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Responsibility to Pay: Compensating Civilian Casualties of War

by Jonathan Tracy*

MR. JAWAD¹ IS THE PATRIARCH of what was a large, industrious Iraqi family. His family, his parents, and his two siblings' families resided in one complex, located in Nassiriya, Iraq. On March 23, 2003 tragedy struck. After U.S. fighter planes targeted an area nearby, and an errant missile landed on the family complex. The only survivors were Mr. Jawad and his teenaged niece Zainab, who was left with severe burns covering over forty percent of her body. Thirteen family members died. The United States paid Mr. Jawad and Zainab \$5,000 for their losses and suffering.

On June 17, 2003, several children were playing in a clearing in the Al-Shula neighborhood of Baghdad. A few weeks earlier, unexploded cluster bombs from U.S. artillery landed in the clearing. Unaware of its deadly impact, the neighborhood children unwittingly picked up the ordinance, and it detonated. The explosion injured four children and killed Mr. Mahmoud's three-year-old daughter. The United States did not compensate Mr. Mahmoud.

On June 18, 2003, Mr. Mohammed, a former Iraqi Army soldier, and nearly one hundred of his comrades, demonstrated at the North Gate entrance to the Green Zone in Baghdad, protesting the dissolution of the Iraqi Army. U.S. soldiers blocked the crowd's ingress to the Green Zone. Protestors threw rocks, but the U.S. soldiers made no violent gestures because the rocks posed no imminent danger. A Military Police convoy of three HMMWVs (High Mobility Multipurpose Wheeled Vehicle, or Humvee) slowly moved through the crowd. The soldier manning the high-powered machine gun in the last HMMWV fired two shots into the crowd. One bullet hit Mr. Mohammed. The soldier later claimed he returned fire in the direction where shots emanated. An investigation later concluded that it was more probable that gunshots were not fired from the crowd. Mr. Mohammed later died from his wound. The United States paid his widow \$2,500 for her loss.

Mr. Abbas was driving in his white van on June 29, 2003 on Haifa Street in Baghdad. As he passed through the Hamm ad Shihab traffic circle, a rocket-propelled grenade was fired from a green BMW at nearby U.S. soldiers. None of the soldiers were injured, and they quickly returned fire. The green BMW sped away. Two bullets errantly hit Mr. Abbas. He died at a hospital several days later from his wounds. The United States paid his widow \$2,500 for her loss.

In early 2004 the survivors in each of these cases filed compensation claims with the author of this article at the Baghdad



UN Photo/ P. Sudhakaran

Devising a new system for compensating innocent Iraqi civilian casualties is imperative.

Convention Center. The U.S. military responded by issuing judgments in the form of "condolence payments."

U.S. military and civilian leadership take tremendous pride in the accuracy of their weaponry and the exceptional training of their military personnel. Nevertheless, innocent casualties are an unfortunate reality of warfare. While the practice of firebombing cities seems behind us, on two occasions U.S. forces lead extensive attacks that combined artillery fire, air strikes, and ground attacks on Falluja, a town west of Baghdad with a population of 300,000. Civilian casualties mount daily in Iraq even without "major battles." Despite the mounting death toll, no mechanism legally obligates the United States (or any military power) to compensate victims of lawful armed conflict. In Iraq, the United States sometimes provides nominal amounts of compensation to victims' families, but this article argues that offering full compensation is imperative.

Most discussions about armed conflict treat civilian casualties as a tragic but unavoidable result that should be minimized to the extent possible. This discussion must be expanded. In wars of choice or intervention, military powers must be legally obligated to compensate victims' families in an adequate, timely, and just manner.

RESPONSIBILITY TO COMPENSATE

Today no norm or obligation exists within international human rights or international humanitarian law requiring a government to compensate foreign nationals innocently harmed. However, an emerging norm requiring compensation or reparation exists if the harm results from a war crime or crime against humanity.² In this vein, the U.S. military can make compensation payments under the Foreign Claims Act³ (FCA) when U.S. soldiers unlawfully harm innocent civilians. The

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FCA creates a system intended to provide full monetary compensation to victims of unlawful acts — such as the incident in Mahmudiyah where four U.S. soldiers raped a young girl and murdered her and her family.⁴ Unfortunately, the military has grossly underutilized the FCA and has not used the statute in many of the most egregious murder and assault cases in Iraq and Afghanistan, including the incident in Mahmudiyah. The FCA allows civil society to articulate concerns when the United States fails to compensate victims of unlawful acts. However, there are no laws requiring the military to compensate civilians harmed during lawful military operations.

The term “civilian” is defined here as a person not armed, formally associated with the groups in conflict, or taking direct part in the conflict. In Iraq, it is impossible to determine the number of civilian casualties harmed by U.S. personnel versus those harmed by various insurgent groups. Certainly, U.S. combat-related actions have harmed thousands of civilians, whether through targeted air strikes, civilians caught in the crossfire, or civilians killed through the escalation of force when U.S. soldiers misperceive a threat. This situation results in moral and practical imperatives necessitating compensation.

When a nation chooses to enter war, whether justifying it under the doctrine of Responsibility to Protect or some other authority, it takes on the responsibility to fight a “just war.” While many just war discussions focus on *jus ad bellum* — the justness of entering a war — and *jus en bello* — fighting a war in a just manner — few emphasize *jus post bellum* — justice after war. When ethicists discuss *jus post bellum*, they are concerned with the rightness of the conclusion of war. A just conclusion exists when: (1) a more secure and just state of affairs than existed prior to the war is established; and (2) the protection of an individual’s human rights is more secure.⁵ Practitioners and scholars concerned with *jus post bellum* are mainly concerned with reparation, trials for war crimes and crimes against humanity and reconstruction efforts to rebuild infrastructure and the rule of law.⁶ The right of innocently harmed civilians to compensation must be added. Civilians’ rights remain insecure if no legal mechanism exists for them to receive compensation. Instead of increasing security, war has destroyed their lives, killed their loved ones, and diminished their prospects for a stable future. There is no justice if “armies of right” bulldoze over civilians and leave them to decay in the mire of war’s aftermath. Offering surviving family members payment recognizes victims’ dignity and helps alleviate families’ immediate needs.

Along with moral reasons, practical considerations also play a key role. The new U.S. Army Field Manual on Counterinsurgency greatly stresses the importance of winning civilians’ hearts and minds.⁷ To win hearts and minds, militaries must take a holistic approach to rebuilding a nation after war by providing infrastructure, governance, safety and well-being. Failure in these components may prevent lasting victory. When people lose faith in the occupying army or a new government, they may seek insurgent forces for shelter or assistance. If militaries abuse the civilian population, whether by cordoning off entire blocks and arresting all fighting aged men, destroying property while raiding houses, frightening children during searches, embarrassing honor-bound men, or unintentionally killing and harming civilians, they will send the population into the enemy’s waiting arms. Thus, positive treatment of civilians becomes imperative to strategic military interests. While

building a school or hospital may help the military “win over” a community, providing individual monetary assistance to a family who lost a breadwinner during a firefight can “win over” a family and a neighborhood.

These moral and practical considerations necessitate that governments and policy-makers ensure militaries can provide full compensation to innocent civilians harmed as a result of armed conflict. The normative legal framework of humanitarian law should include equitable and adequate combat claims.

THE INADEQUACY OF CONDOLENCE PAYMENTS IN IRAQ

Although U.S. law does not formally recognize a right to file combat claims, U.S. military attorneys and commanders have stated that paying combat claims is essential to the military’s interests in repeated engagements since the Vietnam War. After an incident involving the deaths of many Vietnamese in the city of Nha Trang, Judge Advocates at U.S. military headquarters in Vietnam convinced ground commanders that paying claimants would “gain the goodwill of the people,”⁸ and that an “effective

“An equitable combat claims system helps ensure that victims will not only view the alien army as the harbinger of pain and suffering, but as a force that fairly and justly compensates those they harm.”

claims program supported the war against the guerrillas.”⁹ While the military used contingency funds in this particular case, Judge Advocates recommended that U.S. law be amended to authorize combat related claims.¹⁰ Military lawyers continue to realize that offering combat claims is important. In its after-action review of the first year of combat missions after September 11, 2001, the U.S. Army’s Center for Law and Military Operations wrote, “[C]ommanders believed that the payment of legitimate claims helped win the hearts and minds of the populace and enhanced their units’ force protection postures.”¹¹

Instead of creating an equitable law, in every major conflict since Vietnam, the United States has implemented ad hoc nominal payment programs. Iraq is no different. The only form of combat claims that U.S. military regulations allow are termed solatia payments. These are nominal amounts payable from a commander’s operation and maintenance funds as an expression of sympathy. U.S. Central Command (CENTCOM) — the command responsible for Iraq and Afghanistan — did not authorize

Credit: UN Photo/ P. Sudhakaram



Widows of Iraqi civilians accidentally killed during the current conflict typically only receive \$2,500.

solatia payments at the start of operation Iraqi Freedom, reasoning that issuing solatia payments contravened local customs. The U.S. Government Accountability Office (GAO) recently issued a report citing some Marine units that briefly used solatia in Iraq, however.¹² Without solatia, the military lacked mechanisms to provide monetary assistance to innocent civilians harmed from March 19, 2003 until the following September when the military established the current ad hoc program. The highest level of command in Iraq authorized “condolence payments” to be dispersed from the Commander’s Emergency Response Program (CERP) fund. Commanders may use CERP funds to assist the Iraqi people by providing “condolence payments to Iraqi civilians for the death or injury resulting from U.S., coalition, and supporting military operations.” For several reasons the program is inequitable and inadequately meets the moral and practical goals of a combat claims program.

First, payments for every death, injury, or property damage incident are limited to \$2,500. Brigadier generals or higher can now authorize payments of up to \$10,000; however, there is little to no evidence of any individual payments exceeding \$2,500 per death. Placing a price on personal tragedy is always difficult, but it is possible to provide payments respectfully and in line with regional customs. Under the FCA, officers may pay full market value when a tank runs over an Iraqi’s truck in

the course of a non-combat related accident, but may only pay \$2,500 for the death of a civilian killed in a fire. A \$2,500 payment provides little help to widows, like Mr. Mohammed’s wife, with several young mouths to feed. This artificial limit leaves survivors bitter and frustrated with the United States.

Second, reconstruction projects overshadow condolence payments. Commanders prioritize CERP funds for reconstruction projects at hospitals, schools, or power stations, at the expense of condolence payments. In fiscal year 2005 condolence payments accounted for eight percent of all CERP disbursements; in fiscal year 2006 it decreased to five percent. The perception in this author’s unit was that fixing a school and employing Iraqi contractors allowed funds to go further than paying a widow for losing her husband. And when the same fund supports both projects, the one of lesser importance gets short-changed. Mr. Mahmoud did not receive compensation after his daughter died from a cluster munition because funds for condolence payments were unavailable when he visited the convention center.

Third, the rules governing condolence payments are ad hoc. Each unit takes different approaches to if, when, and how to make condolence payments. Some units choose to pay only high profile cases. Others will not pay claims when a different unit caused the harm no matter how difficult or impossible it will be for an Iraqi to file with the “appropriate” unit. In Ramadi military officials told local Iraqis that they could not file claims when the incident occurred over three months before.¹³ This does not afford the victim or survivor time to collect evidence or documents; nor does it allow for time to grieve before filing a claim. A final problem resulting from the program’s ad hoc nature is that no adequate claims officers’ guidelines exist. Different victims receive disparate treatment because officers lack substantive guidance regarding standard of proof, rules of evidence, how to determine valuation, or sensitivity training. Unit lawyers will not operate effectively or uniformly without concrete guidance. The nature of this system leads to drastically different results for civilians who suffer the same harm. These conflicting outcomes intensify negativity and nullify any potential goodwill won by offering condolence payments.

The sum of these problems creates a program where hearts and minds are not won and victims are not offered redress. With firsthand experience meeting over 1,000 Iraqis, this author knows well that the current system is not meeting its goals.

RECOMMENDATIONS FOR AN EQUITABLE COMPENSATION SYSTEM

For a combat claims system to work effectively, the U.S. Congress should legislate a fair, just and equitable system to compensate innocent civilian survivors and victims’ family members. This program should possess several characteristics. First, it is essential that the program be permanent and stand-alone. As long as the military creates ad hoc programs for each military engagement, combat claims will generally fall under a larger umbrella of reconstruction projects where the use of claims will be minimal and overshadowed. With a separate system, funds will always be accessible when needed. Timeliness is essential because a family’s suffering generally grows exponentially when help is delayed. Also, an institutional program will allow the military to start the program soon after combat commences — within days or weeks instead of six months. Permanence would also eliminate disparate results.

Second, military officers should make claims payments. Allowing State Department officials or a non-governmental organization to make payments, while attractive for other reasons, does not achieve one of the program's major goals. Because the military engages in combat activity and causes innocent civilian casualties, the military should offer victims' families condolence for its actions through payments. Furthermore, recognizing harm done can be as important as the monetary payment. The recognition a family receives will mean more coming from someone wearing the same uniform as the person who harmed the loved one. Keeping the program within the military also serves the purpose of documenting civilian casualties. Without knowing an accurate number of civilian casualties, it is difficult to evaluate claims that the United States minimizes civilian casualties as much as possible.¹⁴

Third, the U.S. military must lift the \$2,500 payment limit. The program must contain a mechanism to allow larger payments in deserving cases. Similarly, the amount must be high enough to demonstrate genuine condolence and provide enough resources for the survivors to recover from the loss in the short-term.

Fourth, a claimant must be able to appeal the initial decision when he feels the amount offered is inadequate. Similarly, if the claim is denied outright, the claimant must be given an opportunity to file additional materials and appeal the decision to a higher authority. The claimant deserves to know the basis for decisions and to have decisions in writing. Transparency is

essential in this process so that civilians understand and respect the program.

Fifth, for the program to be successful, claims officers must be adequately trained. The U.S. Army trains Judge Advocates in operational law, a discipline under which claims training could fall. Operational law training allows lawyers to provide excellent legal advice in the field. Adding combat claims training will allow the program to run efficiently and uniformly. The training must provide practical guidance on applicable standards of proof and other evidentiary issues, as well as provide education on why the program is important and why and how claims officers must show empathy towards victims. Establishing guidelines for this program is difficult because valuation will always be somewhat subjective; however, it is possible to effectively train lawyers to evaluate each case by its facts and circumstances to find an appropriate amount.

CONCLUSION

WAR NEED NOT BE TOTALLY UNFORGIVING. When innocent people become intertwined in the consequences of armed conflict, a chance for recognition and compassion exists. An equitable combat claims system helps ensure that victims will not only view the alien army as the harbinger of pain and suffering, but as a force that fairly and justly compensates those they harm. International humanitarian law principles and norms should be expanded to recognize that innocent civilians deserve assistance in order to more fully possess their rights. **HRB**

ENDNOTES: RESPONSIBILITY TO PAY

1 The facts and circumstances of each case discussed in this article are true and accurate, but the names have been altered. The author possesses copies of each case file.

2 See *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, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); *Rome Statute of the International Criminal Court* art. 75, July 17, 1998, 2187 U.N.T.S. 90.

3 Statute of the United States Code, 10 U.S.C. § 2734(a)(3) (2007).

4 Claims are compensable under the FCA only if "[they] 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 . . . indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission." 10 U.S.C. § 2734(b)(3). Therefore, any injury, death, or property damage caused during lawful combat action may not be paid under the FCA.

5 BRIAN OREND, *THE MORALITY OF WAR* 163 (1st ed. 2006).

6 Richard DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 154 (2005).

7 U.S. ARMY, *ARMY FIELD MANUAL 3-24 COUNTERINSURGENCY* (Dec. 2006), available at <http://fas.org/irp/doddir/army/fm3-24.pdf> (last visited Nov. 2, 2007)

8 FREDERIC BORCH, *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975* 41, (1st ed. 2003).

9 *Id.* at 40.

10 *Id.* at 41.

11 Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, *Legal Lessons Learned from Afghanistan and Iraq, Volume I: Major Combat Operations 11 September 2001-1 May 2003* 175, available at <http://www.fas.org/irp/doddir/army/clamo-v1.pdf> (last visited Nov. 2, 2007).

12 U.S. Government Accountability Office (GAO), *The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan* (2007), available at <http://www.gao.gov/new.items/d07699.pdf> (last visited Nov. 2, 2007).

13 A copy of the bulletin dispersed to Iraqis visiting the Ramadi claims site in 2005 is in the author's files.

14 The GAO's report and the documents released thus far under the American Civil Liberties Union's Freedom of Information Act request have brought us no closer to knowing the true number.