corollary, that compensation should *not* be owed for injuries caused by officials who were operating *lawfully* and whose actions were, accordingly, not illegal. Does it not seem anachronistic to proceed to say that contemporary international law, which has incorporated the protection of human rights, nonetheless holds that when officials of one state in the course of performing a public function, kill or injure

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 91, reprinted in INT’L COMM. RED CROSS, INTERNATIONAL RED CROSS HANDBOOK 216, 242 (12th ed. 1983), <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F461FC196C18A52DC12563CD0051E2AC> [hereinafter Protocol I].

a man, woman or child of another state or destroy their property, no international right has been violated and no obligation to provide a remedy comes into operation?

A second problem with the law of war provisions is the procedure they incorporate for compensation. In contemporary international human rights law and international investment law, the actual injured party is afforded standing as the claimant and receives compensation. By contrast, in the law of armed conflict, the principle of compensation is “depersonalized.” By “depersonalization” I mean that a legal fiction holds that the injury suffered by an individual human being through the action of an agent of another state is an injury to that individual’s state; hence it is the injured individual’s state which is alone entitled to make the claim for the injury and to receive compensation for it. This fiction hearkens back to an era in international legal theory in which states were the sole subjects of international law; only they bore rights under it and only they could make claims against other states. Therefore, the death or injury of a person in violation of international law was deemed an injury to that individual’s state. Only when that state lodged and then collected compensation for the injury (an event not likely to occur, if at all, until far into the future) was there a chance that the compensation (or part of it) might trickle down to the individual who actually suffered the injury.

A fiction, Jeremy Bentham reminds us, is a lie.⁵

II.

In many developed legal systems, the principles of irresponsibility for legal injury and depersonalization of compensation have come to seem anomalous. Tort law in many jurisdictions now recognizes a state’s duty to compensate its own citizens for injuries suffered as a result of governmental actions which were not themselves wrongful.

⁵ C. K. OGDEN, *BENTHAM’S THEORY OF FICTIONS* xviii (1932).

Consider two comparative examples. In France, through the 19th century, state liability was the exception⁶ and was based only on wrongful action (“responsabilité pour faute”).⁷ In 1895, however, the notion of state liability *without* fault was introduced.⁸ There are now two kinds of state liability without fault in French law: liability for risk (“responsabilité pour risque”) and liability for breach of the principle of equality (“responsabilité pour rupture de l’égalité devant les charges publiques”).⁹ State liability without fault may be based on a “special risk” which may be created by use of dangerous *things*, like explosives¹⁰ or weapons.¹¹ A special risk may also be created by dangerous *methods*¹² or dangerous *situations*.¹³ In 1951, in the context of domestic police operations, the Conseil d’Etat made a further distinction, between people who are the objects of the operations and people who are the unintended victims of the operations (“étrangers aux opérations de police”).¹⁴ If, during police operations, people “étrangers” to the operations are hurt, then even though there is no fault, there is state liability. If, however, people who are the objects of the operations are hurt, then state liability comes into operation if the official’s action was wrongful.

⁶ RENÉ CHAPUS, *DROIT ADMINISTRATIF GÉNÉRAL TOME 1* 1227 (15th ed. 2001), available at <http://attacheterritorialprep.unblog.fr/files/2010/01/fiche10droitadministratiflaresponsabiliteadministrative.pdf> (“Pendant tout le XIXe siècle, la possibilité d’imposer à la puissance publique l’obligation de réparer les dommages causés par son action (ou son inaction) a eu un caractère exceptionnel.”).

⁷ See *id.* at 1293-1334.

⁸ *Id.* at 1335.

⁹ *Id.*

¹⁰ See, e.g., CE 28 mars 1919, *Regnault-Desrozières* (explosion of ammunitions); see also MARCEAU LONG ET AL., *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* 205-12 (17th ed. 2009).

¹¹ See, e.g., CE Ass. 24 juin 1949, cons. *Lecomte et Franquette et Daramy* (gun). Note that, when it comes to weapons, all firearms, but firearms only, have been considered to constitute state liability without fault; see CHAPUS, *supra* note 6 at 1338, available at http://archiv.jura.uni-saarland.de/france/saja/ja/1949_06_24_b_ce.htm.

¹² See CHAPUS, *supra* note 6, at 1341-45.

¹³ *Id.* at 1345-47.

¹⁴ CE Sect. 27 juillet 1951, *Dme Aubergé et Dumont*.

Professor Dotan has neatly summarized the reasons for this development in French administrative law:

In the area of administrative torts, there has developed a recognition of the duty of the administrative authority to pay damages *without fault*, based, among other things, on the principle of equality, according to which, when an administrative action which was taken for the benefit of the community as a whole, [cost of the] injury has to be distributed, in accordance with the principle of equality, among all citizens, by means of compensation to the individual from the public treasury.¹⁵

In Israeli law, a comparable development has taken place. “In circumstances such as these,” Professor Barak-Erez, now on the Israeli Supreme Court, explains, “the policy objective of the ascription of responsibility is not to deter the public authority or to direct it to operate differently in the future, but rather to prevent an unequal allocation of the public burden [as a consequence of the authority’s actions].”¹⁶

In German law, courts have reached the same material result by a slightly different route. The doctrine of “*Aufopferung*” in German public law holds that someone who has been compelled to make a sacrifice for the benefit of the society as a whole ought to be compensated for the sacrifice, at least with regard to the economically measurable damages resulting from the sacrifice. The sacrifice must, however, go beyond the degree of contribution that every citizen has to make for the benefit of the community; it must be an “extraordinary sacrifice” (*Sonderopfer*). The action by the state agent must have been lawful and is, thus, distinct from a claim for

¹⁵ Yoav Dotan, *Ilot Tviah Tzeborit vePetzuim Lilo Ashem* (Public Causes of Action and Damages Without Fault) in MISHPAT UMIMSHAL 97, 106 (1994), cited in *Estate of Decedent Soumiah Zidan et al v. State of Israel*, A 752/04, Haifa District Court, 30 November 2011 (Isr.).

¹⁶ Daphna Barak-Erez, *Avalot Chukatiot Beldan Chukei HaYesod* (Constitutional Torts in the Era of Basic Laws) in 9 MISHPAT UMIMSHAL 103, 117 (2005), cited in *Estate of Decedent Soumiah Zidan et al v. State of Israel*, A 752/04, Haifa District Court, 30 November 2011 (Isr.).

damages suffered as a result of an unlawful state action.¹⁷

The principle in these national systems is quite clear: where an individual member of the community has been injured by a public action which was undertaken for the benefit of *all* members of the community, the other members of the community should share in the loss of the injured victim. Without such burden-sharing, a hapless member of the community will suffer for the benefit of all others who will simply be free-riders.

If this (to me) self-evident moral proposition can operate *within* a community, should it not apply *a fortiori* when the injured person is not a member of the community and is, thus, gaining no benefit from the injury he or she has suffered? In comparison to a domestic victim, the foreign victim is doubly injured—by the act and by the absence of enjoyment of any indirect benefit from it as a member of the community on whose behalf the injurious act was done.

In international law, intimations of a comparable doctrine may be found in the International Law Commission's work on articles on international liability without fault.¹⁸ In grappling with the problem, the Commission's predicate was that in contemporary industrial, scientific and technologically-based civilizations, some actions taken by states or under their authority, which are legally permissible and, moreover, promise to be beneficial to the community as a whole, may nonetheless present a high risk of considerable injury to others. In the words of the ILC's Commentary:

Regardless of any preventive measures that States may take in undertaking activities, they may nevertheless be unable to prevent the occurrence of

¹⁷ BGHZ 9, 83 (85f.) = NJW 1953, 857; BGHZ 13, 88 (91) = NJW 1954, 993; BGHZ 45, 58 (76) = NJW 1966, 1021; BGHZ 65, 196 (206); Arnulf Schmitt-Kammler, *Der Aufopferungsgedanke*, JURISTISCHE SCHULUNG 1995, 473 *et seq.*

¹⁸ As to the basis for this work., see Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, Secretariat Study, Y.B. INT'L L. COMM'N, 1985, Vol. II, Part One (Addendum), U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part I/Add1).

injuries in the territory of another State. The concept of liability for injuries to others, in the absence of fault, is not new in domestic law. In the case of certain activities, a causal relationship between the activity and the injury is sufficient to entail liability. This concept in domestic law has been continuously promoted for reasons of morality, social policy and maintenance of public order.¹⁹

This principle has been invoked in some international incidents. To cite one example, when the Soviet satellite *Cosmos 954* crashed on Canadian territory in 1978, Canada referred to the general principle of the law of “absolute liability” for injury resulting from high risk activities. The implication was that governmental entities which engage in permissible, but extremely dangerous, activities cannot simply externalize the risk onto others, but should be responsible for the injurious consequences of such activities.

III.

There are many parallels between these clear domestic and incipient international trends and the unintended, but foreseeable, injuries resulting from the conduct of military activities by one state in the territory of another state:

- by their nature, military activities are extremely dangerous;
- the activities are carried out for the benefit of the collective community of the state that conducts them;
- apart from the explicit and licit targets of such activities, military activities pose a risk of serious physical injury or property damage to those who are neither engaged in the conflict nor targeted and who are supposed to be insulated from the military action.

Yet, in that part of the corpus of international law concerned with regulating armed conflict, we find, instead of a legal development parallel to the general principle in developed national

¹⁹ *Id.* at 77-78, para. 358.

legal systems, quite contradictory legal arrangements. We find, first, a deviation from enlightened domestic practice with respect to state torts in the administrative law of developed legal systems, which may qualify as a general principle of law in civilized states. We find, second, a deviation from the well-established obligation of compensation to aliens for violations of customary international law. We find, third, a deviation from the development of absolute liability for extremely hazardous activities. And we find, fourth, a deviation from international law's principle of all human beings' right to live and to enjoy their property.

All of these glaring deviations are accomplished under the rubric of the seemingly innocuous legal term "collateral damage." The term holds that actions involving the use of armed force which cause injury to non-combatant persons or their property, but which were conducted in conformity with the requirements of the law of armed conflict, are not per se wrongful. Such actions will not be deemed wrongful if they were (i) prompted by military necessity and (ii) were proportional to that necessity. And since such actions will not be deemed wrongful, they will not, the argument goes, incur an international legal obligation of compensation.

Collateral damage is what we lawyers call a *terminus technicus*, a technical term. Technical terms can be valuable tools in intellectual discourse. One of their functions, whether in law or in medicine, is to present their referent so clinically and so emotionlessly that it facilitates dispassionate analysis. Sometimes, however, technical terms "over-fulfill" their purpose by infiltrating ordinary speech and becoming euphemisms. The technical term "collateral damage" has made that transition: it is useful to recall that it means killing and injuring noncombatant men, women and children and destroying their property. The term of art may make it easier for decent people to do things they would ordinarily shrink from by anesthetizing moral self-doubt and insulating the party that has caused the damage arising from their actions from international *criminal* responsibility. All of that may be necessary insofar, as societies often need to perform what sociologists call society's "dirty work." But should the technical term be used to absolve the community for whose benefit the dirty work has been done from a

civil obligation to compensate, directly and promptly, the innocent victims or their survivors? And should that obligation operate regardless of whether the actions of the damage-feasor violated the laws of war?

I submit as a general principle that where the community pursues lawful actions whose foreseeable consequence is injury to individuals, the injuries suffered should be compensated. That should include the injuries we call collateral damage in the law of war.

IV.

Like other abnormally dangerous activities, a state conducts military action for the benefit of its own community as a whole. The way a military unit chooses to conduct a particular action is determined by the extent to which it is expected to contribute to its own objectives. For that reason, the *likelihood* of collateral damage occurring is inversely proportional to the danger to which the military actor's personnel are exposed. And it is foreseeable.

Let me explain with a very simple example: the closer to the ground a military aircraft flies, the better the pilot of that aircraft will see his or her target. Thanks to that greater visibility, the aircraft's rocket or cannon fire or its gravity bombs are more likely to achieve their target and less likely to cause collateral damage. But the nature of visibility is that it is reciprocal: If I can see you, you can see me. Visibility is inter-visibility. So the closer the aircraft is to the ground, the more vulnerable it is to fire from the ground defenses within which the target is embedded. The aircraft may achieve a greater margin of safety by making itself less visible by flying higher, but that will increase the likelihood of collateral damage on the ground.

Now my point is not that a principle of international law requires or should require the aircraft to fly lower and, while reducing the probability of collateral damage, expose itself to a higher probability of destruction. Perhaps principles of chivalry should require this; perhaps not. Perhaps international law should require this; perhaps it should not. In both normative systems, the

issue is debatable from many perspectives. The point is, rather, that an actor's inherently dangerous activity is being conducted, by conscious choice, in a way that is less hazardous to the actor and more hazardous to others. The cost of the collateral injury is being shifted from the military actor and onto an innocent non-combatant.

The calculus of cost-shifting is particularly manifest when democratic states engage in so-called "elective international conflicts," a species of armed conflict with which this lecture is especially concerned. These are conflicts which are not fought out of a perceived urgent defensive necessity, but are undertaken as one of a number of available strategies to secure a goal which is not popularly viewed as existential. Nor is the proactive use of military force in elective conflicts necessarily unlawful. A United Nations peacekeeping operation is elective for the states that decide to contribute supplies or personnel. NATO's actions in Serbia and Kosovo and in Libya were, from the perspective of the participating members of the military alliance, elective conflicts. But just because elective conflicts are lawful or even virtuous does not mean that they do not cause collateral damage. Indeed, there may be imperatives in some of these operations that increase the likelihood of collateral damage.

Democratic states which engage in an elective conflict are particularly prone to the dilemma of a correlative "*elective* collateral damage." Without a compelling demonstration that these conflicts *must* be fought in order to preserve their own body-politic, a democratic electorate will be loath to support an elective war if the cost in terms of the lives of its troops and its treasure gets too high. So, figuratively speaking, the aircraft of democratic states engaged in elective conflicts—or more generally, their selection of weapons—will always be subject to a political imperative to "fly higher;" as a consequence, there will be more predictable collateral damage. Thus, the benefit to the democratic state, and in instances of authorization to use force by the world community for its inclusive benefit, comes at the cost of the victims of collateral damage. Collateral damage is being traded off to minimize injuries to one's own combatants. If the policy analysis with respect to injuries caused by lawful administrative actions, which I reviewed a few moments ago, were

applied to a state's foreign military activities, the cost of the collateral damage should be borne by the Treasury of the community which is the correlative beneficiary.

Discharging the state from a duty to repair the injuries caused in armed conflict to non-combatants is also problematic when viewed through another prism, that of the international protection of human rights. A duty of reparation for injuries is fundamental to the notion of human rights and may be deemed a corollary of the international minimum standard. As a general human rights matter, a state may not discriminate, with regard to those subject to its jurisdiction and control, between its own nationals and foreign nationals. But states which have developed a legal distinction between so-called "police actions" and "belligerent actions" do this. An injury resulting from application of the military instrument to its own nationals will be called a "police action" and it leads to compensation. The same action injuring a foreign national will be called a "belligerent action" and will not be the legal basis for compensation.

V.

If I have made my case for compensating the victims of collateral damage, let me turn to its procedure and timing. The Commentary of the International Committee of the Red Cross to Article 91 of Additional Protocol I, states:

On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit.²⁰

Professor Benvenisti, the leading scholar in the area, shares the ICRC's concern with what he calls "the adverse consequences of recognizing individual suits [before then]."²¹

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

²¹ EYAL BENVENISTI, *INTERNATIONAL LAW OF OCCUPATIONS* 334 (2004)

These purported justifications of the depersonalization and deferral of compensation for innocent victims of elective international conflict, whether on account of violations of the law of war or on account of collateral damage, make little sense in contemporary armed conflict. Nowadays, most armed conflict is not a temporally demarcated phenomenon that commences with a declaration of war and concludes with a signature of surrender or a peace treaty. Rather, it occurs in spurts of violence. Serial wars pause to catch their breath, as it were; fragile cease-fires are broken when one of the belligerents deems it advantageous. In some instances, military force is not used in a traditional war with the intention of achieving a decisive victory but in a limited action to preempt possible counter-action or to degrade the offensive capacity of a long-term adversary. The ICRC's assumption of a precise conclusion to a war, accomplished by a treaty of peace or of surrender, has become the rare exception. So deferring claims of or on behalf of victims, whether for violations of the law of war or for collateral damage, until the formal conclusion of the conflict, simply means that most innocent victims of war will probably never receive reparation. Justice delayed here will mean literally justice denied.

The European Court of Human Rights, in the *Behrami* and *Saramati* cases, and the House of Lords in its judgment in *Al Jeddah*, effectively blocked the possibility of compensation for collateral damage caused by national forces in military actions conducted within the framework of an international organization. These decisions have been well described by Alexander Breitegger of the University of Vienna as “sacrificing the effectiveness of the European Convention on Human Rights on the altar of the effective functioning of peace support operations.”²² Certainly, promising that

(explaining that “[t]he settlement of numerous individual claims will not only be cumbersome due to their sheer number and the need to examine each of them in detail, but will in most cases stop short of providing a remedy to most individuals. A comprehensive and durable solution necessitates investment in infrastructure (schools, roads, job generation, etc.) which requires public funding. Cash payments to individuals must be accompanied with agencies that administer saving funds and arrangements that limit short-term spending to ensure long-term availability of funds and prevent inflation.”).

²² Alexander Breitegger, *Sacrificing the Effectiveness of the European Convention*

states contributing forces to such military actions will be immune from liability for injuries their troops may inflict on non-combatants will make it easier to recruit those states for future international peacekeeping operations. At the same time, member-states will not be responsible for the debts of the international organization authorizing the peace-keeping action. As for the organization itself, it is dependent on member-states for its budget and, in any event, is going to be judgment-proof. Bottom line: the innocent victims pay for the benefits accruing to those that initiated the violence.

But if the objective of evading liability for collateral damage is, indeed, “the effective functioning of peace support operations,” the inter-state organizations, the governments, the European Court of Human Rights and the House of Lords, may all be “penny wise and pound foolish.” Governments and the taxpayers funding them, like all profit maximizers, are never enthusiastic about assuming obligations to pay for anything, especially when they have succeeded in evading the obligations in the past and externalizing those costs. For obvious reasons, governments may have an incentive to compensate their own citizens (and constituents) if they injure them, but will be disinclined to compensate non-nationals for comparable injuries.

Yet, there are compelling pragmatic, strategic reasons why payment for collateral damage in elective armed conflict should not fall prey to these economic disinclinations. In the so-called second and third generation modes of warfare, innovated and used with devastating effect by Chairman Mao and General Giap, the support of the non-combatant population is deemed vital. Hence, contemporary counter-insurgency theory now focuses on avoiding alienating the non-combatant population. In those terms, timely compensation to individuals who have suffered collateral damage should be seen as a strategic device. (In that regard, one will be disappointed by the much celebrated United States Counter-Insurgency Manual, which makes no reference to compensation for collateral injuries non-combatants suffer as a consequence of lawful

on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al Jedda, 11 INT'L COMMUNITY L. REV. 155, 174 (2009).

military actions.) The point is that “strategic compensation” is self-serving; in the area of collateral damage, strategic compensation and international human rights converge.

All of these policy and pragmatic considerations should lead to adjustments in the law of armed conflict in order to bring it into conformity with general trends in domestic and international law. The international community should affirm a *general* obligation of reparation to individual non-combatants for unintended injuries caused by military actions, whether those actions were lawful or unlawful.

VI.

There are some encouraging international legal developments with respect to this recommendation. In its 2004 *Wall Advisory Opinion*, the International Court of Justice, in considering Israel’s responsibility for losses incurred by individual Palestinians as a consequence of Israel’s breaches of international humanitarian law, got part of the matter right. It held that Israel “has the obligation to make reparation for the damage caused to all the natural or legal persons concerned” and found that those reparations could entail “compensation or other forms of reparation for the Palestinian population.”²³ Even though the obligation derived, arguably, from a violation of the law of armed conflict and not from collateral damage, the right to reparation was “personalized.”

A better example may be found in the incident in 1988 of the downing of the Iranian Airbus by the U.S.S. *Vincennes* in the Persian Gulf. President Reagan insisted that the U.S. action had not violated the law of war; nevertheless, he promptly offered compensation directly to the families of the victims.²⁴ The United States then

²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 136 (July 9).

²⁴ See Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner over the Persian Gulf (July 11, 1988), reprinted in 2 PUB. PAPERS: RONALD REAGAN, 1988-89, at 934-35 (1991), <http://www.reagan.utexas.edu/archives/speeches/1988/071188b.htm>.

proceeded to pay.²⁵

Alas, Congress has not adopted the Reagan formula. The Foreign Claims Act (FCA)²⁶ empowers the military to compensate foreign nationals harmed by the U.S. military as long as “it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, [or] indirectly related to combat. . . .” The exclusion for harm caused by an action of the enemy is unimpeachable, but the so-called “combat exclusion” is not, for it means that the type of collateral damage with which I have been concerned in this lecture is effectively precluded from the scope of the Act.

For this latter type of collateral damage caused in combat, the U.S. military has instituted a system of “condolence payments.”

Condolence payments are nominal amounts (currently a maximum of \$2,500.00 for a life in Iraq) meant to express sympathy and provide immediate monetary relief to innocent victims. Between October 2001 and September 2003 all condolence-type payments were specifically prohibited in Afghanistan and Iraq by order of Central Command. Only after certain elements of the military realized the need to provide some assistance to innocent victims was the condolence payment program authorized. The documents released show that while the condolence-payment system is a step toward helping where the U.S. has harmed, the program fails to properly deliver justice to civilians and, ultimately therefore, to achieve its goal of winning support of the civilian population.²⁷

CIVIC,²⁸ the nongovernmental organization devoted to addressing and remedying this problem, has proposed a separate and permanent claims system for combat situations. Such a condolence payment program, if it were implemented efficiently and with

²⁵ See *U.S. and Iran Settle Financial Claims*, WASH. POST, Feb. 23, 1996, at A23 (1996 WL RN 6561790).

²⁶ 10 U.S.C.A. § 2734 (West 2006).

²⁷ Marla B. Keenan, *Adding Insult to Injury: U.S. Military Claims System for Civilians*, in *CIVILIANS IN CONFLICT*, (2008), http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf.

²⁸ See generally *CIVILIANS IN CONFLICT* (July 1, 2013), http://civiliansinconflict.org/uploads/files/Center_2_pager.pdf.

appropriate consideration for the victims and their families, would both deal with a human right and constitute a strategic compensation system.

In addition to establishing a permanent and free-standing system, payment to the injured persons should be made promptly. The insistence on the old model of state-to-state compensatory arrangements at the end of the conflict confuses two entirely different types of war injury: personal injury suffered by individuals and general, infrastructural damage suffered by the community as a whole. The latter, by its nature, must await the conclusion of the conflict; the former should not have to wait. In this regard, some recent compensation practices in Iraq and Afghanistan are encouraging.

The mode of implementation has to be administrative. Requiring the injured civilians to bring suit in the courts of the state which has caused the injury is impracticable, from both the perspective of the injured individual and the judicial system of the foreign state. Until the right of victims of collateral damage to reparation is established in conventional or customary international law, it is hard to imagine national judges, even in monist systems, awarding damages. But the prospect of the military force of the injuring state itself deciding on the measure of damages and directly making the payment may add insult to injury. A more practicable and less offensive method, which would serve both humanitarian and strategic purposes, would be to assign the liquidation of damages and their distribution to a neutral entity, on the order of an NGO like the International Committee of the Red Cross.

VII.

Obviously, there are many problems in the implementation of these proposals. It will often be unclear which side is responsible for the collateral damage. When one side uses women and children as human shields or emplaces anti-aircraft batteries by schools or mosques, the party actually bombing or firing and causing the injury may contend, reasonably, that it is not responsible for the ensuing collateral damage. In many conflicts, the injured civilians may favor the enemy and it will be tempting to ignore their claims lest a benefit be given to the adversary. And there is always the danger of transforming a program based upon a humanitarian motive into a pay-to-kill exchange. Some of these problems are daunting, but there are problems in the implementation of any legal arrangement, including the perpetuation of the system in place.

The important issue is the principle involved: in conflict as in peace, the party causing injury and benefitting from it should be obliged to assume a civil liability to the victims and their survivors. Whether or not its actions were internationally criminal, were caused by a chain of grievous errors in the fog of war or were the inevitable consequence of the strategy being pursued, innocent victims are entitled to reparation. That repair should come from the party that, hopefully in ways compatible with the law of war, elected to reduce its own exposure to injury by shifting the danger and consequent injury onto others—and the repair should come in a timely fashion. General principles of law, human rights law and simple morality require no less.