



Reparations for civilian harm from military operations: Towards a UK policy

Roseanne Burke and Mark Lattimer



Cover photo:
Dhiyaldin Shamsaldin takes
notes as body of a man killed
by an airstrike is exhumed,
Mosul, Iraq
©Tommy Trenchard /
Panos Pictures

© Ceasefire Centre for Civilian Rights
December 2021

Ceasefire Centre for Civilian Rights

The Ceasefire Centre for Civilian Rights is an international initiative to develop civilian-led monitoring of violations of international humanitarian law or human rights in armed conflict; to secure accountability and reparation for violations; and to develop the practice of civilian rights.

Ceasefire is registered as a charity and a company limited by guarantee under English law; charity no. 1160083; company no. 9069133.

Acknowledgements

This publication was funded by the Joseph Rowntree Charitable Trust. The views expressed are not necessarily those of the Trust. Research for this report benefited from extensive pro bono support from Allen and Overy LLP. Ceasefire is also grateful to Frank Ledwidge and Dr Haim Abraham for serving as peer reviewers. Copy editing: Sophie Richmond. Report design: Kavita Graphics. The contents of this report including any errors or omissions are the sole responsibility of the Ceasefire Centre for Civilian Rights.

Material from this publication may be reproduced for teaching or other non-commercial purposes, with appropriate attribution. No part of it may be reproduced in any form for commercial purposes without the prior express permission of the copyright holders. Printed in the UK on recycled paper.

ALLEN & OVERY

This report contains research undertaken by Allen & Overy for the Ceasefire Centre for Civilian Rights in 2020 for general information purposes only. The relevant laws and international standards discussed herein may have changed since publication. Allen & Overy is under no obligation to update or revise this report. Nothing contained in this report provides or is intended to provide legal or other professional advice. No reliance should be placed on the content of this report. Allen & Overy is not responsible or liable for any matter relating to any third parties accessing or using this report and its content. Allen & Overy does not endorse nor is Allen & Overy responsible for any future revision, amendment, or addition to this report made by Ceasefire Centre for Civilian Rights or any other third party.

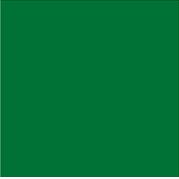


Contents

	Abbreviations	2
	Executive summary	3
1	Introduction	7
	What is civilian harm?	9
2	Civilian harm and the right to reparation	12
	International human rights law	13
	International humanitarian law	14
	Reparation does not depend on criminal responsibility	16
	Addressing incidental civilian harm from attacks on military objectives	17
3	Avenues to reparation	19
	Compensation funds, policies or mechanisms	19
	Civil litigation	31
	Summary statistics on UK accountability for civilian harm	41
4	Challenges to the right to reparation	44
	Identifying responsibility	44
	Establishing jurisdiction	47
	Ensuring access to compensation	48
	Retrogression in the UK	51
5	Towards an effective reparations policy	54
	The right to truth	54
	Satisfaction	56
	Compensation	57
	Restitution and rehabilitation	59
	Guarantees of non-repetition	60
	Conclusion and recommendations for a UK policy on reparations	61
	Recommendations	62

Abbreviations

ACLU	American Civil Liberties Union
ACO	Area Claims Offices
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CCMT	Civilian Casualty Mitigation Team
CERP	Commanders Emergency Response Program
CLC&P	Common Law Claims and Policy Division (of the UK Ministry of Defence)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FCA	Foreign Claims Act (US)
FCC	Foreign Claims Commissions
FOI	Freedom of Information
HRA	Human Rights Act
IAC	international armed conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFI	Iraq Fatality Investigations
IHL	international humanitarian law
ILC	International Law Commission
ISAF	International Security Assistance Force (Afghanistan)
MoD	Ministry of Defence (UK)
NDAA	National Defense Authorization Act (US)
NGO	non-governmental organizations
NIAC	non-international armed conflict
RTA	road traffic accident
UN	United Nations
UNCAT	UN Convention Against Torture
UNCC	UN Compensation Commission



Executive summary

Twenty years after the start of UK involvement in the wars in Afghanistan and Iraq, the UK has no developed policy on reparations for civilian harm. This is despite the fact that thousands of civilians have been killed by coalition military operations in which the UK has played a major part, and despite hundreds of cases in which the UK has paid major awards to civilians who have suffered violations of human rights and international humanitarian law (IHL) through the actions of UK forces. In all cases, these were civilians whom UK military operations were specifically mandated to protect.

Civilian harm includes death, injury and destruction of property. It is important to recognize, however, that harm can extend beyond direct physical injury to include mental or moral harm and that acts of war often have reverberating effects which can have a serious impact on the civilian population.

Summary statistics on UK accountability for civilian harm

Despite decreasing transparency, Ceasefire has been able to draw up the most comprehensive data yet on accountability for civilian harm in relation to UK military operations in Afghanistan and Iraq based on MoD reports, ministerial statements, evidence submitted to Parliament, and FOI requests by media outlets and by Ceasefire.

The total bill for compensation for civilian harm in relation to UK military operations in Iraq and Afghanistan is currently running at £31.8 million from 6,633 cases. This includes £5.4 million in relation to Afghanistan (4,740 cases) and £26.4 million in relation to Iraq (1,893 cases). The final sum may be significantly higher.

The total number of civilian compensation cases, at 6,633, dwarfs the total of 14 criminal prosecutions of UK service personnel for offences against the local population in Afghanistan and Iraq between 2001 – 2020.

More detailed statistics available in relation to Iraq show that the average amount paid per case handled by personnel in theatre, at under £2,000, is considerably smaller than the average amount secured through litigation in the UK, at over £60,000.

Individual awards cover a huge range, from USD 750 for a child wounded in the face in Afghanistan, USD 10,200 for the killing of a husband, two sons and two daughters in a helicopter strike also in Afghanistan, to GBP 2.83 million to the family of Mr Baha Mousa and nine other Iraqis for violations of the right to life and the prohibition against torture.

UK policy gaps

The UK government states that ‘We are proud of our strong record of IHL implementation and compliance’. Civilian protection is also regularly cited by government ministers as a justification for going to war in the first place. However, neither the UK’s 2019 report on

IHL implementation nor its 2020 policy on protection of civilians makes any reference to obligations in respect of civilians who suffer harm as a result of military operations.

Whether by intention or omission, UK policy towards accountability for IHL violations has in recent years focused almost exclusively on repeated criminal investigations of junior service personnel, with very little result. The implication is that violations are seen as transgressions committed by individual service personnel and that the responsibility of the state is limited to prosecuting those individuals.

The Overseas Operations (Service Personnel and Veterans) Act 2021 further restricts the ability of civilians to claim compensation from the UK for violations of IHL and human rights law, introducing a new 'longstop' to limit all claims after six years, risking leaving the UK in violation of its international legal obligations. During the passage of the legislation, UK ministers expressed concern that human rights claims and other instances of 'lawfare' may constrain or undermine military effectiveness 'on the battlefield'. However, the vast majority of allegations – proven or unproven – of abuse by UK service personnel in Afghanistan and Iraq over the last two decades do not concern the conduct of hostilities but rather abuses against detainees within the power of UK personnel or against civilians in the course of law enforcement operations.

Although the legacy of UK operations in Afghanistan and Iraq includes outstanding claims of reparation for civilian harm, the question of reparations cannot be dismissed as a legacy issue. UK military operations continue in Iraq, Syria, Somalia and Mali and extensive military support is being provided to a number of 'partner nations', including Saudi Arabia.

Legal obligations

It is a well-established rule of international law that states must provide reparation where they are responsible for a violation of international law. The ability of individual civilians who have suffered harm to claim reparations is, however, largely left to be determined by national laws.

The *UN 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* confirm the rights of victims to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. The UN Basic Principles further provide that states should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation.

While potential war crimes should always be investigated, placing the focus solely or even primarily on criminal responsibility for violations of IHL will not always be desirable or appropriate from the perspective of redressing civilian harm. Civilian access to reparation should not depend on an unduly high burden of proof required for a criminal conviction. Serious instances of civilian harm may also be caused by IHL violations, such as breaches of the duty to take precautions in attack, which are not criminalized under international law.

Civilian harm can also occur as an incidental result of a lawful attack on a military target. In such circumstances, an *ex gratia* or 'condolence' payment may be appropriate.

Avenues and obstacles to effective reparation

There are two principal avenues through which civilian harm by states involved in overseas military operations has been addressed: through dedicated compensation funds, policies, or mechanisms; and through affected civilians pursuing civil litigation in the domestic courts of states alleged to have caused harm. Both avenues have provided mixed results, and both have variously resulted in the payment of compensation on both a fault and no-fault basis.

Surveying comparative practice for this report, including the practice of Australia, France, Germany, Italy, the Netherlands, Poland and the USA, indicates the widespread use of discretionary *ex gratia* payments in cases of civilian harm. Encouraged by NATO in Afghanistan, *ex gratia* payments are typically small sums whose payment is justified for operational reasons (force protection and winning ‘hearts and minds’). They are not accompanied by an admission of liability and should not be seen as constituting reparations.

In the case of the UK, Area Claims Offices were established in Afghanistan and Iraq during years of military operations. According to the Ministry of Defence, when compensation claims are received ‘they are considered on the basis of whether or not there is a legal liability to pay compensation. In some cases where there is a major threat to the stabilization effort and it is impossible to form a view on strict legal liability, *ex-gratia* payments may be made for personal loss, injury or death. The amounts paid are in accordance with local compensation rates.’

Civil litigation also provides a possible avenue to reparation. Under the domestic law of England and Wales, those who suffer violations allegedly committed by UK military action can sue for reparation by bringing a complaint under the Human Rights Act 1998, bringing a claim under the common law of tort, or both. Claimants, however, face a complex set of obstacles, including various limitation periods, immunities and procedural hurdles.

The number of claims that have led to an offer of compensation following civil litigation is smaller than those processed through Area Claims Offices in theatre but has on average resulted in much higher awards, reflecting the gravity of the harm suffered.

Despite significant development on response to civilian harm by the UK and other partner states during the first decade of the twenty-first century, in recent years there has been marked retrogression. This is partly explained by the shifting role of UK, US and other forces in partnered operations which do not require their ‘boots on the ground’ and the increased use of airstrikes where accountability for civilian harm is harder to establish. It also follows attempts to limit military accountability, including through the Overseas Operations Act 2021 and the removal of Treasury approval for making *ex gratia* payments. The result is an increase in the practical and legal challenges faced by civilians, typically members of vulnerable and disempowered communities in fragile states, in accessing reparations and asserting their rights.

Recommendations

The UK should introduce a policy on reparations for civilians who have been subject to harm in UK military operations overseas. Such a policy is in line with the recommendations on accountability made by the Iraq Inquiry ('Chilcot Report') and should conform to the UN Basic Principles on the Right to a Remedy and Reparation. Building on international standards and widespread existing practice, including from Australia, Iraq, the Netherlands, the USA, NATO and the UN, Ceasefire's recommendations for a reparations policy include:

Holistic reparation

The UK should take a holistic approach to reparations that also takes into account the obligation to provide restitution, rehabilitation, satisfaction and guarantees of non-repetition, as well as compensation. The right to reparation includes the right to the truth.

Investigating and reporting civilian harm

Where civilian casualties are suspected to have occurred (including as a result of information from Battle Damage Assessments or from credible external allegations), effective, prompt, thorough and impartial investigations should be conducted, governed by the right of families to know the fate of their relatives.

Given the current discrepancies between civilian harm reported by the Ministry of Defence and civilian harm reported by civil society and the local population on the ground, processes for documenting civilian harm should be improved and triangulated between internal and external sources. Where possible, in-theatre tracking teams should be established for the purpose of tracking, reporting and mitigating civilian harm (in coordination with coalition partners, as appropriate).

Enabling access to compensation

Where civilian casualties are determined to have been caused by UK overseas operations, the Ministry of Defence should offer compensation to civilian victims and/or bereaved families as a matter of policy. A Civilian Harm Compensation Scheme should be established to enable the effective processing of claims. Where the Ministry of Defence believes it would not be liable for harm under the Human Rights Act or English common law, ex gratia payments should be offered.

Where there is little or no UK ground presence in countries where the UK is engaged in overseas operations, there should be a clear process and mechanism through which civilians can make a compensation claim for property damage, personal injury and death, and information on the process disseminated and available in local languages.

Satisfaction and guarantees of non-repetition

Where a violation of IHL or human rights is found to have occurred, compensation offered should be accompanied by an apology. The incident(s) should be reported transparently and necessary institutional reform should be enacted to prevent repetition. The duty in the Geneva Conventions to respect and ensure respect for IHL should not be flouted by measures to limit UK military accountability. UK legislation should ensure that there are no procedural obstacles, special time limits, immunities or presumption against prosecution relating to IHL violations or offences committed against the civilian population where UK forces are deployed.

Introduction

It is now commonplace to observe that civilians are the first victims of armed conflict. Although a fundamental principle of international humanitarian law holds that only military objects can be the target of attack, the preponderance of casualties in today's wars is among civilians. Sometimes loss of civilian life forms the collateral damage from attacks on military objects. But sometimes attacks are launched indiscriminately, or civilians are deliberately targeted or mistreated in detention.

The UK takes pride in its adherence to international humanitarian law (IHL), otherwise known as the law of armed conflict. The 2019 *UK Government Voluntary Report on Implementation of International Humanitarian Law at Domestic Level* states that:

*'This Government is committed to promoting and upholding the rules-based international system, and we believe that the proper implementation of, and compliance with, IHL is an important part of that system. We are proud of our strong record of IHL implementation and compliance.'*¹

Services are required to undertake periodic training in IHL to agreed standards. Army personnel are required to take the 'Army Military Annual Training Test (MATT) 7', which provides training and assessment in IHL, investigations and accountability, captured persons, and the use of force, and there are comparable requirements for the other two forces.² This is reinforced with further training prior to active deployment. During operations, legal advice is supplied to commanders and their staff by uniformed legal advisers from the relevant service. 'The legal adviser is one of the commander's principal staff officers and advisers, and has a pivotal role in campaign planning and execution.'³ The government states that, in sum, the 'UK's Armed Forces always take the utmost care to protect civilians from the effects of armed conflict'.

Civilian protection is also regularly cited by the UK as a justification for going to war in the first place. While the primary reason given for UK participation in the US-led invasion of Iraq in March 2003 was the threat posed by Iraq's alleged weapons of mass destruction, the UK's participation in the post-invasion Multi-National Force in Iraq (2003–9) was attributed to civilian protection and stabilization, as were participation in subsequent operations in Iraq, in Helmand in Afghanistan (2006–14) and military intervention in Libya (2011). Where the UK government has sought parliamentary approval⁴ for current military operations in Iraq and Syria as part of the Global Coalition to Defeat Da-esh/ISIS, justifications for military action have variously included addressing humanitarian crisis, protecting Iraq and its citizens, and contributing to peace and security, while

1 UK Foreign and Commonwealth Office, *UK Government Voluntary Report on Implementation of International Humanitarian Law at Domestic Level*, London, 2019, p. 5.

2 *Ibid.*, p. 16.

3 *Ibid.*, p. 19.

4 For a summary see Mills, C., *Parliamentary Approval for Military Action*, House of Commons Library, Briefing Paper, CBP 7166, 8 May 2018.

explicitly acknowledging ‘the importance of seeking to avoid civilian casualties’.⁵ Long-standing and ongoing conflicts in Afghanistan, Iraq, Libya and Syria may have exacted an appalling civilian toll overall, but the UK maintains that its own military role is directed towards stabilization and the security of the local population.

The results of the seven-year Iraq Inquiry (‘Chilcot report’) published in 2016 concluded that the UK should have made greater efforts to determine the number of civilian casualties and the broader effects of military operations on civilians in Iraq. ‘The Inquiry considers that a Government has a responsibility to make every reasonable effort to understand the likely effects of its military actions on civilians.’⁶

Given these circumstances it is perhaps surprising that, unlike some of its major strategic partners, the UK has no developed policy on response to civilian harm. Neither the *Voluntary Report on IHL Implementation* nor the 2020 policy paper ‘UK Approach to Protection of Civilians in Armed Conflict’⁷ make any reference to obligations in respect of civilians who suffer harm as a result of military operations.⁸

Public concern about civilian harm caused by UK armed forces and coalition partners remains high

Public concern about civilian harm caused by UK armed forces and coalition partners nonetheless remains high. From the revelations about abuse of detainees at Camp Breadbasket in southern Iraq to the public inquiry into the killing of Mr Baha Mousa to

numerous other confirmed cases since of violations in Iraq and Afghanistan, the question of accountability for causing civilian harm has repeatedly returned to the front pages. But while arguments have raged about the feasibility of prosecuting service personnel for offences committed against civilian populations in overseas deployments, very little attention has been given to the responsibility of the UK government for providing reparation to the civilians whose lives have been seriously, and sometimes catastrophically, harmed.

Following an overview of the international legal obligations on states to provide reparation, this report looks at UK practice on addressing civilian harm overseas beside the practice of other states, including Australia, France, Germany, Italy, the Netherlands, Poland and the United States of America. Practice reveals a range of different avenues for providing reparations for civilian harm, including human rights claims, civil litigation under the law of tort, and compensation awards following official inquiries. Some states have also empowered officials, including commanders on the ground, to make discretionary ‘ex gratia’ payments in cases of civilian harm without accepting any liability. Typically small sums, such payments are generally justified for operational reasons (force protection and winning ‘hearts and minds’) and do not constitute reparations.

The report also discusses some of the contemporary challenges to asserting the right to reparation, including the particular legal and practical challenges faced by civilians who

5 *Hansard*, House of Commons, 2 December 2015, col. 323.

6 UK House of Commons, *Report of the Iraq Inquiry*, 6 July 2016, HC 265, vol. XII, section 17.271 and 17.277, pp. 218–19.

7 UK Foreign and Commonwealth Office, Department for International Development and Ministry of Defence, ‘UK approach to protection of civilians in armed conflict’, Policy paper, 27 August 2020.

8 There are two references to reparations in the policy paper but only in the context of supporting transitional justice initiatives in other states.

have suffered harm in airstrikes or acts of remote warfare, and a regression in state practice over the last decade as states have sought to limit accountability for civilian harm.

The report argues the need for the UK to implement a holistic policy to address civilian harm caused in overseas operations, aligned with existing UK strategy on the protection of civilians. Such a policy would enable the UK to comply with its obligations under international law and to address the serious instances of harm caused by UK military forces to the civilians they are mandated to protect.

What is civilian harm?

Military operations can, and frequently do, have a devastating effect on civilian populations. The harm that is caused is moreover complex, and any serious attempt at a response needs to take into account the impact on civilians, the circumstances or context in which the harm occurred, and the attribution of legal responsibility for the specific incident that caused the harm.

Impact

Civilian harm is often summarized in terms of death, injury and destruction of property.⁹

It is important to recognize, however, that civilian harm extends beyond direct physical injury to include mental or moral harm and that acts of war often have reverberating effects which can have a serious impact on the civilian population.

The 2021 NATO *Protection of Civilians Allied Command Operations Handbook* states that in order to mitigate civilian harm the targeting process should take into account a range of effects on the civilian population. The handbook states that:

‘Potential first, second and third order effects include the following:

- Primary:*
 - *Death and injury to civilians*
 - *Sexual violence*
 - *Destruction of civilian objects (i.e. houses) and critical infrastructure (i.e. water treatment plant)*
- Secondary:*
 - *Forced displacement*
 - *Family separation*
 - *Inadequate access to food and water*
 - *Damaged infrastructure, affecting transportation routes, electricity, water & telecommunications access*
 - *Decreased mobility, lack of freedom of movement*
 - *Lack of access to medical attention*
 - *Damages to schools, disruptions to education*
 - *Disruption in financial services, access to banking and cash*
- Tertiary:*
 - *Weakened government and judicial services*
 - *Traumatized population*

⁹ See e.g. references in 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) (henceforth Geneva Conventions Protocol I), Art. 57, 2(a) ii, ‘loss of civilian life, injury to civilians and damage to civilian objects’

- *Sluggish and dysfunctional infrastructure*
- *Lack of medical services*
- *Market disruption, reduced economic activity*
- *Cycles of violence*
- *Increase in criminality*
- *Spread of infectious diseases.*¹⁰

For the more limited purpose of assessing reparations, the United Nations (UN) Basic Principles 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 offer the following five (non-exhaustive) categories of ‘economically assessable damage’ in the section on compensation:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹¹

Circumstances

The context or circumstances in which civilian harm may be incurred will have important practical consequences for designing policy on protection of civilians as well as legal consequences for the responsibility of the parties to conflict.

Is the armed conflict international or non-international?

In an international armed conflict, Geneva Convention IV provides detailed and specific rules for the protection of civilians in the power of a party to conflict. For non-international armed conflicts, Common Article 3 and Additional Protocol II provide fundamental guarantees for the treatment of detainees, but in other respects the rules are less developed, including with regard to the authority to detain. Such questions should therefore be regulated by international human rights law, although some states do not accept that human rights obligations apply to their actions outside their own territory.

Are the civilians or civilian population within the power of a party to the conflict?

IHL contains different regimes regulating the conduct of hostilities and the protection of civilians and others *hors de combat*. Whereas incidental harm or ‘collateral damage’ to civilians may in certain circumstances be lawful under the conduct of hostilities (see below), parties to conflict are required at all times to ensure the protection of civilians within their power, for example when they are detained or within the control of occupying forces.

10 *Protection of Civilians: ACO Handbook*, NATO Supreme Headquarters Allied Powers Europe, March 2021, <https://shape.nato.int/resources/3/website/ACO-Protection-of-Civilians-Handbook.pdf>

11 UN General Assembly, Basic Principles 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, 2005, UN doc. A/Res/60/147, para. 20.

Responsibility

The responsibility of states or parties to conflict will also depend on the lawfulness of the specific incident which caused the harm.

IHL violations constituting war crimes

Grave violations of the Geneva Conventions and other serious violations of the laws and customs of war which incur individual criminal responsibility include wilful killing, torture and inhuman treatment of civilians and other persons taking no active part in hostilities; intentionally directing attacks against civilians or civilian objects; and knowingly launching indiscriminate or disproportionate attacks affecting the civilian population. In addition to incurring individual criminal responsibility for the perpetrator(s), the state or party to conflict has specific responsibilities related to the investigation and repression of war crimes.

Other IHL violations, including violations of the duty to take precautions

Serious harm to civilians may also result from other violations of IHL which are not criminalized at the international level. These include the duty to do everything feasible to verify that the object of attack is a military objective and not civilian, and the duty to take all feasible precautions in the choice of means and methods of attack in order to avoid, or at least minimize, incidental loss of civilian life, injury to civilians or damage to civilian objects. Large-scale civilian harm can occur on account of the violation of the obligation to take precautionary measures in attack.

Civilian harm incidental to lawful attacks on military objects

A lawful attack on a military objective may nonetheless incur civilian harm. If the incidental civilian harm expected from an attack is not excessive in relation to the concrete and direct military advantage anticipated, then such an attack is permitted under IHL. Even if the attack is lawful, however, the causing of significant civilian harm can trigger procedural obligations under international law, including the duty to investigate, and may also prompt a moral imperative to respond. Amends are also sometimes offered by parties to conflict for operational or strategic reasons as part of managing the relationship with local populations.

(See also the section in chapter 5 on ‘Responsibility, liability and access to justice.’)

2

Civilian harm and the right to reparation

It is a well-established rule of international law that states must provide reparation where they are responsible for a violation of international law.¹² The ability of individual civilians who have suffered harm to claim reparations is, however, largely left to be determined by national laws.

According to the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), ‘Every internationally wrongful act of a State entails the international responsibility of that State.’¹³ States responsible for a violation are under an obligation to cease the violation if it is ongoing, and to offer assurances and guarantees of non-repetition.¹⁴ The articles further elaborate that states that are responsible for a violation are under an obligation to make ‘full reparation’,¹⁵ which may take the forms of restitution, compensation and satisfaction, either singly or in combination.¹⁶

Reparation aims at ‘eliminating, as far as possible, the consequences of the illegal act and restoring the situation that would have existed if the act had not been committed.’¹⁷ There is recognition that it will not always be possible to restore victims to their previous state before a violation, particularly for serious breaches of international law such as torture and sexual assault, which can have wide-ranging and long-lasting effects on victims for the rest of their lives. In the context of armed conflict where there has been large-scale human rights abuses and destruction, providing ‘full’ reparation to victims may be hampered further by issues such as limited resources, lack of political will, and the commission of violations by multiple actors which can shroud responsibility for specific violations. However, challenges in providing full reparation in practice do not lower the overall standard required under international law.¹⁸ The ARSIWA do, however, state that where restitution – which aims to restore the situation before the violation – involves ‘a burden out of all proportion to the benefit deriving from restitution’, then compensation should be offered instead.¹⁹

Given the nature of public international law as regulating relations between states, it is the injured state which is envisaged as primarily having the power to seek reparation for violations. Therefore, in the context of an armed conflict, where a state has violated international law, the injured state may seek reparation before international courts, including on behalf of its citizens who were victims of a violation. However, the ability of

12 *Case Concerning the Factory at Chorzów (Germany v. Poland)* (1928) PCIJ (ser. A, No. 17), para. 47.

13 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 26 et seq., Art. 1.

14 *Ibid.*, Art. 30.

15 *Ibid.*, Art. 31.

16 *Ibid.*, Arts 34, 35–7.

17 *Case Concerning the Factory at Chorzów*, *op. cit.*, para. 47.

18 See Ferstman, C., ‘The right to reparation for victims of armed conflict’, in M. Lattimer and P. Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War*, Oxford, Hart, 2018; Schwagerand, E. and Bank, R., ‘Is there a substantive right to compensation for individual victims of armed conflicts against a state under international law?’, *German Year Book of International Law*, vol. 49, 2006, pp. 367, 393.

19 ILC, ARSIWA, Art. 35(b).

individual victims who have suffered harm to obtain reparation through their state is fraught with potential problems,²⁰ including the fact that in some instances, states have signed peace treaties which waived the rights of individual nationals to claim compensation, as occurred after both the First and the Second World War. Even where states do obtain monetary reparation, further problems may occur regarding whether these funds are actually disbursed to victims, whether all victims are covered by the settlement and whether there are differing entitlements among different groups of victims. Where unfavourable settlements are concluded, individuals and groups of victims have little to no power to challenge them because the right is vested in the state.

However, the existence of the right of states to seek reparation or to conclude peace agreements does not imply the lack of an individual right to reparation. As the International Court of Justice (ICJ) has explicitly confirmed, a state that has violated a rule of international law causing damage to persons has ‘the obligation to make ‘reparation for the damage caused to all *the natural* or legal persons concerned’

a state that has violated a rule of international law ‘has the obligation to make reparation for the damage caused to all the natural or legal persons concerned’

International Court of Justice

(emphasis added).²¹ The historical framing of war reparations as rights and obligations owned exclusively by states, and the concomitant disempowerment of victims, has now become superseded by the development of human rights law and the standing of individuals to pursue reparations for international law violations in both international and domestic fora.

International human rights law

The recognition of individuals as rights holders under international law has largely resulted from the development of human rights law over the last 70 years. Crucially, human rights treaties at the international and regional level have created dedicated mechanisms which enable victims to claim their rights directly and to seek reparations where rights have been violated.

Human rights treaties generally establish an individual right to a remedy²² and some establish an explicit right to forms of reparation. For example, Article 14 of the UN Convention Against Torture (UNCAT) explicitly recognizes the right of victims to compensation and rehabilitation when breaches occur and, where the victim has died as a result of an act of torture, the right of dependants to compensation.²³ Treaty law has been bolstered by the agreement by the UN General Assembly of the 2005 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

20 Ferstman, C., The relationship between inter-state reparations and individual entitlements to reparation: some reflections, in C. Marxsen and A. Peters (eds) *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Dialogues*, MPIL Research Paper Series No. 2018–19, Heidelberg, Max Planck Institute, p. 40.

21 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Op., ICJ Rep. 2004, 9 July 2004, para. 152, p. 198. See also ILC, ARSIWA, Art. 33(2).

22 See for example the UN International Covenant on Civil and Political Rights (ICCPR), Art. 2(3) and the European Convention on Human Rights (ECHR), Art. 13.

23 See also ICCPR, op. cit., Arts 9(5) and 14(6); and UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art. 6.

International Human Rights Law and Serious Violations of International Humanitarian Law' (Basic Principles).

The Basic Principles take a holistic approach to reparation, outlining that 'full and effective reparation' entails compensation, restitution, satisfaction, rehabilitation, and guarantees of non-repetition.²⁴ The Basic Principles also bestow specific rights on victims of violations.²⁵ They establish victims' rights to:

- Equal and effective access to justice;
- Adequate, effective and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.²⁶

Furthermore, the Basic Principles establish duties on states to ensure victims are able to access justice, including making available 'all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy',²⁷ as well as developing procedures to allow groups of victims to present claims for reparation where appropriate.²⁸

The establishment of human rights mechanisms has also strengthened the rights of victims to pursue reparations for violations of IHL which also constitute violations of human rights. The European Court of Human Rights (ECtHR) has, for example, relied on norms of IHL as well as the European Convention on Human Rights (ECHR) when awarding compensation to victims of armed conflict.²⁹

The emergence of the human rights architecture has therefore meant that the notion of an individual right to reparation has progressively become accepted as a matter of law. It entails victims' right to access domestic remedies in response to a violation (the procedural component) and the right to receive adequate and effective forms of reparation.³⁰ Reparation may entail any combination of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (the substantive component).³¹

International humanitarian law

According to the *Study on Customary International Humanitarian Law* compiled by the International Committee of the Red Cross (ICRC), the obligation on states to provide reparation for violations of IHL is an established principle of customary international law, which provides that states are required to make 'full reparation' for violations of IHL,³² and it is applicable to both international armed conflicts (IACs) and non-international armed

24 UN General Assembly, Basic Principles, op. cit., para 18.

25 Ibid.

26 Ibid., Principle 11.

27 Ibid., Principle 12 (d).

28 Ibid., Principle 13.

29 *Al Skeini v. UK*, ECtHR Grand Chamber, Application No. 55721/07, July 2011.

30 Ferstman, 'Right to reparation', op. cit., n. 15.

31 UN General Assembly, Basic Principles, op. cit.

32 'A state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused' ICRC, IHL Database: Customary IHL, Rule 150, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150

conflicts (NIACs). As a matter of treaty law, both the Hague Conventions³³ and Additional Protocol I to the Geneva Conventions,³⁴ applicable to IACs, emphasize the responsibility of a state for all acts committed by its armed forces, and establish that a party to a conflict which violates the provisions of the treaties will be liable to pay compensation.

On the question of whether an individual right to reparation exists in IHL, there has been some historic debate.³⁵ In addition to placing obligations on states to protect civilians and others *hors de combat*, IHL does explicitly refer to the rights of victims in a number of instances, such as the right of families to know the fate of their relatives.³⁶ The *travaux préparatoires* to the Hague Conventions and the Geneva Conventions both indicate that it was originally envisaged that the treaties do confer rights on individuals rather than simply conferring obligations on states.³⁷ It has also been asserted that the fact that states are obliged to make reparation for violations in NIACs does itself imply that reparation is owed to victims as individuals rather than to states, as there may be no other state party in NIACs to act on behalf of victims.³⁸ However, international jurisprudence and state practice on the existence of an individual right to reparation for IHL violations remains contentious.

The ICRC notes that ‘There is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State’, and quotes practice relating to inter-state and other agreements (including the Commission for Real Property Claims in Bosnia and Herzegovina and the Ethiopia-Eritrea Claims Commission), unilateral acts of reparation by states, and reparation sought in national courts.³⁹

There is also provision for reparation in international criminal law. Under the Rome Statute of the International Criminal Court (ICC) and other international and mixed law criminal tribunals, victims of crimes may be entitled to reparation. The Rome Statute establishes that victims of international crimes under the jurisdiction of the court are entitled to reparation, namely for war crimes, crimes against humanity, genocide and aggression,⁴⁰ specifying three forms of reparation: restitution, compensation and rehabilitation. The ICC is a criminal tribunal and therefore it decides on reparations owed by convicted perpetrators (and not states or armed groups) to their victims. While the growing recognition of rights to reparation by international criminal tribunals is an important development under international criminal law, its practical effect is modest given the limited jurisdiction and capacity of such bodies, and the fact that reparations awards can only be made once a criminal conviction is secured after often lengthy trials.

Lack of clarity over whether an individual right to reparation exists in IHL independently of human rights law partially concerns the relative lack of appropriate mechanisms through which the right can be enforced. Unlike human rights treaties, IHL treaties do not specifically

33 The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 3.

34 Geneva Conventions Additional Protocol I, Art. 91.

35 For an overview, see HillCawthorne, L., ‘Rights under international humanitarian law’, *European Journal of International Law*, vol. 28, no. 4, 2017, pp. 1187–215

36 Geneva Conventions Additional Protocol I, Art. 32 (right of families to know fate of relatives).

37 HillCawthorne, op. cit.

38 Ibid.

39 ICRC, IHL Database: Customary IHL, Rule 150, op. cit.

40 Rome Statute of the International Criminal Court, The Hague, International Criminal Court (ICC), Art. 75.

oblige states to afford victims a procedural remedy, nor are there specialized international complaints mechanisms.⁴¹ Victims of violations have therefore had a limited standing to pursue claims against states, face a series of procedural obstacles, and claims that are brought in domestic courts against a third-party state are likely to fail on the grounds of state immunity.⁴²

Despite the gaps in treaty law, there is growing practice in domestic and international jurisprudence recognizing that victims do have a right to reparation for violations of IHL. This has partially derived from, and been complemented by, the development of human rights treaties which allow for an individual right to reparation for violations, as well as soft law such as the Basic Principles which outline the rights of victims of serious IHL violations to full reparation. In its 2019 report, the International Law Commission concluded that there was ‘considerable State practice and a set of norms and principles that have emerged through judicial, ad hoc, and treaty bodies’ on the issue of reparation to individuals for gross violations of international human rights law and serious violations of IHL, and referred to ‘a need for codification and progressive development of these practices to provide guidance to the international community’.⁴³

Reparation does not depend on criminal responsibility

Suspected or potential violations of IHL which result in civilian casualties should always trigger an investigation into the circumstances, including in cases of suspected grave or serious violations which constitute a crime under domestic or international law.⁴⁴ Where the evidence indicates that a crime has occurred, states should ensure that perpetrators are prosecuted, as well as reparation provided to victims.

However, the existence of criminal responsibility is not necessary in order to trigger state responsibility to provide reparation, and nor should reparation depend on the finding that a crime has occurred. Where civilian harm is alleged or documented, some states – the UK in particular – have placed an onus on conducting investigations for the purposes of deciding whether crimes under domestic or international law have occurred to merit prosecution.⁴⁵ In 2015, Commander Sylvaine Wong of the US Navy noted that the UK had, ‘as a matter of domestic policy, taken the most dramatic steps to rely solely on criminal law enforcement investigations for incidences of civilian casualties’.⁴⁶ While this may accurately reflect UK investigative procedure, it should be added that actual

41 Ferstman, ‘The right to reparation’, op. cit., n. 15.

42 This latter doctrine holds that a state is immune from the jurisdiction of another state with respect to acts and omissions in the exercise of its sovereign power. ILC, Draft Articles on Jurisdictional Immunities of States and Their Property, Art. 6, https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf; ICJ, *Germany v. Italy*, paras 91, 97. For a fuller discussion of obstacles, see chapter 4, ‘Challenges to the right to reparation’.

43 ILC, 2019 Report, 71st session, A/74/10, Annex B, para. 29.

44 See generally Lattimer, M., ‘The duty in international law to investigate civilian deaths’, in M. Lattimer and P. Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War*, Oxford, Hart, 2018; Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, September 2019.

45 Lattimer, M., ‘The duty to investigate civilian deaths in armed conflict: Looking beyond criminal investigations’, *EJIL:Talk!*, 22 October 2018.

46 Wong, S., ‘Investigating civilian casualties in armed conflict: Comparing U.S. military investigations with alternatives under international humanitarian and human rights law’, *Naval Law Review*, vol. 64, p. 152.

prosecutions have rarely followed. Information obtained by the Ceasefire Centre from freedom of information requests in 2020 revealed that since 2001 there has only been one prosecution of UK service personnel for war crimes (in Iraq) and a further 14 prosecutions for other offences against the civilian population in Iraq and Afghanistan.⁴⁷

While all potential crimes should be investigated, placing the focus solely or even primarily on criminal responsibility for violations of IHL will not always be desirable or appropriate, particularly from the perspective of redressing civilian harm. This is because violations will not always reach the level of responsibility for crimes under international law, and also because it means that civilian access to reparation may depend on an unduly high burden of proof if states require a criminal conviction before offering reparation. Furthermore, serious instances of civilian harm may be caused by IHL violations, such as breaches of the duty to take precautions in attack, which are not criminalized under international law.

the existence of criminal responsibility is not necessary in order to trigger state responsibility to provide reparation, and nor should reparation depend on the finding that a crime has occurred

Addressing incidental civilian harm from attacks on military objectives

States are required to take constant care to spare the civilian population, civilians and civilian objects in the conduct of military operations. However, this does not mean that civilians are immune from the effects of attacks. Sometimes, civilians may be harmed as a result of military actions that are lawful under IHL – for example, in the course of an attack on a military objective, where all feasible precautions have been taken to minimize civilian harm, and where any expected civilian harm was proportional (i.e. not ‘excessive’) in relation to the concrete and direct military advantage anticipated. Civilian casualties that result from lawful attacks are often referred to as ‘incidental civilian harm’ or ‘collateral damage’.⁴⁸

Debate over whether a violation of IHL has occurred may centre on issues such as: what information was available to commanders when verifying a military objective and undertaking collateral damage estimation; whether sufficient precautions were taken, including whether additional information was sought, or could have been sought, in order to avoid civilian harm; as well as the threshold for what exactly would constitute ‘excessive’ civilian harm relative to the military advantage anticipated. For victims and their families, the harm they have suffered may always seem excessive when seen in relation to the military advantage sought by conflict parties, including foreign ones. However, this issue is complicated by the fact that neither treaty law nor military manuals provide clear guidance on how to interpret what is ‘excessive’.⁴⁹ Some military manuals do provide examples of what would or would not be excessive, even if they do not provide a

47 See Ceasefire, ‘Official figures reveal only one prosecution of UK armed forces personnel for war crimes overseas since 2001’, 9 December 2020.

48 See, for instance, Canada, *Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, August 2001, Glossary p. 3.

49 Gillard, E.C., ‘Proportionality in the conduct of hostilities: The incidental harm side of the assessment’, Research paper, London, Chatham House, 10 December 2018, para. 75.

definition: bombing an isolated fuel tanker in the middle of a densely populated city would be excessive,⁵⁰ for example, while an airstrike against an ammunition depot beside a farmer ploughing a field would not be.⁵¹

Jurisprudence on the matter is also very limited, and largely relates to the crime under international law of carrying out an attack in which the expected incidental harm would be 'clearly excessive' in relation to the anticipated military advantage.⁵² The separate IHL standard has rarely been assessed by domestic and international courts. This lack of clarity has resulted in countries taking significantly different approaches to acknowledging civilian harm, admitting violations of IHL, and offering reparation.⁵³

There are rare occasions where states have admitted that unintentional mistakes were made which may violate rules of engagement. For example, in 2015, the US military accidentally attacked a hospital run by Médecins Sans Frontières in the Kunduz region of Afghanistan, mistaking it for a Taliban compound. The mistakes that led to the attack were described in a 3,000-page report released by the US Department of Defense in 2016, detailing the investigation into what went wrong.⁵⁴

As will be examined in the next chapter, however, the practice of the US and some other states demonstrates that often in cases involving disputes over whether a violation of international law has occurred, 'ex gratia', 'condolence' or 'solatia' payments have been provided. These are payments for harm which is not acknowledged to amount to a violation of IHL, but for which a state may still decide to offer payment in order to maintain good relations with the local population. For example, if an airstrike which was lawful and proportionate resulted in damage to civilian property, such as the loss of livestock, a state may offer an ex gratia payment to the owner of the livestock as a goodwill gesture. An airstrike which killed civilians and where there may be questions over the precautionary measures or proportionality assessment undertaken – and therefore the lawfulness of the strike – may however also result in a state offering an ex gratia payment to a family whose loved ones have died, made on the understanding that the state accepts no legal responsibility. Some form of compensation may well be welcome for the affected civilians, but in such cases the line is often blurred between no-fault compensation for losses incurred as a result of a lawful attack, and losses incurred as a result of a violation of IHL, which imposes duties on states to offer full reparation, including acknowledgement of the violation and assurance that necessary changes will be made in order to ensure it will not be repeated.

50 Le Ministère de la Défense Belgique, *Droit des conflits armés: Manuel du cours pour conseiller en droit des conflits armés*, 2009, vol. VI, p. 14.

51 Canada, *Joint Doctrine Manual*, B-GJ-005-104/FP-021, para. 204.6.

52 Rome Statute.

53 See Gillard, op. cit.

54 Rosenberg, M., 'Pentagon details chain of errors in strike on Afghan hospital', *New York Times*, 30 April 2016.

3

Avenues to reparation

There are two principal avenues through which civilian harm by states involved in overseas military operations has been addressed:

- Through dedicated compensation funds, policies, or mechanisms provided by states to civilian victims of harm; and
- Through affected civilians pursuing civil litigation in the domestic courts of states alleged to have caused harm.

Both avenues have provided mixed results, and both have variously resulted in the payment of compensation on both a fault and no-fault basis. From the point of view of civilians who have suffered harm, the relative success of claims has depended on a wide range of factors, including: the conflict in which the harm was committed, the state responsible and whether it had a presence on the ground, the nature of the harm caused, the availability and quality of legal representation, and the accessibility of relevant information. From the point of view of states engaged in military operations, considerable costs have been expended on administering, or alternatively avoiding or challenging claims, in some cases clearly exceeding any sums paid in actual compensation.

Compensation funds, policies or mechanisms

The use of payment schemes in order to make amends for civilian harm has become a feature of overseas military operations that have taken place over the past two decades. The wars in Iraq and Afghanistan, in particular, were characterized by widespread insurgencies as well as urban warfare which resulted in significant civilian casualties and damage to civilian property. As operations were prolonged during the 2000s, there was an increasing recognition that a battle to ‘win hearts and minds’ could not succeed where civilian harm was not properly mitigated and where no amends were made for harm caused. As stated by General David Petraeus, Former Commander of the International Security Assistance Force (ISAF), ‘If you are killing civilians, then you are obviously not protecting them.’⁵⁵

Members of ISAF in Afghanistan and the Multi-National Force – Iraq (MNF-I) grew to believe that local communities and elders could play an essential role in garnering support for their operations, providing intelligence, and discouraging support of insurgents. Given that many states had troops deployed on the ground, ensuring good relations with local communities could be crucial to the success of operations. Providing payments to local individuals who had suffered harm as a result of operations was therefore seen as an avenue to maintaining good relations with local communities, and demonstrating goodwill where damage had been caused.

It should be noted from the outset that the majority – although not all – of the schemes explored in this section concern payments or ‘amends’ made with no admission of legal

⁵⁵ Kolenda, C. and Rogers, C., *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, Open Society Foundations, June 2016, p. 7.

liability on the part of the state concerned. Generally, the schemes are designed to express sympathy for civilian harm, including harm incurred lawfully under IHL. These schemes are not therefore intended by design to provide ‘reparation’ where a violation has occurred as understood under international law. However, this report will also consider whether such schemes are also used in instances where harm has occurred, or may have occurred, in violation of IHL.

United States of America

The US has a long history of making payments for civilian harm, stretching back as far as the Korean war.⁵⁶ However, the wars in Afghanistan, Iraq and Syria have led to an increased focus on providing a more systematized approach to payments, including new legislative powers to provide funding, and additional reporting requirements on civilian harm. There are two main avenues through which civilians can access compensation from the US:

- The Foreign Claims Act
- The National Defense Authorization Act

The Foreign Claims Act (FCA) was enacted in 1942 ‘[t]o promote and to maintain friendly relations through the prompt settlement of meritorious claims.’⁵⁷ It allows the Department of Defense to settle a number of foreign claims caused by US military operations overseas, including those related to property damage or personal injury or death, provided that such damage, personal injury or death must have occurred outside the United States and be caused by (or incident to) non-combat activities of the US military.⁵⁸ Claims are therefore only eligible under the FCA for non-combat activities, where these activities cause:

- Damage to real property of any foreign country, subdivision or inhabitant;
- Damage to personal property of any foreign country, subdivision or inhabitant; and
- The personal injury or death of any inhabitant of a foreign country.

For example, if a US armoured vehicle was involved in a road traffic accident with a local civilian vehicle, payments for any damage to property or personal injury that resulted from the accident could be provided via the FCA. Under the FCA, a claimant must be a national of a country that is (i) not at war with the United States and (ii) not an ally of any country at war with the United States (or, if the claimant is a national of any country at war with the United States or any ally thereof, the claimant must have been determined by the relevant foreign claims commission or local military commander to be ‘friendly to the United States’). Given these exclusions, the FCA is limited in its ability to provide reparation for harm caused by military operations.

The National Defense Authorization Act (NDAA) authorizes *ex gratia* payments which are ‘nominal monetary payments to friendly civilians as a means of expressing condolence or sympathy or as a goodwill gesture’.⁵⁹

56 Gluck, M., ‘An examination of U.S. military payments to civilians harmed during conflict in Afghanistan and Iraq’, Lawfare Blog, 8 October 2020.

57 10 U.S.C. § 2734(a). Property loss; personal injury or death incident to noncombat activities of the armed forces; foreign countries.

58 Ibid.

59 USA research memorandum.

Historically, the US has made '*solatia*' payments for harm suffered by the civilian population where it was deemed appropriate under local customs to do so. These payments are authorized by paragraphs in service branches' claims regulations,⁶⁰ and can be drawn from a unit's operation and maintenance fund.⁶¹ When the US first began operating in Afghanistan, *solatia* payments were not approved as it was decided there was 'no prior local custom'.⁶²

The US has a long history of making payments for civilian harm, stretching back as far as the Korean war

However, *ex gratia* payments were authorized from 2005 onwards in statutory legislation under the Commanders Emergency Response Program (CERP), which was authorized by Congress as part of the NDAA. This meant compensation could then be provided to civilians either in theory through the *solatia* payment system, or through the *ex gratia* payment systems under the CERP. The more easily approved *ex gratia* payments under the CERP meant that they were favoured over the use of *solatia* payments.⁶³

The current NDAA authorizes up to US \$3 million per year for a Department of Defense department-wide account to make *ex gratia* payments for 'damage, personal injury, or death that is incident to the use of force by the United States Armed Forces, a coalition that includes the United States, a military organization supporting the United States, or a military organization supporting the United States or such coalition'.⁶⁴

These *ex gratia* payments cover different categories, including 'condolence' payments for injury or loss of life, 'battle damage' for loss or damage to property, and 'hero' payments for the families of allies killed in combat. A new NDAA is passed by Congress every year to authorize the budget and expenditures of the Department of Defense. The NDAA of 2016 expanded authorization of the CERP to Iraq; in 2017 it was expanded to Syria; and in 2019, to Somalia, Libya and Yemen.⁶⁵ However, despite the expansion of the scheme to include civilians in these countries, in 2019 no payments were made under the NDAA to civilians in to Syria, Somalia, Libya or Yemen.⁶⁶ In 2020, the NDAA explicitly authorized *ex gratia* payments to civilians harmed in partnered or coalition operations for the first time⁶⁷ (although this had already been happening in practice).

60 Keenan, M., 'Backgrounder: US "condolence" payments', CIVIC, June 2010, p. 1.

61 Rogers, C., Addressing Civilian Harm in Afghanistan: Policies and Practices of International Forces, CIVIC, 2010, p. 5.

62 Muhammedally, S., 'Civilian war victims receive recognition in US law', Just Security, April 2014, <https://www.justsecurity.org/8882/civilian-war-victims-receive-recognition-law/>

63 Rogers, op. cit., p. 5.

64 NDAA, 2020, Sec. 1213(a).

65 Gluck, op. cit.

66 See Department of Defense, Ex Gratia Payments in the Event of Property Damage, Personal Injury, or Death That Was Incident to U.S. Military Operations in Foreign Countries During 2019 (defense.gov) submitted pursuant to Senate Report 116-103 accompanying Department of Defense Appropriations Bill, 2020.

67 Naples-Mitchell, J., 'Congress expands oversight of U.S. payments for civilian deaths', Just Security, 18 December 2019.

Unlike the FCA, which is clear that payments are made based on ‘negligent or wrongful acts or omissions of U.S. service members’,⁶⁸ the regulations for *ex gratia* payments stipulate that payments should not be ‘construed or considered as an admission or an acknowledgment of any legal obligations to provide compensation, payment or reparations.’⁶⁹

How do the schemes work in practice?

Claims under the FCA are investigated and adjudicated by individual unit Foreign Claims Commissions (FCCs), which can be comprised of either one or three voting members. The FCCs have certain payment caps depending on their size and composition, and claims over a certain amount (generally over US \$50,000) must be elevated to a higher authority.⁷⁰

Under the NDAA, the authority to disburse payments is allocated to geographic combatant commanders, who can further delegate the authority to subordinate commanders.⁷¹ Significant discretion lies with field commanders, who ‘may decide whether to follow up on claims, whether to provide payment, and how much to request, up to certain limits.’⁷² Information is collected from a range of sources, including combat unit incident reports, local elders and leaders, testimonies, photographs and property records, although the information collected may depend on the type or severity of the incident. For example, all indirect fire incidents require a battle damage assessment, and in-depth information gathering will usually only occur in relation to more serious incidents of civilian harm, such as personal injury or death.⁷³

Company commanders submit claims to their battalion, and battalion commanders authorize the dispersal of funds. Civil affairs officers and judge advocates ‘often coordinate and oversee the process’, and the more serious the case, the higher the likelihood that higher levels of command and legal advisers will become involved.⁷⁴ Generally speaking, company advisers have a high level of input into the process given they are the ones who generally gather the information and submit it to the battalion. Under the *ex gratia* payments programme, a payment offer ‘will normally be made within 90 days of the relevant incident’ and the procedures set forth in the interim regulations ‘are specifically intended to minimize the time between an incident and offering an *ex gratia* payment.’⁷⁵

In Afghanistan in particular, concerns raised over the operation of *ex gratia* payments largely relate to a lack of standardized processes, including the large amount of discretion this then leaves to commanders in the field, which has meant that civilians who suffer harm may receive differing amounts, or even no payment at all, simply because of the geographic area they are located in and the associated commander. Concerns were also raised over confusion between claims under the FCA and under the *ex gratia* payments

68 U.S. Army, Judge Advocate General’s Legal Center & School, *Operational Law Handbook*, 2015, p. 297, https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2015.pdf

69 U.S. Dept. of Defense, Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury of Loss That is Incident to Military Operations, 22 June 2020, p. 2.

70 *Operational Law Handbook*, p. 298.

71 USA research memorandum.

72 Rogers, op. cit., p. 5.

73 Ibid., pp. 5–6.

74 Ibid.

75 See Interim Regulations for Condolence or Sympathy Payments, op. cit., p. 3.

scheme, and that claims submitted under the FCA which were not eligible, for example because they occurred due to combat operations, but would have been eligible for a condolence payment, were not referred or no condolence payment given.⁷⁶

Of perhaps greater concern is the fact that these schemes seem to depend on the presence of ground troops, which need to be approached in order to determine and submit a claim. For the local population, entering a military base will raise security concerns and may lead to allegations of collaboration. For civilians harmed in operations where there is no local base to travel to, or commander to speak with, accessibility will be an issue. This appears to be borne out by the data related to payments. The 2019 Department of Defense report notes that under the *ex gratia* payments programme, out of the 611 *ex gratia* payments made, only six were predicated on an actual request by a potential recipient, all six of whom were located in Iraq.⁷⁷ These were the only condolence payments made to Iraqi civilians in 2019, where there is now a smaller military presence on the ground. Without any clear avenue to submit a claim, there have been reports of civilians from Iraq and Syria attempting to submit claims via a US embassy, or directly to the Department of Defense through relying on international non-governmental organizations (NGOs) to submit the claim.⁷

Payment amounts

Under the NDAA/CERP, individual subordinate commanders can authorize payments up to US \$5,000 per claim, subordinate sub-unified commanders and similar commanders can authorize up to US \$15,000, and geographic combatant commanders and designees may authorize more than US \$15,000 per individual claim. Payments under the FCA cannot exceed US \$100,000.⁷⁹

However, in terms of assessing how much the US has paid in *ex gratia* payments, it should be noted that there has been a significant transparency gap when it comes to reporting. In 2014, specific funds were allocated by Congress to the Pentagon for the purpose of compensating civilians under the Consolidated Appropriations Act, with an annual reporting requirement for the Secretary of Defense to Congress, 'on the efficacy of the *ex gratia* payment program including the number of types of cases considered, amounts offered, the response from *ex gratia* payment recipients, and any recommended modifications to the program'.⁸⁰

Freedom of information requests revealed that, despite the reporting requirements, the Department of Defense had used a loophole in the law in order not to report *ex gratia* payments to Congress. The Department of Defense stated that because it had not used the funds allocated or the authority designated under the relevant statutes, it was not required

76 Keenan, op. cit.

77 Senate Report (as above).

78 See, for example, the cases of Shadia A. and Razzo B. in Prasow, A., 'Civilian casualties: A case for U.S. condolence payments in Syria', *Just Security*, January 2020; and Khan, A. and Gopal, A., 'The uncounted', *The New York Times*, 16 November 2017.

79 10 U.S.C. § 2734(a), (c). Note that if the Secretary of Defense considers that a claim merits more than the US \$100,000 limit, they can award US \$100,000 to the claimant and report any excess amount to the Secretary of the Treasury for additional payment pursuant to 31 U.S.C. § 1304.

80 Consolidated Appropriations Act of 2014, Section 8127.

to make the reports.⁸¹ After significant criticism over this lack of transparency, this was finally remedied by the NDAA of 2020, which now requires the Department of Defense to ‘submit quarterly reports to Congress delineating all payments made in response to civilian casualties during the preceding period or explaining why no payments were made.’⁸² The Department of Defense submitted the first such report to Congress in May 2020. The latest annual report states that:

‘Section 1213 of the NDAA for FY 2020 authorized the use of not more than \$3,000,000 for each calendar year ... for ex gratia payments for damage, personal injury, or death that is incident to the use of force by the U.S. Armed Forces, a coalition that includes the United States, or a military organization supporting the United States or such coalition.’⁸³

However, despite the report confirming 63 civilian deaths not previously acknowledged, ‘DoD did not offer or make any such ex gratia payments during 2020.’⁸⁴

While the total amount of payments disbursed to civilians may never be known, there are nevertheless many documented payments. In 2015, a freedom of information request revealed data on condolence payments made through the CERP, which was contained in a database that is supposed to be maintained by officials in the field. While the dataset was incomplete, it indicated that from 2011 to 2013, the military made 953 condolence payments totalling \$2.7 million to civilians in Afghanistan, although it should be noted that this does not include *solatia* payments.⁸⁵ The individual payments documented the typical amount of compensation received for different harms, and also provided an insight into the scale and reach of harm that is caused by overseas operations. The average payment for a death was US \$3,426, and the average payment for injuries was US \$1,557. Payments were calculated according to the circumstances of individual cases, such as incorporating the cost of medical care for injuries, or lost income for injury or death.⁸⁶

NATO in Afghanistan

The most practice on payment policies for civilian harm incurred in overseas operations exists in relation to NATO operations in Afghanistan. Under agreements signed with the Afghan government, states that were part of ISAF are not liable for damage to civilian property or civilian injury or death as a result of lawful operations. However, the majority of ISAF members operated some form of payment scheme in Afghanistan, in recognition of the detrimental effect that civilian harm can have on local perceptions of military operations and the role that compensation or condolence payments can play in building more harmonious relations with the local population.

81 For an analysis of the Department of Defense’s reporting obligations and associated loopholes see Naples-Mitchell, J., ‘New DoD policy on amends needs to address transparency gap’, Just Security, April 2019.

82 Naples-Mitchell, ‘Congress expands oversight ...’, op. cit.; NDAA 2020, sec. 1213.

83 U.S. Department of Defense, *Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020* (as corrected 2 June 2021), p. 15.

84 Ibid., p. 16.

85 Currier, C. ‘How the U.S. paid for death and damage in Afghanistan’, *The Intercept*, 27 February 2015, <https://theintercept.com/2015/02/27/payments-civilians-afghanistan/>

86 Ibid.

In 2010, the NGO CIVIC identified payment schemes for Afghan civilians operated by the US, the UK, Canada, Poland, the Netherlands, Australia and Norway.⁸⁷ However, the practical operation of these schemes varied greatly across states, including the amounts offered for particular harms. The scale of civilian harm occurring in Afghanistan, and the patchy and unpredictable nature of payments, led to calls for a NATO policy on preventing and addressing civilian harm.⁸⁸ In 2010, NATO produced non-binding policy guidelines for cases of combat-related civilian casualties:

*'Promptly acknowledge combat-related cases of civilian casualties or damage to civilian property.
Continue to fully implement the ISAF standard operating procedures for investigating possible cases of civilian casualties, or damage to civilian property, and endeavour to provide the necessary information to the ISAF civilian casualties tracking cell.
Proactively offer assistance for civilian casualty cases or damages to civilian property, in order to mitigate human suffering to the extent possible. Examples of assistance could include ex-gratia payments or in-kind assistance, such as medical treatment, the replacement of animals or crops, and the like.
Offers of such assistance, where appropriate, should be discussed with, and coordinated through, village elders or alternative tribal structures, as well as district-level government authorities, whenever possible. Assistance should also, where possible, be coordinated with other responsible civilian actors on the ground.
Offering and providing such assistance should take into account the best way to limit any further security risk to affected civilians and ISAF/PRT personnel.
Local customs and norms vary across Afghanistan and should be fully taken into account when determining the appropriate response to a particular incident, including for potential ex-gratia payments.
Personnel working to address cases of civilian casualties or damage to civilian property should be accessible, particularly, subject to security considerations, in conflict-affected areas, and local communities made fully aware of the investigation and payment process.
The system by which payments are determined and made should be as simple, prompt and transparent as possible and involve the affected civilians at all points feasible.
Payments are made and in-kind assistance is provided without reference to the question of legal liability.'*⁸⁹

The guidelines were largely an attempt to encourage the continued use of *ex gratia* payments, and to create a more uniform and standardized approach. However, the decision on whether to implement a scheme remained at the discretion of individual member states, and of the countries studied in this report, Italy, Germany and France do not appear to have implemented any form of compensation or payment scheme for civilians harmed in Afghanistan.⁹⁰

87 Rogers, op. cit., p. 5.

88 Human Rights Watch, Letter to NATO to Investigate Compensation for Civilian Casualties in Afghanistan, April 2009, <https://www.hrw.org/news/2009/04/02/letter-nato-investigate-compensation-civilian-casualties-afghanistan>

89 'NATO nations approve civilian casualty guidelines', 6 August 2010, https://www.nato.int/cps/en/SID-9D9D8832-42250361/natolive/official_texts_65114.htm

90 Germany and Italy research memoranda.

‘The system by which payments are determined and made should be as simple, prompt and transparent as possible and involve the affected civilians at all points feasible’

NATO civilian casualty guidelines, 2010

The way in which schemes should operate was also left to the discretion of individual states.

This meant that states implemented schemes in a variety of different ways, either through policies or legislation. Australia, for example, introduced legislation in 2009 which created a Tactical Payment Scheme, formally giving powers to the Defence Minister to:

‘authorise the making of one or more payments to a person (even though the payments would not otherwise be authorised by law or required to meet a legal liability) if (...) the person suffers loss, damage or injury outside Australia because of an incident that occurs in the course of an activity of the Defence Force outside Australia.’⁹¹

All schemes operated in the field, although some required approval from higher authorities back in home states where certain monetary limits were exceeded. These schemes therefore operated out of military bases where authority was designated to provide payment. Out of the countries examined, both the Netherlands and Australia reportedly permitted forces to carry cash and issue on-the-spot payments for small damage claims up to a certain limit. For Poland, claims committees operating within Polish military contingents in Afghanistan were established to decide claims.⁹² However, most of these schemes relied on civilians approaching local military bases in order to file a claim.

The CIVIC study found that the limits on compensation that could be provided varied significantly across different NATO member states, including for different types of harm. Some states took a different approach to property damage, for instance, than to personal injury and deaths, which were subject to case-by-case analysis.

- Under the Canadian scheme, a Legal Adviser in the field could approve payments up to US \$1,960, with any payments higher than this subject to approval from Ottawa.
- The Netherlands authorized the use of on-the-spot payments of up to US \$500, which troops could issue for property claims. Aside from this, property claims up to US \$1,500 could be approved by legal advisers, and property claims higher than US \$1,500 required the approval of a Task Force Unit Commander. Claims for personal injury and death were considered on a case-by-case basis.
- Under the Tactical Payment Scheme, Australian field commanders are authorized to distribute payments of up to US \$250,000 per case.
- Following the US system, Polish troops were authorized to issue payments of up to US \$2,500 for death, injury or property loss.⁹³

The burden of proof also varied significantly. For example, the Netherlands employed a high burden of proof, and would only issue payments where it was established ‘beyond doubt that Dutch forces caused the harm’, and forces were proactive in gathering evidence. Other countries, however, such as the UK, the US and Poland, would provide

91 Defence Act 1903 (Cth), Section 123H, Australia.

92 Poland research memorandum.

93 Rogers, op. cit.

payment where it was uncertain whether their troops were involved or were only tangentially involved.⁹⁴

Although Germany and Italy did not operate compensation or condolence payment schemes, potentially due to the fact they were not generally involved in combat operations, there are documented instances of ad hoc payments made to families of civilians killed and injured in operations in Afghanistan. For example, after three civilians were shot at a checkpoint in Kunduz by German troops, the family of those shot were provided with US \$20,000 compensation and a car worth US \$5,000 after consultation with family and community leaders.⁹⁵

Civilian casualty mitigation

In 2008, after years of both disputed and undisputed reports of civilian casualties, ISAF established the Civilian Casualty Tracking Cell. The tracking cell was created to address a recognized need to ensure that civilian casualties were properly documented and that civilian harm should be mitigated in future. In mid-2011, the team was expanded into the Civilian Casualty Mitigation Team (CCMT), which in addition to data gathering also undertook a host of other activities, including establishing working groups, holding conferences, conducting outreach, and monitoring and evaluating the implementation of recommendations for the mitigation of civilian harm. The CCMT was able to document and follow up on responses to civilian death and injury, including the use of *ex gratia* payments. While payments remained at the discretion of states, it is possible that the CCMT provided an added layer of accountability, or at least documentation, of instances of civilian death and injury.

An analysis of the CCMT and its operation is beyond the scope of this report, but it is important to note that its activities may in some respects contribute towards reparation. Monetary compensation is only one aspect of the right to reparation and, to some extent, the work of the CCMT contributed towards guarantees of non-repetition for civilian harm. For while it was clearly not guaranteed that civilians would not continue to suffer death and injury, the work of the CCMT at least demonstrated an institutional willingness to learn from errors and try to mitigate civilian harm.

Despite the work of the CCMT being welcomed as a clear improvement on previous practice, it has not been replicated in other conflict arenas (in Afghanistan the team was also cut back after 2014, when the NATO mission transitioned to a support role). Documentation of civilian casualties in coalition operations in Iraq and Syria is largely led by the US, and is by no means as comprehensive or transparent as the work of the CCMT.⁹⁶ This has contributed to significant discrepancies between the estimated figures of civilian casualties reported by the coalition and those reported by the UN and by civil society organizations.

Blurring the lines?

State practice on *ex gratia* (or 'condolence') payments show that there is a danger that the lines become blurred between incidental civilian harm that is lawful under the law of

94 Ibid.

95 Ibid., pp. 9–10.

96 Shiel, A., 'The sum of all parts: Reducing civilian harm in multinational coalition operations', CMC, 2019, pp. 18–20.

armed conflict, and civilian harm that is caused through a violation (criminal or non-criminal) of IHL, triggering the obligation to provide full reparation to victims. US Army guidelines on condolence payments under the CERP are explicit about the purpose of payments and are worth quoting at length:

'CONDOLENCE PAYMENTS 1-12. CERP is authorized for payments to individuals in case of death or physical injury caused by U.S. or multinational military operations, not compensable under the Foreign Claims Act. Condolence payments can be paid to express sympathy and to provide urgent humanitarian relief. Commanders must verify that a claim against the USG is not a viable option under the Foreign Claims Act prior to using CERP for condolence payments. Condolence payments are different from claims and are not an admission of fault by the USG. It is crucial to remember that when a commander uses CERP funds, it is 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.

*'Note: CERP condolence payments are not Solatia payments and will not be referred to as such. Solatia payments must not be tied directly to a combat action and are given because it is local custom to do so.... For example, if an improvised explosive device detonates and the target is U.S. forces, but host nation civilians are hurt, a commander may choose to issue a Solatia payment. On the other hand, if U.S. forces accidentally hurt civilians during combat operations, condolence payments are more appropriate.'*⁹⁷

Condolence payments are therefore clearly indicated for cases of civilian harm caused by US or coalition partner forces, but for which a claim under the FCA is not available. They carry no admission of fault or liability. Given the wide foreign and combat exclusions under the FCA, however, this would appear to leave in limbo cases of civilian harm caused by US forces in overseas operations where fault did exist.

In fact, condolence payments appear to have been offered or made in cases where the US has accepted that there was an IHL violation, and also denied or withheld in cases on the grounds that there was no violation. In 2015, when the US military attacked a hospital run by Médecins Sans Frontières in Kunduz in Afghanistan, mistaking it for a Taliban compound, 42 patients, staff and caregivers were killed. The US labelled the incident a 'tragic accident' but stated that it did not constitute a war crime.⁹⁸ This failed to recognize that even though the threshold of criminal responsibility may not have been reached, the attack still violated IHL. A Pentagon report detailing what went wrong in the incident concluded that 'personnel failed to comply with the law of armed conflict and rules of engagement', and 16 service members were subject to administrative or disciplinary sanctions, including removal from command.⁹⁹ Despite this acceptance that conduct was in violation of IHL, 170 individuals and families affected were offered 'sympathies and provided condolence payments.'¹⁰⁰

97 Headquarters Department of the Army, *The Commanders' Emergency Response Program*, May 2017, ATP 1-06.2, p. 1-4.

98 BBC News, 'Kunduz hospital bombing "not a war crime" says Pentagon', 29 April 2016.

99 US Central Command, Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan, on October 3, 2015; Investigation and Follow-on Actions.

100 Ibid. See also Rosenberg, M., 'Pentagon details chain of errors in strike on Afghan hospital', 30 April 2016.

In 2020, Human Rights Watch noted the case of Shadia A (who is kept anonymous). In 2017, the US-led anti-ISIS coalition struck Shadia and her husband's hometown, Mansourah, in north-eastern Syria. The attack killed her brother-in-law and his wife, leaving the couple's three children orphaned in Syria, whom Shadia and her husband took in. The children's parents had died during a campaign by the US military lasting several weeks to retake the Tabqa Dam, and the US acknowledged that 40 civilians had been killed in the campaign. Human Rights Watch submitted the case to the US Department of Defense requesting a condolence payment. A year after submitting the claim, the department responded that the request had been denied, because 'although the result was tragic, U.S. forces complied with the law of war'.¹⁰¹ As Human Rights Watch noted at the time, this response 'misses the point of condolence payments entirely'.¹⁰² Given that condolence payments admit no legal wrongdoing and are supposed to express sympathy for lawfully incurred civilian loss, it is hard to see how a condolence payment in Shadia's case would not have been appropriate.

The United Kingdom

The Common Law Claims and Policy Division of the Ministry of Defence (CLC&P) is the body responsible for processing common law, non-contractual monetary compensation claims against the Ministry of Defence. The UK established Area Claims Offices (ACOs) in both Iraq (Basrah) and Afghanistan (Lashkar Gah), which were designated the authority to receive, process and compensate claims. Staff from the CLC&P would go out to Iraq and Afghanistan for periods of six months in order to run ACO claims clinics. ACOs effectively processed two different kinds of payments: *ex gratia* payments which were offered as goodwill gestures but accepted no legal liability for harm, and public liability payments which are made for losses arising from the actions of UK military personnel during operations overseas where the Ministry of Defence would be considered liable under English law.

Initially, it seems that ACOs were not given the authority to make *ex gratia* payments, the authority for which must come from the Treasury. ACOs only provided payments where the Ministry of Defence would be liable in law, for example, 'where on the balance of probabilities, the injury or loss was the result of negligence on the part of the Ministry of Defence'.¹⁰³ In the 2007/8 annual report on claims, it was noted that this created difficulties with the expectations of locals in Afghanistan and 'the definition of legal liability practised by the Ministry of Defence in UK civil litigation'. This led to 'a compromise of the process ... which will assist "civil effect" and contribute to the effort in winning the consent of the local population'. Treasury authority was eventually given and by 2010, *ex gratia* payments were being used on a regular basis in Afghanistan.¹⁰⁴

' The increase in the compensation paid by the Public Liability Team in this financial year includes compensation and legal costs paid to Iraqi civilians of about £5.4 million who were the victims of torture and abuse whilst held in detention by British Forces during Operation TELIC'

MoD report 2008/2009

101 Prasow, op. cit.

102 Ibid.

103 Ministry of Defence, Claims Annual Report, 2007/2008, p. 2.

104 House of Commons Defence Committee, Operations in Afghanistan: Fourth Report of Session 2010–12, Oral Evidence, 15 December 2010, p. 77.

Cases of death and serious injury in Iraq and Afghanistan were dealt with by the Public Liability Team in London and not by ACOs, except for those resulting from road traffic accidents.¹⁰⁵ Claims for death and serious injury could still be submitted to the ACOs in Iraq and Afghanistan, but the case would then be referred to the team in London so that a uniform approach could be taken to such cases.¹⁰⁶

At one point, claims ‘clinics’ were conducted in Afghanistan five times a week, and area claims officers rotated around bases in order to reach as many civilians as possible.¹⁰⁷ Radio announcements and leaflets were disseminated to the local population to raise awareness of the claims process.¹⁰⁸ Military Stabilization Support Teams also provided support to local Afghan civilians ‘by taking receipt of claims, gathering information and forwarding the paperwork to Lashkar Gar for the ACO to assess’, where it would be too difficult or dangerous for civilians to travel in person to the ACO.¹⁰⁹ For Iraq, claims were only registered and investigated for ‘incidents occurring since the declared end of war fighting on 1 May 2003, except for a small number of claims for loss of property from Prisoners of War captured during the war fighting phase.’¹¹⁰ (Under Order no. 17 of the Iraq Coalition Provisional Authority, ‘Third party claims including those for property loss or damage and for personal injury, illness or death ... shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.’)

Claims for both countries covered a range of different harms, for example, the Ministry of Defence’s 2006/2007 annual claims report noted that in Iraq, claims ‘continue to be varied, ranging from fatal shootings, shooting injuries, property damage from search operations and RTAs [road traffic accidents], through to damage to fishing boats...’ The annual report 2008/2009 explicitly states that compensation was paid to Iraqi civilians ‘who were the victims of torture and abuse whilst held in detention by British Forces’. The charity Action on Armed Violence calculated in its 2021 *Blood Money* report that a total of £688,000 was paid out in respect of 289 civilian deaths in Afghanistan. For both Iraq and Afghanistan, the majority of claims year on year were related to property damage.

Table 1 is the total amount of compensation and ex gratia payments provided to civilians in Afghanistan from 2006 to 2011:¹¹¹

Table 1: Total UK compensation and ex gratia payments to civilians in Afghanistan, 2006–11

2006–7	2007–8	2008–9	2009–10	2010–11 (at 30 Nov.)
£136,361	£380,569	£452,707	£1,142,000	£1,049,000

105 Ministry of Defence, *Claims Annual Report, 2004/2005*; see also Ministry of Defence, *Claims Annual Report, 2007/2008*, p. 29; Ministry of Defence, *Claims Annual Report 2006/2007*, p. 35.

106 *Ibid.*, p. 14

107 Ministry of Defence, *Claims Annual Report, 2009/2010*, p. 33.

108 House of Commons Defence Committee, *op. cit.*, Oral Evidence, 15 December 2010, p. 77.

109 Ministry of Defence, *Claims Annual Report, 2009/2010*, p. 33.

110 Ministry of Defence, *Claims Annual Report 2006/2007*, p. 35.

111 House of Commons Defence Committee, *op. cit.*, Oral Evidence, 15 December 2010, p. 78.

Table 2: Specimen entries of settled claims from the ACO lists

Date claim submitted	Approx. date of incident	Damages	District, province	Detail of claim	Claimant's assessment US\$	Agreed payment US\$	Date closed
21 January 2010	30 December 2009	Babaji Hellfire 8	Nahr-e-Saraj	2 brothers and 2 sons killed in Hellfire strike		32,000.00	20 February 2010
8 February 2010	22 November 2009	Wife shot in chest	Nad-e-Ali, Helmand	Shot in chest by ISAF during fight with INS		500.00	13 February 2010
1 June 2010	13 May 2010	Wounding	Nad-e-Ali, Helmand	Son wounded during firefight	11,000	250.00	26 June 2010
22 June 2010	7 June 2010	Wounding	Nahr-e-Saraj	Child wounded in face		750.00	28 August 2010
24 June 2010	Jan.–Feb. 2010	Crop damage	Sangin	5 Khrawas of lost crop		750.00	3 September 2010
1 July 2010	1 July 2010	Road traffic accident	Kabul	Damage to rear of private (local, national) vehicle		200.00	6 July 2010
9 August 2010	1 month ago	Property damage	Nahr-e-Saraj	Not allowed to grow tall crops		5,000.00	14 August 2010
10 August 2010	8 days ago	Fatality	Nad-e-Ali	Daughter killed in crossfire		1,250.00	11 September 2010
13 September 2010	2–3 August 2010	Fatalities	Lashkar Gah	Wife and father killed		5,750.00	16 October 2010
21 September 2010	5 March 2010	Wounding	Nahr-e-Saraj	Child wounded in crossfire	8,000.00	7,000.00	13 October 2010
12 October 2010	23 December 2009	Property damage	Sangin	Compound damage		19,500.00	12 October 2010
18 November 2010	8 November 2010	Fatality	Nad-e-Ali	Mother killed by mortar strike and brother injured by small arms fire		5,000.00	25 December 2010
19 November 2010	10 November 2010	Wounding	Nad-e-Ali	Stone / frag injury caused by ISAF Claymore. Approved and assessed		1,316.46	27 November 2010
13 December 2010	5 January 2010	Fatality	Nahr-e-Saraj	Claims husband, 2 sons and 2 daughters killed by ISAF helicopter strike		10,200.00	24 January 2011

A freedom of information request in 2017 revealed that the ACO in Iraq disbursed a total of £2.1 million to settle 1,145 claims during its years of operation.¹¹² The Iraq ACO was closed in 2009,¹¹³ whereas the ACO in Afghanistan continued to be listed on Ministry of Defence annual reports up until 2019.¹¹⁴

Following a freedom of information request, the complete ACO lists of claims in Afghanistan for calendar year 2010 were made available.¹¹⁵ Out of a total of 1,460 claims made in the year, 951 were settled for an average amount of US \$2,059. A total of 409 claims were denied. The summary figures mask a very wide range of damages claimed and payments awarded. Payments for civilian death or injury ranged from a total of US \$64,000 for eight deaths from a Hellfire missile strike in Babiji in Nahr-e-Saraj to US \$350 for an incident in the same district where family members were wounded and livestock killed. Payments for property damage ranged from US \$116,437 awarded after the construction of an indoor market was stopped by ISAF in Lashkar Gah to US \$50 for damage to a wall from an ISAF vehicle. There were a large number of significant payments to farmers for disruption to cultivation in the vicinity of UK patrol bases.

Table 2 (overleaf) provides some specimen entries of settled claims from the ACO listing to illustrate the type of data released by the Ministry of Defence for 2010. The rate for the death of a family member appears to be up to US \$8,000, although considerably less was offered in some cases. The listing makes no distinction between public liability payments and ex gratia payments, although both appear to be included. A Ministry of Defence spokesperson explained on the release of the figures:

*'When compensation claims are received by the Ministry of Defence they are considered on the basis of whether or not there is a legal liability to pay compensation. In some cases where there is a major threat to the stabilization effort and it is impossible to form a view on strict legal liability, ex-gratia payments may be made for personal loss, injury or death. The amounts paid are in accordance with local compensation rates.'*¹¹⁶

This appears to confirm that ex gratia payments may be made in certain cases where there was a possible violation of IHL.

It is worth noting that claims were dealt with promptly, with most claims settled within a matter of a few weeks, but that such claims only represent a small proportion of civilians in Afghanistan who suffered harm.

Civil litigation

Aside from dedicated compensation or amends schemes, the other principal avenue through which civilians are able to assert the right to reparation for harm suffered is through civil litigation.

112 Forces Network, 'MoD paid over £20m in Iraq War compensation claims', June 2017.

113 Ministry of Defence, *Claims Annual Report, 2009/2010*, p. 5.

114 See reports from 2014 to 2019 at UK Government, MoD Common Law Compensation Claims Statistics.

115 Quinn, B., Ball, J. and Tran, M., 'MoD pays £1.3m compensation to Afghans for death, injury and damage', *The Guardian*, 28 March 2011.

116 Ibid.

Why pursue civil litigation?

Civil litigation will involve proving a state's liability under human rights law or in tort, triggering the right to compensation or other forms of reparation. The burden on the claimant is therefore higher in pursuing litigation than it is in claiming through one of the dedicated administrative schemes described earlier in this chapter, where the establishment of liability is not a prerequisite. Litigation may take years and, if it results in a settlement for the claimant, there is often still no formal admission of liability.

Nevertheless, there are numerous reasons why civilians might choose to pursue civil litigation. Most obviously, where civilians are not covered by existing schemes, civil litigation may be the only avenue available to them (in practice, this was the situation faced by civilian victims in southern Iraq after the UK ACO was closed down). Furthermore, some schemes described earlier have a cap on the maximum amount offered, which may be grossly inadequate to address the harm caused. In some instances, civilians have turned down offers of payment through dedicated schemes in order to pursue claims in court.

Some civilians may pursue litigation in order to ascertain the truth, or to ensure that there is a public record of the alleged wrongdoing. The failure to admit responsibility, or the denial of liability for harm caused, is detrimental to the right to reparation. In addition to compensation, the right to reparation may also entail satisfaction, restitution, rehabilitation, and guarantees of non-repetition. These other aspects of the right to reparation can be just as important as compensation, if not more so. This is coupled with the fact that where harm results from alleged conduct that would constitute a war crime or other crime under international law, investigations can be lengthy, opaque and (typically) inconclusive, leaving victims and their families seeking answers for years. Many civilians may therefore choose to pursue civil litigation as a truth-seeking exercise, in order to enable the facts of a case finally to come to light.

many civilians may choose to pursue civil litigation as a truth-seeking exercise, in order to enable the facts of a case finally to come to light

Domestic law

The laws on state liability for overseas military operations and domestic jurisprudence vary greatly across the countries studied. Broadly speaking, the domestic laws of the eight countries¹¹⁷ studied fall into the following categories:

No legal avenue for litigation: The US is the only country studied where there is no legal possibility for civilians to pursue any form of litigation against the state directly for harm suffered (but see box for actions against private actors). The primary statute that allows for private tort claims against the US government – the Federal Tort Claims Act (FTCA) – explicitly excludes liability for (i) any claim ‘arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war’¹¹⁸ and (ii) any claim ‘arising in a foreign country’.¹¹⁹ It should be noted that US courts have held that a formal

117 Australia, France, Germany, Italy, the Netherlands, Poland, the UK and the USA.

118 28 U.S.C. §2680(j).

119 28 U.S.C. §2680(k).

declaration of war is not necessary in order for a ‘time of war’ to exist for the purposes of the exception, and also that the United States Supreme Court has clearly interpreted the foreign country exception to bar any claims based on an injury suffered in a foreign country, regardless of where the actual tortious act or omission occurred.¹²⁰ This means that drone strikes carried out in countries where there is no state of armed conflict, such as Pakistan, or strikes carried out from military bases on US soil, for example using Unmanned Aerial Vehicles, would still fall under the exemptions. The main avenues left to civilians pursuing redress from the US are therefore the schemes outlined in the preceding section, or suing third parties.

Legally possible, but no precedent: In Australia, it would theoretically be possible under the common law to file a claim against the Australian Department of Defence for civilian harm that gave rise to tortious responsibility. However, no successful cases could be found of this ever occurring.¹²¹ Where harm was caused in battle or in the course of an actual engagement a claim might fail due to combat immunity.¹²²

Claims in tort or delict¹²³ are prohibited, but claims under human rights legislation may be possible: In Germany, France, Italy and Poland, claims in delict are barred as a result of jurisprudence.

- The German Federal Court of Justice (*Bundesgerichtshof*) has interpreted the Civil Code to mean that public liability is not applicable to harm caused to non-German individuals in overseas military operations.¹²⁴
- In French law, the overriding principle is that the state is not liable for any damage caused by an act of war.¹²⁵
- In Italy, the Court of Cassation has determined that acts of war are classified as political acts that are not justiciable before national courts.¹²⁶

Despite claims in tort or delict being prohibited, claims through domestic legislation enacting the European Convention on Human Rights (ECHR) may still provide the possibility to pursue compensation. This will only be possible if the ECHR is applicable to the military operation in question and there has been a violation of rights contained in the ECHR.

Claims in tort and under human rights legislation are possible: In the UK and in the Netherlands, civilians have the possibility to pursue claims against the state under civil law and under domestic legislation that gives force to the ECHR. In the Netherlands, state liability claims relating to rights violations by military operations overseas can in principle be based on the general concept of an unlawful act within the meaning of the Dutch Civil Code, which

120 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004): ‘We therefore hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.’

121 Australia research memorandum.

122 *Shaw Savill & Albion Co. Ltd v. the Commonwealth* (1940), 66 CLR 344.

123 Depending on the jurisdiction, civil wrongs are known as either ‘torts’ or ‘delicts’.

124 Germany, Bundesgerichtshof, III ZR 140/15, 6 October 2016.

125 France, Conseil d’Etat, *Herveaux et al.*, Rec. CE 1873, 27 June 1873, p. 599; Conseil d’Etat, *Debauchez*, Rec. CE 1969, 31 January 1969, p. 66.

126 *Markovic and others v. Italy*, ECtHR, judgment of 14 December 2006, Application No. 1398/03.

defines an unlawful act as the violation of a right and an act or omission in violation of a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.¹²⁷ In the UK, tort claims can be brought under the common law (although such claims will face a series of procedural obstacles or immunities – see below).¹²⁸

Suing military contractors in the US

Although in the US there appears to be no avenue to pursue civil claims for civilian harm in overseas operations against the state directly it is possible under US civil law to sue private actors, including military contractors and, in theory, individual state agents. Since the details of the US torture and rendition programme began to emerge, the American Civil Liberties Union (ACLU) in particular has brought numerous cases against individuals in order to obtain compensation for the use of torture committed in the so-called ‘war on terror’.

All attempts to sue US officials have failed due to a range of complex legal reasons, including jurisdiction, state immunity, immunity of state officials when acting in their official capacity, and a ‘national security’ exception to the Constitution.¹²⁹ There has, however, been some limited success in pursuing litigation against private military contractors and contractors hired by the CIA. (In the wars in Iraq and Afghanistan, one estimate suggests that over 50 per cent of the US contingent were contracted.)¹³⁰

In 2008, former inmates of the US detention facility at Abu Ghraib in Iraq launched civil litigation against private military contractors for their role in widespread abuses at the prison. In 2013, one of the contractors, Engility Holdings Inc., settled a lawsuit by paying \$5.28 million to 71 former inmates of Abu Ghraib and other US run detention sites for the torture and mistreatment they suffered. Another civil case, this one against CACI Premier Technology has been in the US courts for over a decade. In 2019, a federal appeals court cleared the way for a civil trial to proceed, and refused to provide CACI with derived sovereign immunity, which may instead be examined during the trial phase.

In addition to private military contractors, contracted psychologists behind the CIA torture programme have also been sued in the US courts. A lawsuit was filed under the Alien Tort Statute on behalf of three victims against two such psychologists, who were paid millions of dollars by the CIA to design and oversee the torture program. In August 2017, after the case had been allowed to proceed to a trial, the case was settled out of court.¹³¹

Law of the ECHR

Unlawful civilian harm incurred in military operations may constitute a violation of both IHL and human rights law. It has been established that human rights law and international humanitarian law apply concurrently during an armed conflict.¹³² The concurrent application of human rights law means that states are not absolved of complying with

127 Art. 6:162 of the Dutch Civil Code.

128 Claims under the law of tort are possible in the jurisdictions of England and Wales and Northern Ireland. Civil claims in Scotland can be brought under the law of delict.

129 See, for example: Fassbender, B., ‘Can victims sue state officials for torture? Reflections on *Rasul v. Myers* from the perspective of international law’, *Journal of International Criminal Justice*, vol. 6, no. 2, May 2008, pp. 347–69. See also the following cases: *Khaled El-Masri v. United States* and *Meshal v. Higgenbotham*.

130 Congressional Research Service, Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis, 13 May 2011; see also McFate, S., ‘America’s addiction to mercenaries’, *The Atlantic*, August 2016.

131 Business and Human Rights Resource Centre, \$5M paid to Iraqis over Abu Ghraib, 2013, and US appeals court rules military contractor can be sued over allegations of torture & war crimes in Abu Ghraib, 2019; ACLU, ‘*Salim v. Mitchell* – Lawsuit against psychologists behind CIA torture program’, August 2017.

132 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, op. cit., para. 106.

human rights obligations when conducting military operations. Significant jurisprudence on the application of human rights law to situations of armed conflict has been developed by the European Court of Human Rights (ECtHR), which has established that the ECHR is applicable during armed conflict, including in overseas military operations of contracting states, providing that jurisdiction of the state can be established.

Therefore, despite the fact that jurisprudence in Germany, France and Italy interprets the relevant national law as not allowing civil compensation claims for overseas military operations, this does not mean that civilians are barred from bringing claims in all cases. States bound by the ECHR will still be liable to pay compensation to civilians where they have violated convention rights, providing that the jurisdiction of the contracting state can be established where the violation took place.

Jurisdiction

Article 1 of the ECHR establishes that states 'shall secure to everyone within their jurisdiction the rights and freedoms' contained in the convention. Jurisdiction obviously applies within the territory of the state itself; however, the ECtHR has also established other exceptional, limited circumstances where the convention applies extraterritorially.

Spatial jurisdiction: State responsibility arises when a state exercises 'effective control' over an area outside of its national territory, either through its military forces or through local administration. This principle can apply to both entire areas of a country deemed to be under the effective control of military forces, areas where a state party exercises 'public powers', as well as specific locations or buildings such as detention centres.

Personal jurisdiction: Where state authorities use force against an individual extraterritorially, in the exercise of authority and control over that individual, a jurisdictional link is established between the state and the individual.

Prior to the overseas military operations that European states conducted in Iraq and Afghanistan, ECtHR case law regarding extraterritorial application of the ECHR related to the 'effective control' exception of spatial jurisdiction and concerned cases where both the state that was occupied and the state that was occupying were both ECHR contracting states. In addition, personal jurisdiction case law related exclusively to where persons were taken into the custody of state agents. The legal complexities of European states' military operations, particularly in Iraq, has led to an expansion of the extraterritorial application of the ECHR by the ECtHR, including in the landmark case of *Al Skeini and others v. UK* (see box - see overleaf).

The ECtHR further built on the *Al Skeini* interpretation of personal jurisdiction in *Jaloud v. Netherlands*.¹³³

The applicant brought a case against the Netherlands after his son, Azhar Sabah Jaloud, was shot by Dutch troops at a vehicle checkpoint in south-eastern Iraq. The ECtHR found that individuals passing through a checkpoint 'set up for the purpose of asserting authority and control over the persons passing through it'¹³⁴ implies that the ECtHR applied the personal

¹³³ *Jaloud v. the Netherlands*, ECtHR, Application No. 47708/08, 20 November 2014.

¹³⁴ *Ibid.*, para. 152.

Al Skeini and others v. UK¹³⁵

The applicants were relatives of six Iraqi civilians who had been killed by UK armed forces in Basra between 8 May 2003 and 10 November 2003. The first four were killed by British soldiers on patrol or during raids; the fifth was allegedly killed as the result of being beaten and forced into the river by British soldiers who had arrested him; and the sixth (Baha Mousa) died in a detention facility after being taken into custody by British forces.

Apart from Baha Mousa, who was killed in a detention facility, the House of Lords (as it was then) ruled that the other five applicants did not come under the jurisdiction of the UK and therefore ECHR. The ruling was based on the fact that previously 'effective control' had only been established where the territory that was controlled was already under the ECHR, and further, that even if the ECHR could apply to the territory of states not party to the ECHR, the UK did not have effective control over Basra where the killings took place.¹³⁶

The ECtHR established in its ruling that its pre-existing case law did 'not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States,'¹³⁷ meaning that the ECHR can be applied wherever the jurisdiction of a contracting state can be established. Then, the ECtHR applied a mix of spatial and personal jurisdiction in order to find that there was a jurisdictional link between all of the applicants and the UK. Rather than examining whether the UK had 'effective control' over Basra, the ECtHR found that the UK exercised 'public powers,' namely authority and responsibility for the maintenance of security in south-east Iraq.

Because the UK exercised 'public powers' the ECtHR found that it 'exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.'¹³⁸ The court also noted in the judgment that personal jurisdiction is the 'exercise of physical power and control over the person in question.'¹³⁹

model of jurisdiction elaborated in *Al Skeini* to conclude that Dutch troops had power and control over Jaloud to the extent that jurisdiction applied.

Jurisprudence on the extraterritorial applicability of the ECHR remains a relatively new area of law concerning overseas military operations. Case law has significantly expanded the scope of the application of the ECHR, as described above, although in a recent interstate case the ECtHR found that it had no jurisdiction over the lawfulness of the extraterritorial use of force during the 'active phase of the hostilities' in an international armed conflict.¹⁴⁰

Convention rights

There have been seven decided cases before the ECtHR concerning overseas military operations in Iraq and Afghanistan. The ECtHR has interpreted the ECHR alongside IHL in order to try to bring complementarity between the two bodies of law. The cases involved alleged violations of Article 2 (Right to life), Article 3 (Prohibition of torture) and Article 5 (Right to liberty and security). Where a violation is found to have occurred, the

135 *Al Skeini and Others v. the United Kingdom*, ECtHR Grand Chamber, Application No. 55721/07, 7 July 2011.

136 *House of Lords, Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, [2007] UKHL 26.

137 *Al Skeini*, para. 142.

138 *Ibid.*, para. 149.

139 *Ibid.*, para. 136.

140 *Georgia v. Russia (II)*, ECtHR, Application No. 38263/08, Judgment (Merits), 21 January 2021.

court may award reparation to the applicant alleging the violation. Compensation awards tend to be modest, but the ECHR jurisprudence is of central importance for the practice of the UK and other Council of Europe member states.

Under Article 2 (Right to life), the jurisprudence of the ECtHR 'appears to accept that acts that violate the right to life, but could be considered lawful under IHL, are never contrary to Article 2'.¹⁴¹ Cases concerning allegations of violations of Article 2 during overseas military operations have centred on a violation of the procedural element of Article 2: the obligation to conduct an effective, independent and impartial investigation where a death has occurred. The ECtHR has recognized that, given the difficulties in carrying out an investigation in full compliance with the ECHR in hostile environments such as conflict or post-conflict situations, a degree of flexibility is allowed which may take into account the difficulties such situations present.¹⁴² The handing over of prisoners by UK forces to Iraqi custody, where they were subject to inhuman treatment, was held to be a violation of Article 3 (Prohibition of torture and inhuman or degrading treatment or punishment).¹⁴³ Under Article 5 (Right to liberty and security) the case law of the ECtHR effectively establishes that wherever an individual is in the physical custody of a state (or state agents), a jurisdictional link is established. That means any individual detained by the armed forces of ECHR contracting states are entitled to rights under the ECHR, including the right to a review of the lawfulness of their detention.

Cases before the ECtHR regarding Iraq and Afghanistan have set important legal precedents which have allowed civilians to claim compensation before the national courts of European states. In the UK, in particular, the rulings regarding jurisdiction and the right to liberty have meant that many civilians have brought cases against the UK government for violations under the Human Rights Act 1998, which incorporates the ECHR in domestic law.

Litigation in the UK

Under the domestic law of England and Wales,¹⁴⁴ those who suffer violations allegedly committed by UK military action can sue for reparation by bringing a complaint under the Human Rights Act 1998 (HRA), which gives effect to the ECHR under domestic law, bringing a claim under the common law of tort, or both.

The Human Rights Act 1998 makes a breach of the ECHR by a UK public authority unlawful as a matter of domestic law across UK jurisdictions and gives the victim a potential claim for damages. Confirmation of the extraterritorial application of the ECHR to overseas military operations (explored above) therefore had a significant impact on the ability of civilians to bring compensation claims against the UK government in the English courts for harm caused in overseas operations.

141 Landais, C. and Bass, L., 'Reconciling the rules of international humanitarian law with the rules of European human rights law', *International Review of the Red Cross*, vol. 97, no. 900, 2015, pp. 1295–311, at p. 1299.

142 *Jaloud v. the Netherlands*, op. cit.

143 *Al-Saadoon and Mufdhi v. the United Kingdom*, ECtHR, Application No. 61498/08, 2 March 2010.

144 Although there are differences between the UK jurisdictions of England and Wales, Scotland and Northern Ireland, this report refers to the law of England and Wales where the majority of claims in this context have been raised.

English tort law: Legal liability under the common law of England and Wales arises when a party causes harm as a result of negligent or wrongful actions. Therefore, it must be shown that an injury has occurred or a right has been violated in order to have a claim. Where a claim is brought for a tortious wrong that occurred outside of the jurisdiction of England and Wales (for example in the context of overseas military operations), the laws of the country in which the wrong occurred will be applied to the case by the English courts. Therefore, where a claim is brought for military harm caused to civilians in Iraq, the English courts will apply the Iraqi law of tort to the case, including any statutory bars in the local law of Iraq.

Claims can therefore be brought under either body of law, or indeed both. The avenue via which a claim is brought may be determined by which law is applicable to the injury caused, for example, whether the ECHR is applicable according to existing jurisprudence on extraterritorial jurisdiction, or whether there are applicable time limits or limitations to the claim in tort.

Limits on liability

Regarding tort law, there are a number of limits on liability that apply to claims from civilians harmed in overseas military operations. These derive from: the standard statute of limitations on civil claims that applies to all civil claims; any statute of limitations in the national law of the foreign country if that law is being applied by the English courts; the Crown Act of State Doctrine, which in limited circumstances provides a defence in tort law to the UK government for sovereign acts carried out in overseas military operations; the common law doctrine of ‘combat immunity’; and the War Damage Act 1965.

Limitation periods: Under the Limitation Act 1980, the limitation period for actions in respect of negligence resulting in death or personal injuries is three years from the date of accrual of the action or the date of the claimant’s knowledge of damage (whichever is later).¹⁴⁵ This period can however be extended at the discretion of the court,¹⁴⁶ and the High Court has determined that the Limitation Act 1980 confers on the court the widest possible discretion, to allow cases to proceed outside of the limitation period where the interests of justice so require.¹⁴⁷ Under the Foreign Limitation Periods Act 1984, where English courts must take into account the law of another country (e.g. the tort law of another country because that is where the injury occurred), then the law of that other country relating to limitation shall apply in respect of the case.¹⁴⁸ Under the HRA, proceedings must be brought within ‘(a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances.’¹⁴⁹ The HRA therefore has a stricter time limit but at the same time confers a broad discretion on the courts regarding time limitations.

Crown act of state: The notion of ‘Crown act of state’ is a doctrine of English law which provides a defence to claims in foreign tort law for acts of state performed abroad, including in the context of military operations. The doctrine was examined in detail by the

145 Limitation Act 1980, s.11.

146 *Ibid.*, s.33.

147 *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyinyi, Jane Muthoni Mara and Susan Ngondi v. The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB).

148 Foreign Limitation Periods Act 1984, s.1.

149 Human Rights Act 1998, s.7(5).

UK Supreme Court, where it was deemed that acts of state that fall under this defence are ‘a very narrow class of acts: in their nature sovereign acts — the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it.’¹⁵⁰ This was summarized by Lord Sumption as ‘(i) that the act should be an exercise of sovereign power, inherently governmental in nature; (ii) done outside the United Kingdom; (iii) with the prior authority or subsequent ratification of the Crown; and (iv) in the conduct of the Crown’s relations with other states or their subjects.’¹⁵¹

The doctrine was further examined in *Alseran v. Ministry of Defence*,¹⁵² where the application of the Crown act of state doctrine was held not to depend on establishing that either the allegedly wrongful act, or the wider military operation of which the act formed part, was lawful in international law. Therefore, acts that are prohibited under international law can still be Crown acts of state and a defence to claims in foreign tort law.¹⁵³ However, Leggatt J. held that in principle, an act can only be a Crown act of state if it has been authorized or ratified by a government policy or decision which is a lawful exercise of the Crown’s powers as a matter of English domestic law. Policies that are ultra vires and thus illegal under English domestic law have no legal effect and can give rise to the Crown’s liability in tort – including policies that breach the Human Rights Act or indeed IHL. As Leggatt J. explained:

*‘acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.’*¹⁵⁴

‘Combat immunity’: The common law doctrine of combat immunity provides that armed forces are not under a duty of care to avoid causing loss or damage in the heat of battle. The leading English cases¹⁵⁵ concern actions brought by UK military personnel against the MoD, but the doctrine would also apply to civilians harmed in the course of military operations. In *Smith*, the scope of combat immunity was narrowed to exclude conduct removed in place and time from the actual operations themselves, and the Supreme Court held that the question of whether a duty of care was just, fair and reasonable should be decided on the facts.

War Damages Act 1965: This act removes the entitlement to receive compensation for damage to, or destruction of, property caused by acts lawfully done, or on the authority of, the Crown in a war in which the UK is engaged.¹⁵⁶

Claims against the UK

The Ministry of Defence has settled hundreds of claims related to civilian harms in Iraq and Afghanistan. Litigation against the UK government challenged the legality of the UK’s

150 The *Serdar Mohammed* case [2017] UKSC 1, [2017] AC 649.

151 *Ibid.*, para. 81.

152 *Alseran v. Ministry of Defence* [2017] EWHC 3289 (QB).

153 *Ibid.*, paras 54–61.

154 *Ibid.*, para. 71.

155 *Mulcahy v. Ministry of Defence* [1996] 2 WLR 474; *Smith v. Ministry of Defence* [2013] UKSC 41.

156 War Damage Act 1965, c. 18.

The Iraqi civilian litigation

The Iraqi civilian litigation concerns a large group of claims resulting from the UK's military intervention in Iraq from 2003 to 2009. The claims are from Iraqi nationals who allege unlawful imprisonment and ill-treatment by UK armed forces. Hundreds of claims were settled out of court before the first full trial of civil compensation claims in which the testimony of claimants themselves, as well as extensive factual evidence adduced by the Ministry of Defence, were tested in an English court. Four claims were tried as 'lead' cases, resulting in the judgment in *Alseran and others v. Ministry of Defence*, handed down in December 2017.

The High Court found that the four men had been unlawfully detained and had variously been subject to inhuman and/or degrading treatment with respect to assaults, hooding with sandbags, deprivation of sight and hearing, use of 'harshing' techniques and use of sleep deprivation. They were each awarded compensation between £10,600 and £33,300.

Mr Justice Leggatt concluded the judgment with an endnote on the over 600 outstanding claims:

'Although there is no assumption that the four cases which are the subject of this judgment are representative of the rest, some of the central conclusions reached – on issues such as whether it was lawful to detain the claimants, whether the conditions in which they were held and certain practices to which they were subjected amounted to inhuman or degrading treatment, whether their claims are time-barred and how any damages should be assessed – are likely to affect many other cases in the litigation.'

The judgment should allow the Ministry of Defence and solicitors Leigh Day LLP, representing the Iraqi claimants, to assess the merits of the remaining cases.¹⁵⁷

In July 2020, a UK defence minister told parliament that of the roughly 1,000 civil cases that have been brought in English courts relating to unlawful detention and mistreatment of detainees in Iraq, 'approximately 330 have been settled to date and 217 have been either withdrawn or struck out. Discussions regarding the resolution of the remaining 414 claims remain ongoing.'¹⁵⁸ One case was settled in 2020/21 and a total of 417 cases were settled in 2020/21.

detention and treatment of civilians and those *hors de combat* in Iraq and Afghanistan, and established the liability of the UK to pay compensation for breaches of human rights. Claimants from Iraq and Afghanistan were then able to submit compensation claims to the CLC&P, which were generally settled as public liability claims.

Regarding unlawful detention, the Ministry of Defence stated in 2013 that 'compensation is offered on a "tariff" basis, with the sum to be paid determined primarily by the length of detention, ranging from £1,500 for a few hours to £115,000 for 3 years or more.'¹⁵⁹ Where claims of mistreatment or abuse are proven or credible, additional compensation was paid.¹⁶⁰ In 2017, in response to a freedom of information request from the Press Association, it was revealed that the UK had paid £19.8 million in out-of-court settlements in 326 cases relating to Iraq, in addition to the £2.1 million the Area Claims

157 Leigh Day, 'High Court finds MoD breached the Geneva Conventions during the Iraq War', December 2017, <https://www.leighday.co.uk/latest-updates/news/2017-news/high-court-finds-mod-breached-the-geneva-conventions-during-the-iraq-war/>

158 UK Parliament, Iraq: Detainees, Question for Ministry of Defence, UIN 70307, tabled on 7 July 2020.

159 Ministry of Defence, *Claims Annual Report 2012/2013*, p. 6

160 Ibid.

Office in Iraq had paid to settle 1,145 claims.¹⁶¹ The Ministry of Defence declined to provide details on individual case settlements, citing a confidentiality agreement with the solicitors representing claimants. It was estimated at the time that litigation regarding human rights abuses in Iraq had cost the Ministry of Defence £100 million.¹⁶²

It is understood that out-of-court settlements are generally agreed with no admission of liability on behalf of the Ministry of Defence, and this has been confirmed by officials in some cases. This is somewhat at odds with the fact that claims were considered by the Public Liability Team on the basis of whether or not there was a legal liability to pay compensation.

In December 2017, judgment was handed down in the High Court in four lead cases out of hundreds in what has become known as the Iraqi civilian litigation (see box). Following conclusions reached on legal issues affecting all the cases, as well as findings of human rights violations and breaches of the Geneva Conventions in the four lead cases, the High Court hoped the parties would be able to make a realistic assessment of the likely outcome of over 600 remaining claims. Negotiations between the Ministry of Defence and claimants' solicitors were concluded in 2021 and again are subject to a confidentiality agreement.

Summary statistics on UK accountability for civilian harm

Despite cases of both alleged and confirmed abuse of civilians often making the headlines, comprehensive information on UK accountability efforts in respect of civilian harm have not been published. Poor transparency, confidentiality of ongoing legal proceedings and politicised messaging have all contributed to difficulties in deciphering what the UK has and has not done in respect of addressing civilian harm from military operations.

However, Ceasefire has been able to draw up the most comprehensive data yet on accountability for civilian harm in relation to UK military operations in Afghanistan and Iraq based on MoD reports, ministerial statements, evidence submitted to Parliament, and FOI requests by media outlets and by Ceasefire. Summary statistics are given on the next page.

The total bill for compensation for civilian harm in relation to UK military operations in Iraq and Afghanistan is currently running at £31.8 million from 6,633 cases. The final sum may be significantly higher.

This above figure includes a partial estimate for cases settled in 2020/21 (most as part of the Iraqi civilian litigation), following negotiations between the parties. (The estimate has been generated by multiplying the number of pending cases remaining after others were withdrawn or struck out, by the lowest compensation award made in the *Alseran* case, in which four lead cases were tried before the High Court.)

¹⁶¹ Forces Network, 'MoD paid over £20m in Iraq War compensation claims', June 2017, <https://www.forces.net/news/mod-paid-over-ps20m-iraq-war-compensation-claims>

¹⁶² Ibid.

Table 3: UK prosecutions and compensation for civilian harm in Afghanistan and Iraq 2001 – 2021

Prosecutions (convictions) [†]	Afghanistan		Iraq		Total	
war crimes	0 (0)		1 (1)		1	
other offences	9 (9)		5 (5)		14	
Total	9		5		14	
Compensation*	Cases	Amount (£m)	Cases	Amount (£m)	Cases	Amount (£m)
ACOs	4,727	5.3	1,145	2.1		
civil litigation (settled to 2017)			330	19.9		
civil litigation (settled to 2021)	13	0.1**	418	4.4**		
Total	4,740	5.4	1,893	26.4	6,633	31.8

[†] A prosecution may involve more than one defendant. In the 14 prosecutions, a total of 41 defendants were charged and 15 convictions secured.

* The MoD uses the term 'compensation' to include both public liability payments and ex gratia payments.

** Estimate.

The total number of civilian compensation cases, at 6,633, dwarfs the 14 criminal prosecutions of UK service personnel for offences against the local population in Afghanistan and Iraq.

The more detailed figures for Iraq also enable a comparison to be made between avenues for reparation. The average amount paid per case handled by Area Claims Offices in Iraq, at under £2,000, is considerably smaller than the average amount secured through litigation in the UK, at over £60,000.

4

Challenges to the right to reparation

Despite extensive state practice concerning compensation for civilian harm in overseas operations, considerable practical and legal challenges remain to prevent civilians from accessing reparation. These can interlink to create the perverse result that civilians may be more likely to get justice if their car is damaged by a military vehicle in a traffic accident than if their family are killed in an airstrike.

The majority of cases which have resulted in compensation to civilians harmed relating to the conduct of European states' military personnel deployed in Iraq and Afghanistan involve torture, inhuman or degrading treatment, and unlawful detention. Much more complicated to bring successfully are cases where civilians have suffered harm as a result of kinetic force, including airstrikes. In the first decade of military involvement in Afghanistan and Iraq, the US, UK and other European states saw growing public concern over overseas operations whose cost in both resources and soldiers' lives was considerable and whose positive effect on controlling insecurity and improving the situation of the local populations looked increasingly doubtful. The public mood shifted further after revelations appeared concerning the abuse of detainees at the US-run prison at Abu Ghraib and UK detention facilities in southern Iraq. European states certainly became less willing to deploy ground troops in overseas operations. In 2013, for example, after a decade or more fighting in Iraq and Afghanistan, the UK Parliament voted against military operations in Syria despite an impassioned call to arms by the prime minister. Two years later, after the Paris terror attacks, Parliament approved military intervention in Syria but on an 'airstrikes only' basis.

Examining current conflicts in Syria, Iraq, Yemen, Somalia and Afghanistan, it is clear that European states and the US are increasingly reluctant to deploy troops on the ground, and that their participation in such conflicts is conducted through air operations and a 'remote

warfare' strategy, relying on drones and support for foreign forces in partnered operations. The increased use of airstrikes should not result in a decrease in accountability and the provision of reparation for civilian harm, yet this appears to be what is happening in practice.

an increase in the use of airstrikes appears to have resulted in a decrease in accountability and the provision of reparation for civilian harm

Identifying responsibility

While it may seem relatively straightforward to assert that whoever has committed a violation is responsible for that violation, in practice it is not always easy to prove responsibility. Conflicts across the Middle East, North Africa and West Asia have been characterized by the involvement of a complex array of both state and non-state actors, with violations of IHL occurring on multiple sides. These complex situations present numerous challenges to civilians seeking to identify which party was responsible for a violation.

Where multinational coalitions are operating, it is not always possible to identify which state is responsible for an attack. In fact, coalition structures can facilitate opacity and the avoidance of responsibility for civilian harm. When Operation Inherent Resolve first began operations, the US Central Command published daily press releases on airstrikes that had been carried out that day and which states had been involved in the strikes. It also issued monthly press releases identifying cases of confirmed civilian casualties, incidents under investigation and incidents that had been investigated but deemed not credible. As new states joined the coalition, this reporting began to be restricted, and by 2017, a coalition agreement meant that daily and monthly releases no longer identified which states were involved in strikes or alleged incidents of civilian harm.¹⁶³ In some instances, it has taken years to attribute attacks that have killed civilians to the state that carried out the attack. This has led to some civilian victims being unable to pursue claims for compensation because they were unable to identify which state to take legal action against.

Basim Razzo

In 2015, coalition airstrikes destroyed the homes of Basim Razzo and his brother. Basim lost his wife, daughter, brother and nephew in the attacks, and his sister-in-law was the only other survivor. A video of the airstrike was uploaded to YouTube claiming to be an attack on an ISIS compound. It emerged that the airstrike was carried out based on faulty intelligence and had mistakenly targeted civilians. The US military offered the capped sum of condolence payment according to the prevailing policy: \$15,000.¹⁶⁴ In November 2019, four years after the attack, it was revealed that the Dutch military was actually responsible, after investigative journalists published an interview with the pilot who had carried out the airstrike.¹⁶⁵ In March 2020, Razzo filed a lawsuit against the Netherlands for \$2 million. In September 2020, the government of the Netherlands made a 'voluntary offer of compensation' of €1 million, although it explicitly stated that it did not admit liability.¹⁶⁶

The case is thought to be the first where compensation has been offered for coalition airstrikes.

Lack of transparency over which state party is responsible for an attack can therefore act as a significant obstacle to accessing reparation. Some states clearly hope to rely on this in order to evade responsibility. Danish Colonel Søren W. Andersen has stated, for example, 'You shouldn't be able to track one specific attack in one specific area back to a Danish plane. We prefer to hide in the crowd.'¹⁶⁷ Yet 'hiding in the crowd' is effectively hiding from the legal obligation to provide reparation where harm has been done.

Some states do, however, acknowledge specific strikes or have reporting mechanisms nationally to improve transparency over potential civilian casualties. The NGO *Airwars* has assessed the UK as being the most transparent among members of the anti-ISIS coalition insofar as strike data is concerned. The UK routinely released information on dates, approximate locations and intended targets for more than 1,700 airstrikes

163 Shiel, op. cit., p. 21

164 Khan and Gopal, op. cit.

165 Treffers, L., 'Dutch F-16 pilots break their silence on airstrikes and civilian harm', *Airwars*, 23 March 2020.

166 Boffey, D., 'Mosul civilian first to be compensated for mistaken coalition bombing', *The Guardian*, 9 September 2020.

167 Shiel, op. cit., pp. 21–2, citing the original 'Politikere kræver mere åbenhed af Forsvaret', *Information*, 23 October 2014.

conducted by the Royal Air Force against ISIS, as well as further information in response to parliamentary questions and freedom of information requests.¹⁶⁸ However, this does not extend to accountability for ‘non-combatant harm’, on which Airwars assessed UK performance as poor. Ceasefire has itself found that locations given in respect of strike data in relation to Mosul were often too approximate to enable meaningful triangulation with on-the-ground reports of civilian casualties. Transparency of location data deteriorated further during the Raqqa assault when 80 per cent of airstrikes were identified by the Ministry of Defence at city level.

In October 2020, the Dutch defence ministry introduced plans to make it standard practice to notify the Defence Committee of the Parliament of the Netherlands whenever the defence ministry conducts an investigation into possible civilian casualties from its own military action¹⁶⁹ However, it will be left to the discretion of the Defence Minister whether this information is to be shared publicly or privately, and is also dependent on military coalition agreements. The announcement followed considerable concern in parliament and among the Dutch public at the Bassim Razzo case, and at revelations that the Netherlands was also responsible for a 2015 airstrike in Hawija in which 70 civilians were reported to have been killed (see next box).

Hawija bomb factory attack

In June 2015, the Netherlands carried out an airstrike on an ISIS bomb factory in the Iraqi city of Hawija. While the impact from the explosive dropped should not have resulted in civilian casualties, the secondary explosions that resulted from the bombs that were stored within the facility resulted in significant civilian casualties. It has been estimated that over 70 civilians were killed and more than 100 were injured.¹⁷⁰ The attack was only attributed to the Netherlands in 2019, through journalistic investigations. In 2020, relatives of the victims of the attack prepared to file a compensation claims against the Dutch government. However, the Defence Minister of the Netherlands has stated that no individual compensation payments will be made.

In 2020, it was announced that an independent committee would investigate the bombing of Hawija and how civilian casualties occurred. However, it was also stated that the Dutch cabinet want to compensate the community, rather than provide compensation to individuals and their families, such as through providing water and electricity supplies and housing repair. As the lawyer for victims and their families noted, for the victims who no longer live in the area, improving the water supply in Hawija will not provide any redress, and those who will not benefit from any collective scheme will continue to pursue reparation through the courts. It therefore remains to be seen whether the independent committee will acknowledge a violation of IHL and what form of reparation victims receive, if any.

Aside from difficulties in transparency over identifying which state has carried out an attack, some states have asserted that the legal basis upon which they have participated in a conflict may affect their responsibility to provide reparation. Speaking in relation to the airstrike in Hawija, the Dutch Defence Minister stated that because participation in military operations fighting ISIS in Iraq was at the request of the government of Iraq, the

168 Airwars, *Credibility Gap: United Kingdom Civilian Harm Assessments for the Battles of Mosul and Raqqa*, Submission to UK Parliamentary Defence Select Committee, September 2018, p. 20.

169 Bijl, E., ‘Dutch transparency about civilian harm remains insufficient’, PAX, 5 October 2020.

170 See e.g. Treffers, L., ‘Airwars suspends cooperation with Netherlands defence ministry until possible role of Dutch F-16s in lethal event is clarified’, Airwars, 22 October 2019.

obligation to provide reparations for civilian harm incurred by the Netherlands lies with the Iraqi government.¹⁷¹

Aside from the question of any liability limitation agreement between the Netherlands and Iraq, this position is at odds with the principle that a state which is responsible for a wrongful act is responsible for making reparation for that act. The ARSIWA framework does state that ‘the conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.’¹⁷² However, the activities of the Combined Joint Task Force in Iraq do not meet this standard. International coalition forces are not exercising the governmental authority of Iraq, and remain under independent command and control.

Furthermore, after it was announced that compensation would be provided to Basim Razzo for the attack on his family compound in Mosul, the Defence Minister stated that the situation of the Hawija airstrike was ‘substantially different’, because the attack in Mosul turned out to be against an illegitimate target, whereas the ISIS bomb factory was a legitimate target.¹⁷³ It should be noted that although the offer of compensation to Basim Razzo explicitly did not admit legal liability, this statement implies that the Dutch government believes the Mosul attack was a violation of IHL. However, the statement fails to acknowledge that the correct identification of a military objective does not make an attack on that objective automatically lawful. Legality also rests on whether adequate precautions were taken to spare the local civilian population and assess potential civilian harm, including for example collecting intelligence on the amount of explosive stored in the area, or issuing warnings to local civilian populations. Failing to take precautions or assess the proportionality of such an attack would still be a violation of IHL whether the target was legitimate or not.

Establishing jurisdiction

As outlined in the previous chapter, in order for a claim to be admissible under the ECHR, an alleged violation must be attributable to a contracting state and the jurisdiction of the state must be established. In previous cases where extraterritorial jurisdiction was established, this was where forces belonging to a contracting state were deployed on the ground and exercised spatial control over a particular territory or area, and/or personal control and authority over a particular individual.

However, in the more recent generation of conflicts, including the Libya intervention and the war against ISIS, the participation of ECHR contracting states, including the UK, the Netherlands and Germany, has largely been through the deployment of air power in support of partner forces rather than ‘boots on the ground’. Establishing extraterritorial ECHR jurisdiction in the case of an airstrike has been recognized as problematic ever since the *Bankovic* case. *Bankovic* concerned the 1999 NATO bombing of the Serbian radio-television headquarters in Belgrade, which killed 16 civilians. The ECtHR found that the case was inadmissible because a jurisdictional link could not be established between the victims and the states which had carried out the airstrikes. The court stated

171 Neurink, J., ‘Hawija: Iraqi bomb victims demand Dutch compensation’, *Deutsche Welle*, 12 February 2019.

172 ILC, ARSIWA, Art. 6.

173 NOS, ‘Commission is investigating Hawija air strike, no individual compensation’, 2 October 2020.

that there was nothing in Article 1 of the ECHR to suggest that the positive obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the convention could be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’.¹⁷⁴ The ECtHR ruling in *Bankovic* has meant that many European states have concluded that where civilians are killed as a result of airstrikes, absent territorial control, the ECHR is not applicable and states cannot be held responsible for any possible violations that occur.

The court’s more recent rulings in the *Jaloud*, *Al Skeini* and *Al-Jedda* have significantly expanded the extraterritorial application of the ECHR to overseas military operations (see previous chapter). None of these cases, however, concerned the conduct of airstrikes. In *Hanan v. Germany* (see next box) the court did confirm the existence of a procedural obligation under Article 2 to undertake an investigation in the case of civilian deaths from an airstrike, but did not consider whether there had been a substantive breach of the right to life.

Given the court’s complex and at times confusing approach to extraterritorial application of the ECHR, establishing jurisdiction remains a significant obstacle to be overcome in cases of civilian harm caused through airstrikes, at least in the absence of territorial control. It is possible an application may succeed where both the exercise of public powers and physical power and control over the victim(s) could be shown. Where ECHR jurisdiction cannot be established, civilians who had experienced harm would have to rely on a claim in tort.

Ensuring access to compensation

The policy and practice on compensation for civilian harm have significantly decreased despite the scale of civilian harm that has been incurred in recent conflicts, including the war against ISIS in Syria and Iraq. Many of the schemes providing compensation – whether on a fault or no-fault basis – outlined in the previous chapter of this report were created principally for the purpose of maintaining positive relations with the local population. These schemes were processed in-theatre and relied on a military presence on the ground in order to operate. Airstrikes, therefore, do not fit neatly into the structure of these schemes. The conduct of remote warfare means that, in some cases, strikes are carried out from military or intelligence bases in the US or the UK, and armed forces often have little to no contact with the local civilian population who may suffer harm. With no personnel on the ground, there is less force-protection incentive for states to offer compensation and there is no military base or ground presence for civilians to approach to make a claim. While schemes may cover civilian harm as a result of airstrikes in theory, civilians are not accessing compensation in practice.

This also applies to *ex gratia* payment schemes. As outlined earlier, although US legislation theoretically allows for condolence payments to civilians in Iraq, Syria, Yemen, Libya and Somalia, these payments are not happening in practice.¹⁷⁵ In 2019, it was reported that since the majority of US troops left Iraq in 2011, only three condolence payments had been made in Iraq – despite massive aerial campaigns that resulted in significant civilian

¹⁷⁴ *Banković and Others v. Belgium and 16 Other Contracting States*, ECtHR, Application No. 52207/99, 19 December 2001, para. 75.

¹⁷⁵ See Department of Defense, *Report on Ex Gratia Payments*, op. cit.

Hanan v. Germany¹⁷⁵

In September 2009 insurgents in Afghanistan hijacked two fuel tankers which became immobilized on a sandbank in the Kunduz River. German troops, part of the International Security Assistance Force (ISAF), were stationed in a base nearby. The German commanding officer ordered an airstrike on the immobilized tankers, carried out by the US Air Force. However, members of the local population had surrounded the tankers to try and extract fuel. It remains unknown how many people died. The German government made *ex gratia* payments of US \$5,000 per person to the families of 91 individuals killed and to 11 persons injured.

After the airstrike, investigations were initiated by the German Federal Prosecutor General but were discontinued due to lack of sufficient suspicion of criminal liability under either the German criminal code or the code of crimes against international law.

Among those killed in the airstrike were the two sons of Mr Hanan, Abdul Bayan and Nesarullah, who were 12 and 8 years old respectively. Mr Hanan launched legal proceedings in Germany, both to compel the bringing of public charges against the colonel who ordered the airstrike, and to claim compensation under German domestic law. The motion to bring public charges was dismissed, as was the compensation claim, which went all the way to the *Bundesgerichtshof* (Federal Court of Justice). The court ruled that compensation claims from foreign nationals for harm suffered in overseas military operations are not permissible under German domestic law.¹⁷⁶

Mr Hanan subsequently filed a case before the ECtHR alleging that Germany violated its obligations under the ECHR Article 2 (Right to life) complaining that the investigation had been ineffective, and Article 13 (Right to a remedy) that he had no effective remedy to challenge the discontinuation of the investigation. Although the claim was not upheld on the merits, the Grand Chamber found that a jurisdictional link did exist under Article 1 of the ECHR due to 'special features' of the case, including the fact that under the ISAF status-of-forces agreement, Germany retained exclusive criminal jurisdiction over its military personnel for alleged war crimes.

casualties and property damage – one in July 2016 in Hatra (\$2,500), one in June 2018 in Mishraq Village (\$57,400) and one in Anbar Province in March 2019 (\$4,000).¹⁷⁸ The Department of Defense report on condolence payments in 2020 stated that six condolence payments in total were made in 2019 to civilians in Iraq. It therefore appears that during the entire aerial campaign against ISIS over the past six years, fewer than 10 condolence payments have been made to civilians in Iraq. No condolence payments are recorded to have ever been made to civilians in Syria since the commencement of US operations there in 2014.¹⁷⁹ The vast majority of condolence payments recently made by the US – 605 payments made in 2019 alone – were made to civilians in Afghanistan.

This is perhaps because *ex gratia* payments are made 'where U.S. forces are operating' or where 'counterinsurgency or stability operations' are being conducted by US forces. The US has had limited ground troops presence in Iraq and Syria as part of Operation Inherent Resolve. Ground operations to recapture ISIS territory in Mosul, Raqqa and other locations were led by local partner forces while the US, UK and other coalition

¹⁷⁶ *Hanan v. Germany*, ECtHR, Application No. 4871/16, 2020.

¹⁷⁷ *Bundesgerichtshof*, 6 October 2016, III ZR 140/15.

¹⁷⁸ Landis, A. and Greenblatt, M., 'Collateral damage: U.S. forgoes condolence payments in Iraq, Syria', *Newsy*, 16 December 2019.

¹⁷⁹ *Ibid.*

members provided extensive aerial support. Some have asserted that the lack of condolence payments for civilians who have suffered extensive harm in anti-ISIS airstrikes is due to the lack of US troops operating in the area, preventing them from having an avenue through which to file a claim.¹⁸⁰

Where forces are not operating locally, or conducting operations where the support of the civilian population is necessary, the US appears to be less willing to provide condolence payments. The Department of Defense has both legislative authority and funding from the US Congress which could be used to address the high level of civilian harm that has been caused – both by US forces directly and by coalition partners¹⁸¹ – in military operations against ISIS, yet in practice civilians are not offered payments, or able to access them.

While the US *ex gratia* payment scheme at least applies theoretically to civilians affected in overseas operations, the UK does not operate an *ex gratia* payment scheme for civilian harm inflicted during current overseas military operations. In 2016, in response to a parliamentary question regarding *ex gratia* payments to civilians killed or injured by UK airstrikes, a defence minister stated:

*'In the special circumstances of operations in Iraq and Afghanistan HM Treasury authorised the Department to make ex gratia payments in theatre in appropriate circumstances to nationals of those countries who had suffered harm or damage as a result of UK military activities: information on such payments was published annually. No such authorisations are currently in force, and any proposal to make ex gratia compensation payments to civilians killed or injured by UK airstrikes would require HM Treasury approval on an exceptional basis. There are currently no such proposals.'*¹⁸²

The UK therefore does not operate an *ex gratia* payment scheme in relation to current overseas operations. The Iraq ACO closed in 2009, and the Afghanistan ACO had not made any payments since 2015/16, although it continued to be listed on Ministry of

Defence annual reports.¹⁸³ The 2014/15 Ministry of Defence compensation claims report states that the department is not authorized to make *ex gratia* payments, with the exception of 'claims arising from low flying and ... certain claims settled in theatre by Area Claims Officers'.¹⁸⁴ However, all the annual reports from 2016/17 onwards note that the only exception for *ex gratia* payments relates to claims arising from low flying, implying that in-theatre *ex gratia* payments were no longer authorized after 2016.¹⁸⁵

'any proposal to make ex gratia compensation payments to civilians killed or injured by UK airstrikes would require HM Treasury approval on an exceptional basis. There are currently no such proposals.'

UK Defence Minister, November 2016

180 Eviatar, D., 'Why isn't the US compensating families torn apart by its air strikes?', Defense One, 24 July 2020.

181 NDAA, 2020, Sec. 1213(a).

182 UK Parliament, Written questions, answers and statements, Ministry of Defence: Compensation, Question for Ministry of Defence, UIN 54689, tabled on 24 November 2016.

183 Ministry of Defence, 'Common law compensation claims financial year 2018/19', p. 5.

184 Ministry of Defence, 'Compensation claims financial year 2014/15', June 2016, p. 2.

185 See reports from 2014 to 2019 at UK Government, 'MOD common law compensation claims statistics'.

Although *ex gratia* payments are no longer possible, civilians who suffer harm from current UK overseas operations could in theory still submit a public liability compensation claim to the CLC&P in London, if the harm they suffered resulted from a violation of IHL by UK forces. CLC&P Guidance provides contact details online for those wishing to enquire about compensation claims (information provided in English only).¹⁸⁶ Such claims, however, are unlikely to succeed in practice. It is very difficult to demonstrate the commission of a violation of the law on the conduct of hostilities without access to the information available to the commander at the time of the attack. The Combined Joint Task Force – Operation Inherent Resolve reports that it conducts its own internal investigation into allegations of civilian harm, and determines whether airstrikes were in compliance with the law of armed conflict.¹⁸⁷ All the civilian killings for which the coalition has admitted responsibility have been described as ‘unintentional’ and the coalition habitually states that all feasible precautions were taken.¹⁸⁸

Unfortunately, the widespread recognition among states involved in overseas military deployments in Iraq and Afghanistan that civilian harm needs to be addressed seems to have regressed over the past decade. Particularly where states’ participation is limited to aerial warfare, civilians are not able to access any form of compensation or condolence payment for harm. This seems extraordinary when considering the extent of military engagement and the scale of civilian harm that has occurred in recent overseas military operations. The Combined Joint Task Force has carried out some 15,000 strikes in Iraq, and some 20,000 strikes in Syria during the war against ISIS. The coalition estimates that it has caused 1,410 civilian deaths, while civil society sources estimate that the actual figure is between 8,310–13,187.¹⁸⁹ Yet data regarding condolence payments indicates that fewer than 10 payments have been made to civilians in Iraq throughout this time, and none in Syria.

Retrogression in the UK

Despite, or perhaps because of, the judgment in *Alseran* and the scale of compensation paid out by the Ministry of Defence to settle hundreds of further cases of human rights violations, the UK government introduced new legislation in 2020 with the stated aim of ending what ministers described as ‘vexatious’ claims against UK service personnel [sic] and repeated investigations into their conduct.

Ministers’ rhetoric tended to confuse *criminal* investigations into the conduct of individual service personnel and *civil* claims against the Ministry of Defence. On the criminal side, the activities of both the Iraq Historic Allegations Team and Operation Northmoor (looking at allegations of criminal conduct by UK personnel in Afghanistan) were wound up without resulting in a single successful prosecution, and were widely criticized as a failure, by both human rights activists and by organizations representing service personnel. In fact, official figures released in 2020 by the Ministry of Defence to Ceasefire Centre for Civilian Rights following a freedom of information request revealed that over two decades there had been only one UK prosecution for war crimes (related to

186 Ministry of Defence, Common Law Claims & Policy Division, ‘Guidance: What we do and the types of claims we handle’, section 4 ‘Contact Details’, last updated July 2020.

187 See e.g. ‘Combined Joint Task Force – Operation Inherent Resolve monthly civilian casualty report’, November 2019.

188 Ceasefire and MRG, *Mosul after the Battle: Reparations for Civilian Harm and the Future of Ninewa*, London, January 2020, p. 25.

189 Airwars, ‘US-led coalition in Iraq and Syria’.

the killing of Baha Mousa in Iraq, for which one individual was convicted of inhuman treatment under the International Criminal Court Act 2000). There were also five prosecutions for other offences against the civilian population in Iraq, leading to five convictions, and nine prosecutions for such offences in Afghanistan, leading to nine convictions.¹⁹⁰ A long-running preliminary examination by the Office of the Prosecutor at the ICC concluded that there was a reasonable basis to believe that UK servicemen had committed war crimes including wilful killing/murder, torture and inhuman/cruel treatment, but under the complementarity provisions of the court's statute declined to pursue a full investigation because it was not shown that the UK had acted to shield perpetrators from justice.

ministers' rhetoric has tended to confuse *criminal* investigations into the conduct of individual service personnel and *civil* claims against the Ministry of Defence

In March 2020, the Conservative government introduced the Overseas Operations (Service Personnel and Veterans) Bill, creating a 'triple lock' against prosecution of UK service personnel after five years and also imposing an absolute limit or 'longstop' of six years on bringing claims for personal injury and/or death in connection with military operations overseas, applicable to both tort claims and

claims under the Human Rights Act. The bill drew significant criticism from prominent military figures, UN human rights mandate holders and NGOs. Following a concerted parliamentary campaign in which Ceasefire was active, the bill was heavily amended to exclude crimes under international law, including war crimes, torture, crimes against humanity and genocide, from the triple lock on prosecutions.

As enacted in April 2021, however, the Overseas Operations (Service Personnel and Veterans) Act 2021 retains the longstop provisions limiting all civil claims after six years. These provisions arguably violate ECHR standards on the right to a remedy,¹⁹¹ and the right to a fair and public hearing.¹⁹² In order for restriction of access to a court to be lawful under the ECHR, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁹³ When examining statutes of limitations, the ECtHR has stated that it must ascertain 'whether the nature of the time-limit in question and/or the manner in which it was applied is compatible with the Convention.'¹⁹⁴ Limiting claims concerning violations of non-derogable rights under Articles 2 and 3 cannot be considered compatible with the convention. The bill also violates the UK's obligations under the UN Convention against Torture, which enshrines the right to remedy and reparation for victims of torture and mistreatment, and should not be subject to any statute of limitations or 'longstop'.¹⁹⁵

The resulting situation effectively discriminates against civilian victims. Civil claims from service personnel and veterans are also limited by the longstop provisions in the act, but

190 Ministry of Defence freedom of information response to Ceasefire, <https://www.ceasefire.org/official-figures-reveal-only-one-prosecution-of-uk-armed-forces-personnel-for-war-crimes-overseas-since-2001/>

191 ECHR, Art. 13.

192 Ibid., Art. 6.

193 *Steel and Morris v. United Kingdom*, ECtHR, Application No. 68416/01, 2005, para. 62.

194 *Vrbica v. Croatia*, ECtHR, Application No. 32540/05, 2010, para. 66.

195 UNCAT, Art. 14; *Mrs. A v. Bosnia and Herzegovina*, Communication No. 854/2017, Views of 22 August 2019, UN Doc. CAT/C/67/D/854/2017.

they will rightly continue to have access to non-judicial remedies such as the Armed Forces Compensation Scheme, unlike civilian victims. Current and former service personnel will therefore still have access to a remedy in the form of compensation via dedicated schemes, whereas civilians will be left with no recourse to justice or remedy.

It appears that UK policy on reparations for civilian harm is moving retrogressively. Creating barriers to both criminal prosecutions and civil claims for violations of international law affecting civilians in overseas operations suggests that, despite evidence of serious and widespread civilian harm, the UK is seeking to avoid liability and is failing to comply with its international obligations to provide reparation.

5

Towards an effective reparations policy

While this report has demonstrated some of the key challenges to addressing harm to civilians caused in overseas military operations, there are also many examples of good practice that states can look to in order to implement a policy on reparations that complies with their obligations under international law.

A review of state practice in the context of overseas military operations shows that where attempts have been made to address civilian harm, the most common response provided is monetary payment. The reasons for this are numerous, but one reason may be that certain aspects of reparation, such as provision of medical services for rehabilitation or restitution of land and property, are more problematic to provide overseas, including in territories where the state may still be at war.

Unfortunately, this has led to the concept of reparation in the context of overseas military operations effectively becoming synonymous with compensation. Not only does this compound the lack of clarity in cases where compensation is paid on a no-fault basis, it also fails to take into account the obligations on states to provide full reparation for violations. Victims may receive a one-off, lump-sum payment for an injury or harm that will require life-long treatment. Furthermore, all victims are unique, and may have different priorities when it comes to reparation. For example, where a parent has lost children in an unlawful attack, their principal interest may be in a criminal conviction of the perpetrator, or a formal apology from the responsible state, rather than monetary considerations. States should develop flexible policies, possibly in conjunction with partner states involved in military operations, to ensure that victims of IHL violations have access to holistic reparation, and incidental civilian harm caused in the course of lawful attacks is also adequately addressed.

The right to truth

The ‘right of families to know the fate of their relatives’ is a general principle that governs IHL provisions concerning missing and dead persons, as codified in Geneva Conventions Additional Protocol I.¹⁹⁶ The Inter-American Commission on Human Rights has stated that the right to know the full, complete and public truth ‘is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition.’¹⁹⁷ In many post-conflict situations around the world, the establishment of truth commissions at the national level has marked an important first step to establishing the extent of violations, and issues of causation and responsibility, paving the way for measures of reparation.

Aside from representing a means of obtaining compensation, the justice system also provides a mechanism through which the truth can be sought and revealed. While criminal justice processes should reveal the truth where IHL violations result in

¹⁹⁶ AP1, Art. 32.

¹⁹⁷ Inter-American Commission on Human Rights, *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, para. 357; see also ICRC, Customary IHL Database, Rule 150.

prosecutions, the unwillingness of states to prosecute military personnel has meant that some civilians have had to rely on civil litigation in order to establish the facts about what happened to their family members.

Baha Mousa

In September 2003, Baha Mousa was working as a receptionist at a hotel in Basra, Iraq, when the hotel was raided by British forces and he was taken to a British military base. Some 36 hours after being taken into custody, Mr Mousa was dead. An examination found 93 separate injuries on his body.

In 2004, Mr Mousa's family launched a successful High Court challenge to the UK's decision not to hold an independent inquiry into the death; however, the Ministry of Defence continued to fight the ruling for several years until finally, in 2008, a public inquiry was announced.

In 2007, seven members of the British armed forces faced charges related to Baha Mousa's killing, but only one conviction was obtained, after Corporal Donald Payne pleaded guilty to the war crime of inhumane treatment. The judge remarked that there was no evidence to secure more convictions 'as a result of a more or less obvious closing of ranks', after soldiers claimed they could not remember what happened.¹⁹⁸

After launching a civil suit against the Ministry of Defence, the family of Baha Mousa and nine other Iraqis were in July 2008 offered £2.83 million in compensation, and the government apologized for the 'appalling abuse' they had suffered. A Ministry of Defence statement said:

'the settlement is with an admission of liability by the Ministry of Defence which follows on from a statement on 27 March 2008 by the Secretary of State for Defence when substantive breaches of Article 2 (right to life) and 3 (prohibition of torture) of the European Convention on Human Rights were admitted'.¹⁹⁹

The public inquiry into the death of Baha Mousa reported in September 2011. The results of the public inquiry found that British troops were using interrogation techniques against Iraqi prisoners which had been banned since 1972, and were a breach of the prohibition on torture and ill-treatment. The inquiry provided 73 different recommendations to the Ministry of Defence.²⁰⁰

While the family of Baha Mousa (see box) did ultimately obtain an official apology, compensation and a public inquiry into the circumstances of the killing which provided recommendations for institutional learning, it is of concern that this was only achieved because Mr Mousa's family had to pursue justice through the courts, and not because of any institutional policy or willingness to follow the obligation under international law to provide reparation. The case also demonstrates the potential failings of criminal prosecutions in providing justice, as well as the potential avenues for justice that civil litigation can present.

In order to fulfil its investigatory obligations under ECHR Article 2, the UK established in 2014 the Iraq Fatality Investigations (IFI), a form of judicial inquiry tasked with

198 Morris, S. and Gillan, A., 'Soldiers cleared over ill-treatment of Iraqi prisoners', *The Guardian*, 13 March 2007.

199 Weaver, M. and Norton-Taylor, R., 'MoD to pay £3m to Iraqis tortured by British troops', *The Guardian*, 10 July 2008.

200 *Report of the Baha Mousa Inquiry*, Chair Sir William Gage, HC 1452, 3 vols, 2011–12, <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>

investigating ‘the circumstances surrounding Iraqi deaths involving British forces’ on a case-by-case basis. However, the IFI is not concerned with determining civil or criminal liability and appropriate cases are referred by the Ministry of Defence only after it is decided that there is no realistic prospect of a conviction and all criminal investigations and review processes have been concluded. There is no comparable mechanism for deaths caused in Afghanistan.²⁰¹

Satisfaction

The right to truth is partly realized through the award of satisfaction. The UN Basic Principles state that satisfaction should include ‘verification of the facts and full and public disclosure of the truth’²⁰² Experience in the UK has shown that civil litigation has often served to ensure there is a public record of rights violations. There is, however, a risk that compensation may be offered in respect of alleged IHL or human rights violations on the condition of non-disclosure of the facts of the case or the amount given. Where states do offer compensation, this should be accompanied by a public acknowledgement of wrongdoing and an apology in order to fulfil obligations under the right to reparation.

While many states that participated in the conflicts in Iraq and Afghanistan have not responded satisfactorily to accusations of violations of IHL, some have undertaken steps to fulfil the obligation to provide satisfaction to victims by *inter alia* properly committing to investigate and respond to allegations.

In 2016 the Chief of the Australian Army commissioned a report into the relationship between different branches of the Australian armed forces. However, upon conducting research for the report, author Dr Samantha Cromptoets began hearing numerous accounts of war crimes committed by special forces in Afghanistan.²⁰³ This led to an inquiry being commissioned by the Inspector-General of the Australian Defence Force, an independent office outside the military chain of command.²⁰⁴ The inquiry was conducted by Paul Brereton, a judge and major general, and in November 2020, a redacted version of the Brereton Report was published.

The report found evidence of war crimes – namely that 39 civilians were murdered, and two were cruelly treated. The report stated that none of the murders took place in the heat of battle, and occurred when civilians were in the detention or control of Australian Special Forces.²⁰⁵ When the report was published, Chief of the Defence Force General Campbell apologized to the people of Afghanistan, and the Department of Defence is reportedly exploring how compensation payments will be made. It was also announced that the Office of the Special Investigator will be created to carry out prosecutions of those involved, and reforms to the Australian Special Forces will also be made.²⁰⁶

201 See UK Ministry of Defence, Iraq Fatalities Investigation, 8 June 2018, <https://www.gov.uk/government/collections/iraq-fatality-investigations>

202 UN Basic Principles, para. 22(b).

203 Ziesing, K. and Levick, E., ‘Brereton IGADF redacted report released’, *Australian Defence Magazine*, 19 November 2020

204 Guilfoyle, D., ‘Australian war crimes in Afghanistan: The Brereton Report’, *EJIL:Talk!*, 23 November 2020.

205 Knaus, C., ‘Key findings of the Brereton report into allegations of Australian war crimes in Afghanistan’, *The Guardian*, 19 November 2020.

206 Ibid.

The Australian example stands in stark contrast to other countries also accused of serious IHL violations in Afghanistan. Institutional willingness to investigate and to encourage compliance and transparency in the investigation contributes towards satisfaction, including the establishment of the truth and, where appropriate, prosecution of those responsible.

Compensation

The most extensive state practice on the provision of compensation for civilian harm relates to the establishment of national reparations schemes, typically in a transitional justice context, including those in Colombia, Guatemala, Sierra Leone and Iraq.

Although no one scheme can be said to encapsulate best practice, some positive features of different national and international schemes in overcoming common obstacles are highlighted in the next box. This points a way to reconciling the challenges of the state obligation to make full reparation, the need to deal with violations by multiple perpetrators, and the importance of delivering equal and effective access to justice for a potentially large set of civilian claimants.

In addition to implementing dedicated schemes, states should also consider contributing to existing national schemes which can take a more comprehensive approach to compensation and restitution through state structures. In Iraq, for example, Law No. 20 on Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions can provide compensation and the allocation of land to victims of IHL violations and incidental harm caused by armed conflict since 2003. The law identifies five categories eligible for reparation: martyrdom or loss; full or partial disability; injuries and conditions requiring short-term treatment; damage to property; and damage affecting employment and study. Victims can receive one-off lump-sum payments, a monthly pension and/or a plot of residential land.²⁰⁷

Regarding compensation paid by international actors, the most common reference point is the practice of the US, which has for decades made available payments for civilian harm caused in overseas operations. However, as is made clear throughout this report, such *ex gratia* or ‘condolence’ or payments are frequently derisory in amount, explicitly exclude all responsibility for the harm caused, and their purpose is operational, not reparative. In some cases they have nonetheless been made in circumstances where a violation of IHL has clearly occurred, and which should therefore have triggered reparation. But *ex gratia* payments may have an important role in providing a form of no-fault compensation in cases of civilian harm that is incidental to lawful attacks on military objectives. Recent reviews in the US have strengthened policy in this area:

- **Transparency:** The Department of Defense is now legally required to submit quarterly reports to Congress delineating all payments made in response to civilian casualties or explaining why no payments were made.²⁰⁸
- **Accountability:** Compensation is not limited to civilian harm caused by the US, but specifically allows for compensation for harm caused by any coalition actors.

207 Sandoval, C. and Puttick, M., *Reparations for the Victims of Conflict in Iraq: Lessons Learned from Comparative Practice*, London, Ceasefire Centre for Civilian Rights, November 2017.

208 Naples-Mitchell, ‘Congress expands oversight ...’, *op. cit.*; NDAA, 2020, Sec. 1213.

- Geographical coverage: There has been a steady expansion of the conflicts and regions eligible under the scheme, with coverage now extended to Afghanistan, Iraq, Syria, Somalia, Libya and Yemen.²⁰⁹

Responsibility, liability and access to justice

Although international human rights and humanitarian law place obligations on states to provide reparation where a violation has occurred, the obstacles in the way of a civilian seeking to make a claim for reparation are often considerable, and sometimes insurmountable.

- Security considerations may be paramount, particularly while a conflict is ongoing. A claimant may well fear retaliation, particularly if the process is associated with the potential for criminal prosecution of the perpetrator(s).
- Given that many conflicts today involve multiple armed actors, often operating in coalition or partnership, identifying the actor responsible for a particular violation may itself present a challenge.
- Logistical difficulties inherent in conflict or post-conflict environments will be compounded if a foreign party is believed to be responsible for the violation, necessitating representation before the courts or administrative bodies of a foreign state with an unfamiliar legal system. This alone will place making a claim outside the means of the vast majority of victims of civilian harm.²¹⁰
- Obtaining the necessary evidence to establish commission of a violation may present the greatest obstacle of all. In detention cases, records may be incomplete, compromised or unobtainable, and perpetrators or witnesses may close ranks. In conduct of hostilities cases, access to the military decision-making record may simply be denied, leaving the claimant unable to establish what information was available to the commander and whether all feasible precautions were taken and a robust civilian harm assessment undertaken.

Bearing in mind the obstacles to accessing justice for victims and the administrative burden on the state (exacerbated by contentious proceedings), most post-conflict reparations programmes do not require a judicial finding of responsibility for each individual case of violation. In Iraq, Law No. 20 of 2009 established a compensation programme for victims of 'military operations, military mistakes and terrorist actions' and had processed nearly 185,000 claims by 2016.²¹¹ In the UK, a Victims' Payments Scheme ('Troubles pensions') was recently established to acknowledge the acute harm and provide compensation to those living with severe and permanent disablement caused by physical or psychological injury in a Northern Ireland Troubles-related incidents.²¹² At the international level, a UN Compensation Commission (UNCC) was established in 1991 to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait (paid for by a charge on Iraqi oil revenues). Because Iraq's liability under international law had been affirmed by Security Council resolutions, the UNCC mainly had a fact-finding task and was therefore established as a claims commission rather than an international court or tribunal.²¹³ It made some 1.5 million awards out of a total of 2.7 million claims.

Although these schemes cover a very wide range of circumstances and instances of violation, they share a number of features in common. The governing terms of the scheme recognize both extensive civilian harm and a general responsibility on the part of the state for repairing that harm (including in cases where a strict determination of civil liability may not be available), as well as providing an administrative procedure for claims to be processed in a non-

209 See Department of Defense, *Report on Ex gratia Payments*, op. cit., pp. 267–8.

210 It is worth noting that the Iraqi claimants and their witnesses in *Alseran v. Ministry of Defence* were initially refused visas to enter the UK to attend court.

211 See Sandoval and Puttick, op. cit., n. 209.

212 *Victims' Payments Regulations 2000*, UK Statutory Instruments, 2020, No. 103, part 8, Regulation 53, <https://www.legislation.gov.uk/ukSI/2020/103/contents/made>

213 UN Security Council Resolution 687, 8 April 1991, S/RES/687.

discriminatory manner.²¹⁴ Although the violations concerned could in many cases also be characterized as crimes under national or international law, the award of compensation is not an adjunct to, or dependent on, the outcome of criminal prosecutions. Broadly speaking, claimants are required to demonstrate, and the scheme body to confirm, the extent of the harm suffered and the nexus to the conflict in question.

Particularly where there are a large number of potential claimants, such schemes enable claims to be dealt with efficiently and a measure of justice to be delivered to victims, although they may not result in the same level of satisfaction as a judicial proceeding. It should however be noted that, as with all heads of reparation, the establishment of such a compensation scheme should not be regarded as exhausting or replacing other avenues of justice.

Restitution and rehabilitation

The Basic Principles outline that restitution includes, as appropriate: restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to one's place of residence; restoration of employment and return of property. Restitution therefore requires a holistic approach that the mere provision of compensation will often not fulfil. Furthermore, the Basic Principles state that '*Rehabilitation* should include medical and psychological care as well as legal and social services.'

The new Yazidi Survivors' Law, passed by the Iraqi parliament in March 2021, is one of the most comprehensive.²¹⁵ Targeted at Yazidi, Christian, Shabak, and Turkmen survivors of sexual violence and other ISIS crimes, the law provides for both individual and collective measures. The law includes forms of restitution in the areas of education, employment and property. Survivors covered by the law are entitled to resume their educational studies in exception to age requirements and are given priority in appointment to public functions, with a 2 per cent quota. In addition, survivors are entitled to a free housing unit or a residential plot of land with a mortgage loan. The law also tasks a new Directorate-General with providing services to survivors through opening health and psychological rehabilitation centres for female survivors, both inside and outside of Iraq.

Interesting examples of international practice include the US's humanitarian programmes which exist in parallel to civilian condolence payment schemes. The Afghan Civilian Assistance Program and the Marla Ruzicka Iraqi War Victims Fund provide civilians and their families who have suffered death, injury or loss, with food and household items, physical and psychological rehabilitation services, and professional assistance. Such programmes are part of the US contribution as a major humanitarian, development and stabilization donor to both countries. It should be emphasized that, in the absence of any individual or collective acceptance of responsibility for civilian harm, potentially significant reparative measures look more like charity. The failure of the US to accept responsibility also limits their value as state practice from the legal point of view.

This tension can also be seen in the Netherland's statement committing to compensate the community of Hawija after an airstrike caused multiple civilian deaths, injury and damage to local infrastructure (see previous chapter). The Netherlands has stated that it wishes to

214 These features distinguish such schemes from *ex gratia* or *solatia* payments which are discretionary payments primarily mandated by operational considerations.

215 Ceasefire, 'The Yazidi Survivors' Law: A step towards reparations for the ISIS conflict', briefing, May 2021; <https://www.ceasefire.org/the-yazidi-survivors-law-a-step-towards-reparations-for-the-isis-conflict/>

provide reparation through repairing and improving water and electricity supplies and housing repair. While this should be done in conjunction with individual compensation for harm, it is a good example of collective measures which aim at partial restitution.

Guarantees of non-repetition

The Basic Principles outline that guarantees of non-repetition can entail a range of measures such as strengthening civilian oversight of the military, and strengthening the rule of law and legal reforms to implement IHL obligations, including through promoting training on the rules of IHL with a range of military and non-military actors. Institutional reform to ensure compliance with IHL is central to effective guarantees of non-repetition.

One of the most significant examples of a state taking steps to guarantee non-repetition were the reforms implemented by Canada in 1995 which disbanded the Canadian Airborne Regiment after evidence of serious violations of IHL emerged. In 1993, Canadian UN peacekeeping forces who had been deployed to Somalia tortured a 16-year-old Somali boy to death after he had been caught in the UN compound. Other evidence of wrongful killing and mistreatment of Somali civilians, as well as videos which demonstrated racism and hazing rituals within the regiment led to a widespread public outcry and ultimately the regiment's disbandment.²¹⁶

While the Canadian example concerns institutional reform to prevent the repetition of conduct amounting to war crimes, there are also positive examples when it comes to mitigating civilian harm through institutional learning, such as NATO's Civilian Casualty Mitigation Team (CCMT), described earlier in this report. Tracking all instances of civilian harm and attempting to use the lessons learnt to inform future military action to mitigate harm can make a significant contribution towards guarantees of non-repetition, reducing the likelihood of future IHL violations as well as incidental civilian harm. Numerous actors have called for the CCMT to be replicated in other conflict arenas.

²¹⁶ Knaus, C., 'War crimes: former minister reveals why Canada disbanded its special airborne force after scandal', *The Guardian*, 2 December 2020.

Conclusion and recommendations for a UK policy on reparations

Twenty years after the start of UK involvement in the wars in Afghanistan and Iraq, the UK has no developed policy on reparations for civilian harm. This is despite the fact that thousands of civilians have been killed by coalition military operations in which the UK has played a major part, and despite hundreds of cases in which the UK has paid major awards to civilians who have suffered violations of human rights and IHL through the actions of UK forces. In all cases, these were civilians whom UK military operations were specifically mandated to protect.

Whether by intention or omission, UK policy towards accountability for IHL violations has in recent years focused almost exclusively on criminal investigations (often on a repeated basis) of junior service personnel, leading only very rarely to prosecutions. The UK Government Voluntary Report on IHL Implementation accordingly devotes its chapter on ‘Domestic jurisdiction over violations of IHL and ICL’ to a description of procedures for criminal prosecution, with no mention of civil jurisdiction. The implication is that violations are seen as transgressions committed by individual service personnel and that the responsibility of the state is limited to prosecuting those individuals.

Furthermore, the response of the Ministry of Defence towards civilian harm has deteriorated during the last decade. Despite significant development on response to civilian harm by NATO member states – including the UK – during the first decade of the twenty-first century, in recent years there has been marked retrogression. This is partly explained by the shifting role of UK, US and other forces in partnered operations which don’t require their ‘boots on the ground’, but is also related to the refusal of states to provide avenues for reparation and to make themselves accountable for civilian harm caused. The result is an increase in the practical and legal challenges faced by civilians, typically members of vulnerable and disempowered communities in fragile states, in accessing reparations and asserting their rights.

The Overseas Operations (Service Personnel and Veterans) Act 2021 further restricts the ability of civilians to claim compensation from the UK for violations of IHL and human rights law, introducing a new ‘longstop’ to limit all claims after six years. This risks leaving the UK in violation of its international legal obligations under human rights treaties to which it is party, including the ICCPR, UNCAT and the ECHR, and including the duty to provide a remedy and reparation where rights have been violated.

During the passage of the legislation, UK ministers expressed concern that human rights claims and other instances of ‘lawfare’ may constrain or undermine military effectiveness ‘on the battlefield’. However, the vast majority of allegations – proven or unproven – of abuse by UK service personnel in Afghanistan and Iraq over the last two decades do not concern the conduct of hostilities but rather abuses against detainees within the power of UK personnel or against civilians in the course of law enforcement operations.

'The interface between the legal and policy dimensions of an operation is the crucial point at which its legitimacy is determined'

Chilcot Report

Conversely, the most thorough official inquiry into a UK military operation, the Chilcot report, stressed both the need to understand the likely effects of military actions on civilians and the requirement to recognize the legal implications of such action, including under IHL and human rights law. The Chilcot team produced a handbook for those involved in operational

policy and its implementation, published by the Ministry of Defence in 2017, entitled *The Good Operation*. It directs senior planners to 'establish a clear audit trail setting out accountabilities and responsibilities' and ensure that it is properly resourced. The handbook emphasizes:

*'The interface between the legal and policy dimensions of an operation is the crucial point at which its legitimacy is determined. Never underestimate the extent to which that is the case, and the potential hangover into the period after conflict if that interface is an uncomfortable one.'*²¹⁷

Although the legacy of UK operations in Afghanistan and Iraq includes outstanding claims of reparation for civilian harm, the question of reparations cannot be dismissed as a legacy issue. UK military operations overseas continue to be extensive, even after the August 2021 withdrawal from Afghanistan. In September 2020, a UK defence minister confirmed, in response to a parliamentary question:

*'UK Armed Forces are currently operating in support of counterterrorism operations in four countries (Afghanistan, Iraq, Somalia and Mali), are presently providing counterterrorism training to an additional nine partner nations: Bangladesh, Cameroon, Ghana, Indonesia Kenya, Lebanon, Maldives, Saudi Arabia and Tunisia. The RAF is conducting strike operations only in Iraq and Syria.'*²¹⁸

Ongoing UK operations in Iraq and Syria have included over 1,700 airstrikes to date.

Recommendations

The UK should introduce a policy on reparations for civilians who have been subject to harm in UK military operations overseas. In respect of violations of human rights or IHL the UN Basic Principles provide that states should 'endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation.'²¹⁹ Building on international standards and widespread existing practice, a reparations policy should take into consideration the following elements.

217 Ministry of Defence, *The Good Operation: A Handbook for Those Involved in Operational Policy and its implementation*, London, 2017, p. 33.

218 UK Parliament, Armed forces: Counter-terrorism question for Ministry of Defence, UIN 78789, tabled on 22 July 2020.

219 UN Basic Principles, op. cit., para. 13.

Holistic reparation

The obligation to provide reparation for violations encompasses a range of obligations on states, of which the duty to provide compensation is just one. The UK should take a holistic approach to reparations that also takes into account the obligation to provide restitution, rehabilitation, satisfaction and guarantees of non-repetition, as well as compensation. The right to reparation includes the right to the truth.

Investigating and reporting civilian harm

Reports of civilian harm can arise internally, including through Battle Damage Assessments, or through credible external allegations. Where civilian casualties are thought to have occurred, effective, prompt, thorough and impartial investigations should be conducted, governed by the right of families to know the fate of their relatives. In the past, the UK has failed to conduct effective, prompt, impartial and thorough investigations into allegations of IHL violations. This has led to a cycle of delayed and compromised re-investigations into allegations, which caused significant trauma to both civilian victims and veterans alike, and has denied many victims and their families the justice they deserve.

Given the current discrepancies between civilian harm reported by the Ministry of Defence and civilian harm reported by civil society and the local population on the ground in Syria and Iraq, processes for documenting civilian harm should be improved and triangulated between internal and external sources.

Where possible, in-theatre tracking teams should be established for the purpose of tracking, reporting and mitigating civilian harm, as was done by NATO in Afghanistan. Where this is not practical in-theatre, such a team should be established and embedded within the Ministry of Defence.

The UK should consider replicating the proposed new practice in the Netherlands, where the Parliamentary Defence Committee will be notified whenever the Defence Ministry conducts an investigation into possible civilian casualties from its own military action. Where appropriate, such notifications and reports should be made public.

Enabling access to compensation

Where civilian casualties are determined to have been caused by UK overseas operations following effective, prompt, thorough and impartial investigations, the Ministry of Defence should offer compensation to civilian victims and/or bereaved families as a matter of policy. A Civilian Harm Compensation Scheme should be established to enable the effective processing of claims. Where the Ministry of Defence believes it would not be liable for harm under the Human Rights Act or English common law, ex gratia payments should be offered.

Where there is little or no UK ground presence in countries where the UK is engaged in overseas operations, there should be a clear process and mechanism through which civilians can make a compensation claim for property damage, personal injury and death. For instance, claims could be submitted via embassies, through online platforms, or through trusted local intermediaries.

The UK should work with the US and other coalition partners to ensure that civilians are able to access any compensation and condolence payment schemes that are currently in operation, including working with coalition partners to streamline processes for civilians to access existing payment schemes for harm caused through coalition activities.

The UK should work with local civil society organizations and national governments to raise awareness of reparations schemes, ensuring information is disseminated and available in local languages, and support victims in filing claims.

Supporting national reparations programmes

Where national reparations programmes exist in countries where the UK has conducted overseas operations, the UK should take a flexible approach to supporting national efforts through offering funds, technical expertise and facilitating complementary reparations approaches.

The existence of reparations programmes at national level in countries of operation does not absolve the UK of its own obligation under international law in respect of making reparation for civilian harm it has inflicted in overseas military operations.

Satisfaction and guarantees of non-repetition

Where a violation of IHL or human rights is found to have occurred, it should be reported transparently and necessary institutional reform should be enacted to prevent repetition.

Measures to limit UK military accountability, including special time bars on civil claims or presumptions against prosecution, are incompatible with the UK's obligations under international law to provide reparation to victims of IHL violations. UK legislation should ensure that there are no procedural obstacles, special time limits, immunities or presumption against prosecution relating to IHL violations or offences committed against the civilian population where UK forces are deployed.

Where violations of IHL are found to have occurred, any compensation offered should be accompanied by a formal apology. Offering compensation for IHL violations as settlement agreements that do not admit liability and which are not accompanied by an apology demonstrate a lack of commitment to ensuring institutional learning and guarantees of non-repetition.

Reparations for civilian harm from military operations: Towards a UK policy

In brief

Twenty years after the start of UK involvement in the wars in Afghanistan and Iraq, the UK has no developed policy on reparations for civilian harm. This is despite the fact that thousands of civilians have been killed by coalition military operations in which the UK has played a major part, and despite hundreds of cases in which the UK has paid major awards to civilians who have suffered violations of human rights and international humanitarian law through the actions of UK forces. In all cases, these were civilians whom UK military operations were specifically mandated to protect.

Informed by comprehensive data on accountability for civilian harm in relation to UK military operations

in Afghanistan and Iraq, the report considers the UK record beside the practice of seven other coalition partners, including the United States, as well as NATO and the UN. Practice reveals a range of different avenues for addressing civilian harm, including compensation schemes, human rights claims, civil litigation under the law of tort, and *ex gratia* payments made by commanders in theatres of operation.

The report presents recommendations for a fair and effective policy on reparations for civilians who have been subject to harm in UK military operations overseas, in line with international legal standards and the recommendations of the Chilcot Report.

Ceasefire Centre for Civilian Rights,
3 Whitehall Court, London SW1A 2EL, United Kingdom
www.ceasefire.org

CEASEFIRE ■ ■
centre for civilian rights