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Sorry, Not Sorry: The U.S. Military's Use of Condolence and Compensation Payment Programs in Relation to Civilian Victims of Drone Strikes

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I. INTRODUCTION

In September 2015, a United States (“U.S.”) drone strike destroyed two houses in Mosul, Iraq, killing four civilians.^{1,2} Basim Razzo, a former engineering student at Western Michigan University who moved to Iraq to care for his elderly mother, was one of only two survivors.³ Mr. Razzo assisted U.S. military troops when they set up a base across the street from his house in 2003, only to lose his wife, daughter, brother, and sister-in-law, as well as his house and countless valuable possessions and mementos at the hands of the U.S. military twelve years later.⁴

A recent New York Times article highlighted the plight of such innocent civilian victims of drone strikes by U.S. forces. The article explained how gaps in U.S. military intelligence can lead to drone strikes being authorized on targets that are not affiliated with terrorist leaders or operations in any way, and surprised many Americans by detailing the difficulties foreign civilians face when attempting to receive compensation from the U.S. government for such failures and destruction. Powerful drone strikes have obliterated civilian houses, destroyed crops, torn innocent families apart, and caused untold amounts of property damage.

Civilian deaths caused by the U.S. drone program abroad breed resentment among foreign populations, undermining the United States’ efforts to gain support from local populations in its global “War on Terror”. Despite acknowledging the benefits of compensating civilians for their losses caused by drone strikes and other military actions, the U.S. military relies on a complicated patchwork of programs in order to do so. This piecemeal approach to military accountability to foreign civilians delineates between compensating civilian victims for things like property loss and medical treatment,

¹ Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html?_r=0

² All citations in this paper have omitted internal quotation marks and citations, unless indicated otherwise. Some internal citations are included for purposes of demonstrating strength of authority.

³ Id.

⁴ Id.

and offering condolence payments to the families of civilian victims who have been killed by U.S. military action. The fragmented approach also differentiates between harm caused during combat operations, and harm caused outside the combat context. For civilians trying to navigate this complicated system, this means that similar claims are handled in wildly different ways with no adequate explanation, leading to further confusion and resentment.

This paper will examine the history of compensation and condolence payment programs in the U.S. military, beginning with the Foreign Claims Act arising out of the military's experience in World War I, and the introduction of solatia payments during the Korean War. We will also explore the use of these programs in the "War on Terror" and consider how the utilization of these programs currently serves to frustrate both the programs' goals and the U.S. military's objectives.

In addition, this paper will review U.S. policies regarding drone strikes, embodied in the U.S. military's targeted killing program. This review will consist of an analysis of the targeted killing program under international law in order to determine whether the program is carried out in a lawful manner. The two major branches of international law are Human Rights Law and International Humanitarian Law, and we will see that the U.S. military's targeted killing program is unlawful when considered under either paradigm.

Finally, this paper will examine the use of compensation and condolence payments in relation to the U.S. military's use of drones. We will examine the obligations the U.S. military has to civilian victims of drone strikes under international law, if any. Furthermore, we will perform a case study in order to examine the difficulties faced even by those whose victimization cannot be seriously questioned. Finally, we will examine current standards for determining how compensation and condolence payment programs are administered, and make suggestions for the future. By the end of this paper, it will be clear that the U.S. military's fragmented approach to military accountability undermines the programs' goals of fostering positive relations with foreign civilian populations, is

antithetical to the military's objectives (especially in the counterinsurgency context), and requires a systematic overhaul and coordinated approach amongst programs.

II. CONDOLENCE AND COMPENSATION PAYMENT PROGRAMS

The U.S., like every other country in the world, is under no legal obligation to provide compensation to foreign civilians for collateral damage arising from legal activities during armed conflict.⁵ However, as a global power with military units stationed around the globe, it is advantageous to maintain healthy relationships with the civilians of countries where there is a U.S. military presence.⁶

Especially in the counterinsurgency context, the support of local populations is crucial.⁷ A citizen whose crops are run over or whose car is damaged by a U.S. military vehicle will naturally be upset and seek compensation for the damage caused to their property. Likewise, a citizen whose family member is killed by U.S. military troops who claim to be democratic liberators will expect some expression of condolences from the military force responsible for their pain and suffering.

The failure to compensate civilians for property damage or express condolences for the accidental killing of an innocent civilian will make those civilians who feel wronged more likely to harbor ill feelings against the U.S. military and therefore support the enemy, making military operations much more difficult. Over the past century, the U.S. military has designed programs to right the accidental wrongs committed by U.S. troops. These programs fall under two main categories: condolence payment programs and compensation payment programs.

⁵ U.S. Dep't of Def., DOD LAW OF WAR MANUAL para. 5.17.5.1 (June 2015)

⁶ See Major Katharine M. E. Adams, A Permanent Framework for Condolence Payments in Armed Conflict: A Vital Commander's Tool, 224 Mil. L. Rev. 314, 343 (2016) (The U.S. military has recognized that in other countries where the U.S. military has had a presence for an elongated period of time, like Korea and Japan, it is in the military's interest to maintain good relations with local populations. "The presence of the United States in Iraq and Afghanistan has been so prolonged, the same considerations should apply. In fact, these considerations should apply [whenever] U.S. forces must maintain the support of the local population.")

⁷ See Id. at 316 (Using compensation and condolence payment programs to maintain positive relations during counterinsurgency operations is strategically advantageous.)

A. MAIN DIFFERENCES BETWEEN CONDOLENCE AND COMPENSATION PAYMENT PROGRAMS

U.S. military programs that allow for payments to foreign civilians harmed by the U.S. military can be broadly categorized as either condolence or compensation payment programs.

Compensation payment programs attempt to “make a victim whole for their loss.”⁸ Compensation payment programs therefore act like a kind of insurance system, with the amount distributed by the military directly determined by the amount of “damages” suffered by the civilian.⁹ When the system works as intended, the amount distributed is carefully calculated according to the local economy.¹⁰

The Army regulation that interprets and applies the main compensation payment program, the Federal Claims Act (the “FCA”), uses language that furthers the insurance system comparison and requires that any payment administered be reduced by the amount that can be recovered by the civilian via applicable insurance coverage.¹¹ The FCA is “explicitly prohibited” from awarding compensation “based solely on compassionate grounds, placing the FCA squarely in the realm of compensation out of a sense of legal or policy-based obligation, and not as a mere expression of condolence for a loss.”¹²

Condolence payment programs, on the other hand, are intended only as a display of sympathy for the civilian’s loss and “in no way constitute a waiver of sovereign immunity exposing the United States to legal suit.”¹³ Even though the U.S. military is under no obligation to offer condolences to the loved ones of innocent civilian victims killed by U.S. military actions, many have argued that the

⁸ Id. at 320

⁹ See Cora Currier, Our Condolences: How the U.S. Paid for Death and Damage in Afghanistan, THE INTERCEPT (Feb. 27, 2015), <https://theintercept.com/2015/02/27/payments-civilians-afghanistan/> (Claims for injuries incorporate aspects of damages similar to those used in the U.S. legal system, like cost of medical care, the victim’s earning potential, and more.)

¹⁰ See Id. (Military officers conduct research to determine the amount necessary to satisfy a claim, asking questions as specific as “What’s a chicken worth in my area versus what it’s worth in downtown Kabul?”.)

¹¹ See Adams, *supra* note 6, at 328 (The regulation uses terms like “damages” and “entitlement to compensation” when discussing factors used to calculate compensation amounts to be paid.)

¹² Id.

¹³ Id. at 343

U.S. has a moral duty to do so.¹⁴ Furthermore, the international community is beginning to consider the practice an “emerging norm in international law.”¹⁵

B. COMPENSATION PAYMENT PROGRAMS

1. The FCA

The U.S. military has one permanent compensation payment program, the FCA.¹⁶ The purpose of the legislation is to “promote and maintain friendly relations” between the U.S. and “host countries” via swift settlement of meritorious claims when the U.S. military has caused harm in a foreign country.¹⁷ Foreign countries, their political subdivisions, and civilian residents thereof are all allowed to file claims under the FCA for personal injury, death, or damage to either real or personal property.¹⁸

A major limitation of the FCA, however, is that it does not cover harm arising from combat operations.¹⁹ As a result, the FCA does not cover damage caused by troops who accidentally destroy property or kill civilians while in firefights with groups like ISIS in urban settings where civilian populations are often present in large numbers.²⁰ This is a major problem when fighting against groups like ISIS in the counterinsurgency context because “[e]xposing innocents to harm is at the

¹⁴ *Id.* at 344; see Harvard International Human Rights Law Clinic, Frequently Asked Questions on Amends, CIVILIANS IN CONFLICT (2013), https://civiliansinconflict.org/wp-content/uploads/2017/11/Amends_FAQ_2013.pdf (Discussing the moral imperative for offering condolences, U.S. Senator Patrick Leahy said in 2009 that “To not [do so], I think, goes to our very conscience and our very morality.”)

¹⁵ See Adams, *supra* note 6, at 344 (“Amends are beginning to be recognized at the United Nations.” 2010 and 2012 U.N. reports “describe the making of amends as an emerging norm in international law ... The 2010 report of the United Nations Special Rapporteur on Extrajudicial Killings called on the international community to pay attention to the emerging practice of making amends”.)

¹⁶ Foreign Claims Act, 10 U.S.C. § 2734 (2006)

¹⁷ Adams, *supra* note 6, at 320

¹⁸ Foreign Claims Act, 10 U.S.C. § 2734 (2006)

¹⁹ *Id.*

²⁰ See Currier, *supra* note 9 (The FCA “only covers incidents that happen outside of combat situations – meaning that civilians caught up in battles have no recourse.”)

core of their tactics, and exaggerating those harms to generate public outrage is at the front of their playbook.”²¹

This exception is known as the combat activity exclusion, and it “prohibits payment of claims related to harm caused by ‘activities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict.’”²² The combat activity exclusion is a constant source of controversy and confusion, both with civilians and U.S. military troops.²³

The fact that the combat activity exclusion exists and causes such frustration is a testament to the fact that the FCA and its predecessor were designed and enacted to address problems caused by a different type of warfare in a distant era.²⁴ As World War I was coming to a close, “General John J. Pershing, the leader of the American Expeditionary Force, sent a telegram to the U.S. Congress requesting legislation that would allow the U.S. military to pay for injuries and damages that it inflicted upon French civilians and their property.”²⁵ This request resulted in passage of the 1918 Indemnity Act,²⁶ which was enacted to address damage caused by U.S. military soldiers stationed “far behind the front lines” during World War I.²⁷ The Indemnity Act was therefore not concerned with combat-related damage to civilians or their property, but rather, with damage caused by U.S.

²¹ See Robert Malley & Stephen Pomper, An Accounting for the Uncounted, THE ATLANTIC (Dec. 16, 2017), <https://www.theatlantic.com/international/archive/2017/12/isis-obama-civilian-casualties/548501/> (ISIS has “hid among civilians, used them as human shields, and [done what it needs] to do either to deter coalition airstrikes or ensure they would come at high cost.”)

²² Adams, *supra* note 6, at 321-22 (quoting U.S. Dep’t of Army, Reg. 27-20, Claims (Feb. 8, 2008))

²³ See *Id.* at 321 (A civilian whose car was destroyed by a drone strike doesn’t care whether the military was engaged in legitimate combat activities, he “simply wants compensation.” Similarly, the exclusion is a “major source of frustration” for U.S. military units “seeking to maintain the support of local national populations.”)

²⁴ See *Id.* at 328 (The FCA and its predecessor “are creatures of the world wars of the last century, traditional wars with clear front lines.”) (citing John Fabian Witt, Form and Substance in the Law of Counterinsurgency Damages, 41 LOY. L.A. L. REV. 1455, 1460 (2008))

²⁵ Christopher V. Daming, When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act, 39 Wash. U.J.L. & Pol’y 309, 311 (2012), https://openscholarship.wustl.edu/law_journal_law_policy/vol39/iss1/10/

²⁶ Indemnity Act (American Forces Abroad), ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943)

²⁷ Adams, *supra* note 6, at 328-29

military troops conducting non-combat activities (often involving the newest technology of the day, the automobile) like driving from one military camp to another.²⁸

During World War II, the U.S. planned to station troops in Iceland, “far from any front lines”.²⁹ However, the Prime Minister of Iceland would only agree to allow U.S. military troops to be stationed in the country if the U.S. agreed to reimburse Icelandic citizens for any damage caused by U.S. troops.³⁰ President Franklin Roosevelt agreed to this condition and quickly moved to update the 1918 Indemnity Act, which resulted in passage of the FCA.³¹

This historical background shows that the U.S. passed the FCA to address damage caused negligently by U.S. soldiers in foreign countries “far behind the front lines and unrelated to combat.”³² The FCA was never intended for use in modern counterinsurgency operations which lack clear front lines and involve intentional exposure of civilians to harm. As a result, application of the FCA to civilian claims in places like Afghanistan, Iraq, Yemen, and Pakistan has “strained the FCA to the breaking point” as U.S. military troops attempt to fit a square peg in a round hole.³³

The U.S. military’s attempt to solve modern-day issues with decades-old legislation has resulted in “haphazard application” as different U.S. military troops have interpreted the combat activity exclusion in varying narrow or broad ways, “often depending on how motivated they are to pay a certain claim.”³⁴ This inconsistent application of the law has had the opposite of the intended

²⁸ See Witt, *supra* note 24 at 1459-60 (“During the year and a half of its involvement in [World War I], the United States floated more than 100,000 motor vehicles across the Atlantic. The cars and trucks America had so successfully delivered to the western front quickly began to cause mayhem. Soldiers were driving motorized vehicles on roads built for horse-drawn vehicles in towns accustomed to horse-drawn speeds. The situation was a prescription for injury and accidental death. The carnage was so great that it even affected those who were sent to try to resolve it. In May 1916, an auto accident took the life of the British officer charged with compensating French civilians injured by British army vehicles.”)

²⁹ Adams, *supra* note 6, at 329

³⁰ *Id.*

³¹ *Id.*; see Daming, *supra* note 25, at 316-17

³² Adams, *supra* note 6, at 329

³³ *Id.* at 330

³⁴ *Id.* at 321

affect and led to resentment of the U.S. among some civilian populations.³⁵ As one organization which closely monitors the military's interactions with civilians has noted:

Approach varies greatly between units. Some seem to be interpreting and executing policy in a manner intended to offer as much assistance as allowed to civilians mistakenly caught up in combat operations. This is a positive signal that some U.S. troops understand the strategic and moral imperatives of providing [compensation for harm caused by U.S. troops]. Unfortunately, a number of units took the opposite stance and declined any assistance whatsoever, no matter the apparent validity of the claim.³⁶

Members of the military directly responsible for handling claims brought by civilians under the FCA have voiced similar concerns.³⁷ Although it would be fiscally impossible for the U.S. military to pay for “every act of destruction carried out during armed conflict, war being destructive by nature”, inconsistent application of an offered solution to civilians’ dissatisfaction with U.S. troops’ behavior only serves to frustrate and anger civilian populations, transforming a potential solution into another source of civilian dissatisfaction.³⁸

2. *United States Agency for International Development Programs*

Inconsistent application and the combat activity exclusion have caused U.S. military troops to turn to *ad hoc* systems to resolve civilian claims when necessary. U.S. military troops stationed in

³⁵ *Id.* at 323

³⁶ Campaign for Innocent Victims in Conflict, UNITED STATES MILITARY COMPENSATION TO CIVILIANS IN ARMED CONFLICT 7 (May 2010), https://reliefweb.int/sites/reliefweb.int/files/resources/A8F90B05D58DDE504925773B001EB07C-Full_Report.pdf

³⁷ See *Adams, supra* note 6, at 323 (“As one judge advocate noted, ‘Unfortunately, the use of the combat exclusion can undermine support of U.S. military efforts from the local population. In much the same way that payment of claims can create goodwill and a positive perception of U.S. forces, denial of payment can have the opposite effect. While any claimant who is denied compensation will be upset and dissatisfied, the situation can become exponentially worse when a claimant is denied compensation due to improper analysis or lack of sufficient investigation. While the claimant may not immediately realize that his claims was improperly adjudicated, subsequent discussions with other successful claimants may reveal inconsistencies between [units handling claims]. These inconsistencies ultimately result in distrust of the foreign claims system and U.S. forces.’”)

³⁸ *Id.* at 324

Grenada have turned to the United States Agency for International Development (“USAID”) for funds to pay claims when the FCA’s combat activity exclusion got in their way.³⁹

The USAID has supplemented the FCA (as well as military condolence payment programs) with its own aid programs when called upon to do so in Afghanistan and Iraq.⁴⁰ Congress has subsequently authorized USAID to spend approximately \$40,000,000 “to assist victims of U.S. military operations in Iraq”, and has likewise authorized \$60,000,000 for the Afghan Civilian Assistance Program, which includes assistance for Afghani civilian victims of war.⁴¹

The USAID, though, has made sure to distinguish its programs in Afghanistan and Iraq from the FCA by specifying that its assistance is not “compensation” (nor “reparations”).⁴² Instead, USAID funds are “provided through local contracts with local vendors to provide war victims with needed medical care, establish a livelihood, and/or rebuild homes destroyed by the war.”⁴³ USAID’s primary role is focusing on long-term development, and relying on *ad hoc* assistance from USAID “is not a realistic way ahead, especially because the USAID does not operate in immature theaters” like Yemen, Somalia, and other countries where the U.S. military is engaged in operations against ISIS and other terrorist organizations.⁴⁴

C. CONDOLENCE PAYMENT PROGRAMS

1. *Solatia*

The term *solatia* is derived from the Latin term *solatium* (solace), and is defined as “anything that alleviates or compensates for suffering or loss”.⁴⁵ *Solatia* payments, like other condolence

³⁹ *Id.* at 338

⁴⁰ *Id.* (citing Office of the Inspector General, U.S. Agency for International Development, Report No. E-267-08-002-P, Audit of USAID/Iraq’s Management of the Marla Ruzicka Iraqi War Victims Fund (2008))

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 338-39

⁴⁵ *Id.* at 331 (citing Jacqueline H. Wilson, Blood Money in Sudan and Beyond: Restorative Justice or Face-Saving Measure? (Mar. 25, 2014) (unpublished Ph.D. thesis, Georgetown University)

https://m.repository.library.georgetown.edu/bitstream/handle/10822/709806/Wilson_georgetown_0076D_12674.pdf?sequence=1&isAllowed=y

https://m.repository.library.georgetown.edu/bitstream/handle/10822/709806/Wilson_georgetown_0076D_12674.pdf?sequence=1&isAllowed=y)

payment programs, serve as expressions of sympathy only, and payment of solatia is not an admission of liability or obligation to compensate.⁴⁶ This condolence payment program has its origins in the Korean War, and as such it is the oldest of the U.S. military condolence payment programs.

During the Korean War, U.S. military commanders handicapped by the FCA's combat activity exclusion began to offer cash and other gifts to civilians whose property had been damaged or whose loved ones had been killed, in line with local custom.⁴⁷ These types of payments have, in fact, been utilized in almost every armed conflict since World War I as a way to get around the FCA's combat activity exclusion:

In Vietnam, U.S. Forces frustrated with the combat activity exclusion of the FCA began processing combat claims funded by "assistance-in-kind funds" from Military Assistance Command, Vietnam. In Grenada, judge advocates frustrated by the combat activity exclusion worked with USARCS to establish a combat claims compensation program using funds from the U.S. Agency for International Development (USAID). In Panama, the FCCs on the ground received DoD Operations and Maintenance Funds to pay combat claims, while the Department of State (DoS) set up its own combat claim program through a Letter of Instruction with the government of Panama covering a compensation system to be run by Panama and funded by the DoS.⁴⁸

Solatia payments are usually comprised of monetary donations, but because they are not necessarily intended to make a civilian "financially whole" like compensation payment programs, they might also include funeral flowers or another expression of sympathy.⁴⁹ Solatia payments are drawn from operations and maintenance funds, which means that a U.S. military officer's decision to offer a solatia payment means that those funds will not be available for use in some other part of the unit's mission.⁵⁰

⁴⁶ See Adams, *supra* note 6, at 331

⁴⁷ See Khan & Gopal, *supra* note 1; see also Currier, *supra* note 10 (Noting that since the Korean War, "the U.S. military has realized that it's often in its best interest to make symbolic payments for civilian harm, even when it occurs in combat.")

⁴⁸ Adams, *supra* note 6, at 330-31

⁴⁹ *Id.* at 331

⁵⁰ *Id.* at 331-32

Despite their usefulness, solatia payments are not authorized to be paid out whenever necessary; the U.S. military makes a decision as to whether or not solatia payments will be made available to citizens each time the nation begins military operations in a country.⁵¹ When military operations began in Iraq and Afghanistan in the early 2000s, the U.S. military incorrectly determined that solatia payments were not customary for either country, so they were not authorized.⁵² As a result, no civilian payment program existed to offer condolences for civilians suffering losses due to U.S. military operations for the first four years in Afghanistan or the first five months in Iraq.⁵³

It is not clear how the U.S. military makes the decision as to whether or not solatia payments will be made available in a given country.⁵⁴ In 2004, however, General Counsel to the Department of Defense responded to U.S. military troops' requests for solatia authorization by issuing an opinion that solatia is appropriate under both Iraqi and Afghani custom.⁵⁵ Thankfully, U.S. military troops who recognize the importance of maintaining positive relations with civilian populations have admitted to scraping together funds to make solatia payments before that authorization came.⁵⁶

Solatia payments offer a significant benefit in that they are not accompanied by any type of combat activity exclusion, so they can be distributed, for example, to civilians who are injured when U.S. military troops exchange gunfire with ISIS combatants. In addition, because the funds for solatia

⁵¹ Campaign for Innocent Victims in Conflict, *supra* note 37, at 3; *see* Adams, *supra* note 6, at 332 (Solatia payments are only authorized on a permanent basis in four countries: Micronesia, Japan, Korea, and Thailand.)

⁵² *See* Campaign for Innocent Victims in Conflict, *supra* note 37, at 3; *see also* Adams, *supra* note 6, at 332 (“Until 2004, the DoD specifically prohibited the use of solatia in Afghanistan and Iraq, having determined (incorrectly) that condolence payments were not a commonly accepted practice in these countries.”)

⁵³ Campaign for Innocent Victims in Conflict, *supra* note 37, at 3

⁵⁴ *See* Adams, *supra* note 6, at 332 (“One regulation refers to a Command Claims Service or USARCS as appropriate authorities. Another authoritative source refers to local commanders having the authority to determine the propriety of solatia in a certain country. In actual practice, the DoD General Counsel and U.S. ambassadors have also made solatia determinations in the past. Contradictory regulations and practice make it difficult to determine who truly has the authority to authorize solatia in a given country.”)

⁵⁵ *Id.* at 333

⁵⁶ *Id.*

payments come from operations and maintenance funds, there are few procedural obstacles to quick payment of civilian claims.⁵⁷

However, because solatia payments must be approved by a high-level authority in each country before they can be distributed, troops on the ground are left at a disadvantage when those high-level authorities mistakenly restrict those payments, as occurred in Afghanistan and Iraq.⁵⁸ The solatia payment program (much like the FCA) also suffers from inconsistent administration because when a claim is denied under the FCA it should be referred for a solatia payment, but many U.S. military troops fail to do so, and instead deny valid claims outright.⁵⁹ Furthermore, groups like ISIS “ignore country borders, making country-specific [solatia] authorizations less useful to commanders as U.S. troops [and drones] follow the fight.”⁶⁰

2. *The Commander’s Emergency Response Program*

When the U.S. military found secret caches of millions of U.S. dollars that had been hidden by the Saddam Hussein regime, they put the cash to work for the Iraqi people by creating the Commander’s Emergency Response Program (the “CERP”).⁶¹ The CERP was designed to “allow commanders in Iraq to quickly respond to the needs of the local population, such as humanitarian relief and reconstruction projects.”⁶² CERP funds were authorized to be used as condolence payments

⁵⁷ *Id.* at 334

⁵⁸ *Id.* at 333; see Idrees Ali, *How much is an Afghan life worth? That depends*, REUTERS (Mar. 20, 2017), <https://www.reuters.com/article/us-usa-afghanistan-civilians/how-much-is-an-afghan-life-worth-that-depends-idUSKBN16R0A5> (U.S. military troops suffered from poor relations with Afghani civilian populations until solatia payments were finally authorized; before then, “the Taliban was gaining influence and goodwill by giving civilians money after fatal U.S. strikes”.)

⁵⁹ See Campaign for Innocent Victims in Conflict, *supra* note 37, at 6-7 (“Most of the cases we reviewed that were denied under the FCA combat [activity exception] were not referred for a condolence payment.” ... For example, “an Iraqi civilian filed a claim under the Foreign Claims Act on behalf of his son. The son was returning from Jordan in his car when fired upon by U.S. forces. The son was killed and the car destroyed. He requested [\$27,000] in compensation and was denied by an Army Captain who found that the claim arose from combat action. An Army witness notes in the claim that the incident “could be combat excluded” because it arose from an ‘escalation of force.’ No referral to condolence is mentioned and no payment is made[, despite the fact that the claim was eligible for solatia payment.]”)

⁶⁰ Adams, *supra* note 6, at 318

⁶¹ *Id.* at 334; see Campaign for Innocent Victims in Conflict, *supra* note 37, at 5 (CERP funds “can be paid out for death, injury, or property damage due to U.S. combat operations.”)

⁶² Adams, *supra* note 6, at 318

in Iraq in September 2003, and in Afghanistan in November 2005.⁶³ However, CERP condolence payments competed with other CERP projects like humanitarian relief and reconstruction, and this caused frustration among members of the U.S. military who hoped to use the funds to dole out condolence payments.⁶⁴

Once the secret cache of Hussein regime cash ran out, CERP evolved into an appropriated fund which was subject to annual congressional action.⁶⁵ Because Congress now holds the purse strings, CERP funds are only available in any conflict zone on a temporary basis, subject to the legislative process and the political maneuvering and bargaining that accompanies that process.⁶⁶ As a result of Congressional oversight and regulation, CERP funds are only to be used to make condolence payments if the claim is not covered by the FCA (most often because of the combat activity exclusion), but in practice this rarely happens and valid claims are denied outright, leading to further civilian frustration and resentment.⁶⁷

The CERP suffers from other drawbacks as well. Unlike solatia payments which can be quickly distributed by troops after an incident, CERP condolence payments can be distributed within several weeks after an incident, but because the claims are adjudicated by a Judge Advocate (like FCA claims), payments often take up to several months, depending on the Judge Advocate's caseload and investigative abilities.⁶⁸ This is especially frustrating considering the fact that CERP condolence

⁶³ Id.

⁶⁴ See Id. at 334-35 (“One claims judge advocate explained his frustration with CERP as follows: ‘I lacked money because the vast majority of my brigade’s CERP funds went to various reconstruction projects. Understandably, my commander prioritized CERP funds for hospitals, schools, or power stations, at the expense of condolence payments. The perception was that fixing a school and employing Iraqi contractors allowed funds to go further than paying a widow for her husband’s death.’”)

⁶⁵ Id. at 335

⁶⁶ Id.

⁶⁷ Id. at 336 (“[T]he local population does not care which U.S. law allows for payment of their claim, they simply want to be recompensed in some manner.” When the U.S. military fails to follow procedure, claims which are not valid under the FCA but are valid under solatia or CERP guidelines go unpaid.)

⁶⁸ See Campaign for Innocent Victims in Conflict, *supra* note 37, at 5 (Proactive investigation of claims is a rarity, not the norm.)

payments do not actually require a legal review and are viewed by some troops as “walking around money”.⁶⁹

Following the rise of ISIS in Iraq, Congress authorized up to \$5,000,000 of CERP funds which had already been appropriated for use in Afghanistan in 2016 to be made available for use as condolence payments in Iraq.⁷⁰ This diversion of funds to Iraq is a “tacit admission that the United States anticipates future collateral damage from operations in Iraq despite the previous ‘withdrawal’”, which is not surprising considering the heightened use of drone strikes to combat ISIS and similar groups.⁷¹

D. CONCLUSIONS

The U.S. military’s fragmented approach to handling civilian claims for damage to property and loss of life is implemented via compensation and condolence payment programs, the main three being the FCA, solatia payments, and CERP. These programs are designed to foster positive relations between the U.S. military and civilian populations, but because they are applied in such a piecemeal fashion and without any consistency, they often breed resentment among the foreign populations they are intended to benefit. The U.S. military has acknowledged the benefits of compensating civilians for their losses, but is yet to develop a coherent policy of programs that can adjudicate claims and provide compensation or condolence payments in a timely, organized, and consistent fashion.

III. U.S. DRONE STRIKE POLICY: TARGETED KILLINGS

The U.S. military’s use of drones to target members of terrorist organizations like ISIS with the specific intent to kill those members is referred to as “targeted killing”.⁷² Targeted killings have

⁶⁹ See Adams, *supra* note 6, at 337-38 (Compare: CERP condolence payments are often reviewed by a Judge Advocate “because of the requirement that they be vetted for FCA applicability”, but a retired Marine colonel commented on CERP’s usefulness by saying troops “can respond quickly to things that come up You don’t have to put in forms and wait.”)

⁷⁰ *Id.* at 337

⁷¹ *Id.*

⁷² See Stephen Dycus et al., *National Security Law* 417 (6th ed. 2016) (A targeted killing is when “lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. In a targeted killing, the specific goal of the operation is to

been used with increased frequency in the “War on Terror”,⁷³ giving rise to questions concerning their legality under international law. International law subsists of two main schools of thought: Human Rights Law (“HRL”) and International Humanitarian Law (“IHL”) (also known as the Law of Armed Conflict (“LOAC”) or the laws of war).

HRL governs governmental treatment of civilians during times of peace, and its concerns focus more on law enforcement policies, operations, and procedures than on military actions.⁷⁴ IHL, meanwhile, is concerned with the conduct of governments and individuals in wartime and, in relevant part, is intended to limit the suffering of both combatants and civilians to only that which is “necessary to achieve the legitimate political goals of a conflict.”⁷⁵ Traditionally, it has been widely accepted that HRL applies during times of peace, while IHL applies during times of war.⁷⁶ However, there is a growing school of thought that HRL should apply during armed conflicts as well.⁷⁷ Regardless of which body of law is used to evaluate the U.S. military’s treatment of foreign civilians, it is readily apparent that the U.S. military’s targeted killing program violates the main tenets of international law as viewed through the prisms of both HRL and IHL.

A. TARGETED KILLINGS AND HUMAN RIGHTS LAW

1. *Are targeted killings properly viewed through the HRL framework?*

use lethal force. This distinguishes targeted killings from ... law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill.”) (quoting Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings at 5, U.N. DOC. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston))

⁷³ See Micah Zenko, The (Not-So) Peaceful Transition of Power: Trump’s Drone Strikes Outpace Obama, COUNCIL ON FOREIGN RELATIONS (Mar. 2, 2017) <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama> (Targeted killings in Pakistan, Yemen, and Somalia have increased from one every 5.4 days under President Obama to one every 1.25 days under President Trump.)

⁷⁴ See Dycus et al., *supra* note 72, at 420 (HRL “generally requires some kind of judicial procedure” before an individual is killed. “The law enforcement model under human rights law rests on a presumption of innocence, a preference for arrest and detention by due process, and an insistence on credible evidence and fair trial before judicial punishment.”)

⁷⁵ Id. at 277

⁷⁶ See Id. at 277-78 (The traditional view that the U.S. adheres to is that “during armed conflicts, the more general HRL gives way to the more specific IHL and its *jus in bello* principles.”)

⁷⁷ See Id. at 278

The argument as to whether HRL or IHL applies when analyzing U.S. targeted killings in foreign countries begins with a basic question: is the U.S. engaged in an “international armed conflict” with ISIS and other terrorist organizations? If so, the provisions of the Geneva Conventions of 1949 apply to govern the conduct of the U.S. military.⁷⁸ However, the U.S. maintains that because ISIS and other terrorist organizations are “non-state actors”, the conflict cannot be categorized as an international armed conflict under the Geneva Conventions.

Many scholars agree with that analysis and concur with the U.S.’s assertion that most provisions of the Geneva Conventions do not apply.⁷⁹ This suggests that HRL should govern, because the U.S. is not engaged in an “international armed conflict” (words that give rise to notions of being at war with an enemy). Indeed, the European view is that HRL always applies regardless of this analysis, even alongside IHL on the battlefield, and the international legal community is beginning to show signs of agreement.⁸⁰

2. *HRL standards for using force*

HRL views targeted killings as extrajudicial killings occurring outside of an armed conflict.⁸¹ According to HRL, law enforcement during peacetime “rests on a presumption of innocence, a preference for arrest and detention by due process, and an insistence on credible evidence and fair

⁷⁸ See *Id.* (“The extensive provisions of the Geneva Conventions of 1949 apply only to armed conflicts of an international (inter-state) character, not to non-international armed conflicts ... except for baseline, general humanitarian protections for victims of all armed conflicts found in Common Article 3.”)

⁷⁹ See *Id.* (“Because armed conflicts today frequently involve violent clashes between states and non-state actors – terrorists, insurgents, guerrilla groups, even pirates – the Geneva Conventions and their Protocols often fail to provide clear guidance for belligerents.”) (citing John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 205-13 (2011))

⁸⁰ See *Id.* at 424 (“[T]he International Court of Justice and other international courts have applied HRL in armed-conflict settings. ... Indeed, there is a growing tendency to apply HEL in armed conflicts, expanding the protections otherwise available to civilians and dis-armed combatants. ... By contrast, the United States takes the position that during armed conflicts HRL gives way to IHL and its *jus in bello* principles.”); see also Adams, *supra* note 6, at 344-45 (“There is a trend in international law over the past decade to conflate human rights law with international humanitarian law, and a growing expectation that parties to an armed conflict comport themselves like a domestic police force as opposed to a combat force. The United States takes the position that in an armed conflict, international humanitarian law is the *lex specialis*.”)

⁸¹ See Dycus et al., *supra* note 72, at 422

trial before judicial punishment.”⁸² Therefore, HRL requires that in order for a civilian to be lawfully killed by government action, the killing must be made in order to “defend persons from unlawful violence, to effect an arrest or prevent [an] escape, or to quell a riot or insurrection.”⁸³ In addition, HRL forbids governmental killings “unless the government uses no more force than absolutely necessary as a last resort to defend a person from imminent unlawful violence. The right to use lethal force thus turns on the conduct, not the status, of the target.”⁸⁴

U.S. policies concerning targeted killings are unlawful under the HRL standard of using “no more force than absolutely necessary as a last resort to defend a person from imminent unlawful violence”.⁸⁵ In McCann v. United Kingdom, 21 E.H.R.R. 97 (1996), the European Court of Human Rights was confronted with a situation in which plain clothed United Kingdom soldiers in the Special Air Service shot and killed three members of the Provisional IRA.⁸⁶ The soldiers knew that the IRA members were planning to detonate a car bomb at that location using a radio-controlled detonation device, so the soldiers suspected that the car the IRA members had just parked was about to explode and they shot and killed the IRA members to prevent them from remotely detonating the bomb.⁸⁷

Bypassing the question as to whether or not the soldiers individually committed a human rights violation, the Court focused on “whether the anti-terrorist operation as a whole was controlled and organized in a manner which respected the requirements” of HRL.⁸⁸ The Court found that more

⁸² Id. at 420

⁸³ Id. at 422

⁸⁴ Id. at 443

⁸⁵ Id.; see Daphne Eviatar, *Trump’s New Shoot to Kill Drone Policy Breaks International Law*, NEWSWEEK (Oct. 2, 2017), <http://www.newsweek.com/trumps-new-shoot-kill-drone-policy-breaks-international-law-675673> (The Trump administration “wants to remove the requirement in Obama’s Presidential Policy Guidance, or PPG, that the U.S. will only lethally target individuals off the battlefield if they pose a ‘continuing, imminent threat to U.S. persons.’ Although that policy stretched the definition of ‘imminence’ beyond any meaningful boundaries, it at least suggested a nod toward international law. The new guidance reportedly removes the imminence requirement altogether, allowing the U.S. government to kill ‘foot-soldier jihadists with no unique skills or leadership roles’ and regardless of what threat, if any, they pose. In other words, it doesn’t even pretend to comply with international legal limits.”)

⁸⁶ See Dycus et al., *supra* note 72, at 421-22

⁸⁷ See Id.

⁸⁸ Id. at 422-23

force was used than absolutely necessary, because the IRA members “might have been arrested or at least turned away at the border, perhaps rendering a subsequent use of lethal force unnecessary.”⁸⁹ Furthermore, even though the soldiers had definitive intelligence that the IRA members were going to detonate a car bomb, the Court questioned the soldiers’ use of firearms to kill the IRA members instead of incapacitating them via nonlethal wounding shots.⁹⁰

The U.S. targeted killing program, meanwhile, kills suspected terrorists who are thousands of miles away from the U.S. persons they target, and does so by destroying entire buildings at a time. Unlike the situation in McCann, where the soldiers had solid intelligence that the IRA members were about to detonate a car bomb, the U.S. military conducts targeted killings against suspected members of terrorist organizations, regardless of the intelligence at the time the strike is ordered.⁹¹

It is hard to see how individual terrorists far from the U.S. civilians they might seek to harm pose an imminent threat of unlawful violence against U.S. persons. The U.S. military would argue that leaders of terrorist organizations who coordinate the activities of terrorists in the U.S. *always* pose an imminent threat to U.S. persons, but this stretches the definition of “imminence” beyond any meaningful boundaries.⁹² In addition, the U.S. now carries out targeted killings against low-level “foot soldier jihadists with no unique skills or leadership roles”, not just organizational leaders, so the imminent threat posed by these individuals is even further deflated.⁹³ Furthermore, the U.S. military’s targeted killing policy selects targets not based on the threat level they pose, but rather, based on their importance within the structure of the terrorist network they are a part of, regardless of threat level at time of killing.⁹⁴

⁸⁹ Id. at 423

⁹⁰ See Id.

⁹¹ See Eviatar, *supra* note 85

⁹² See Id.

⁹³ See Id.

⁹⁴ See Luke Hartig, *Trump’s New Drone Strike Policy: What’s Any Different? Why It Matters*, JUST SECURITY (Sep. 21, 2017) <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/> (“Over 16 years of operations, our counterterrorism professionals have become adept at analyzing the structure of terrorist networks and targeting them based on the understanding that there are particular nodes that, if removed, could

In addition to violating the “imminent threat” standard, the U.S. targeted killing policy also violates HRL’s “no more force than absolutely necessary as a last resort” standard. In McCann, even though the soldiers had solid intelligence that the IRA members posed an imminent threat, the Court questioned the soldiers’ decision to shoot to kill and suggested that they might have instead shot to incapacitate the IRA members.⁹⁵ The U.S. targeted killing policy utilizes drones with weapons capabilities much more destructive and powerful than that of a handheld firearm.⁹⁶ If shooting to kill when an IRA member is known to pose an imminent threat is using more force “than absolutely necessary as a last resort”, then deploying a one hundred-pound Hellfire missile with a sixty-foot kill radius to lethally target a courier who poses no imminent threat to U.S. persons is a clear example of using more force “than absolutely necessary as a last resort” and the U.S. military’s targeted killing policy violates HRL standards.

B. TARGETED KILLINGS AND INTERNATIONAL HUMANITARIAN LAW

1. Are targeted killings properly viewed through the IHL framework?

The U.S. may not be engaged in an international armed conflict with terrorist organizations like ISIS and therefore subject to the full provisions of the Geneva Conventions, but it *is* engaged in an armed conflict of a non-international nature.⁹⁷ Armed conflicts of a non-international nature can be properly viewed as falling within the purview of IHL,⁹⁸ and the U.S. has adopted the position that the U.S. military’s activities related to the “War on Terror” are properly viewed through the IHL

have a devastating impact on the entire network. In many cases, those nodes may be couriers, bodyguards, or propagandists who, while lawful military targets under the laws of war, may not pose a continuing, imminent threat to U.S. persons.”)

⁹⁵ See Dycus et al., *supra* note 72, at 423

⁹⁶ See Carey Dunne, *Just How Powerful is the Reaper Drone?*, CO. DESIGN (Jul. 10, 2014)

<https://www.fastcodesign.com/3032885/just-how-powerful-is-the-reaper-drone> (“[T]he Reaper, the most precise drone to date, has 100-pound Hellfire missiles, which obliterate anything and anyone within a 60-foot radius of an intended target. If a Hellfire Missile were dropped on Boston’s Fenway Park it could take out most of the baseball diamond.”)

⁹⁷ See Dycus et al., *supra* note 72, at 278 (Military conflicts between states and terrorist organizations, insurgents, and the like can be defined as non-international armed conflicts.)

⁹⁸ *Id.* at 310

lens.⁹⁹ Indeed, the prevalence of armed conflicts with terrorist and guerilla groups across the globe has led some countries to simply treat all armed conflicts as falling within the IHL framework.¹⁰⁰ As mentioned previously, the traditional view amongst the international community was, until recently, that IHL applies during armed conflicts, while HRL only governs during times of peace.¹⁰¹

2. *IHL standards for using force*

The overarching goal of IHL is to limit civilian and combatant suffering to only that which is “necessary to achieve the political goals of a conflict.”¹⁰² In furtherance of that goal, IHL requires that the use of military force be based on the principles of distinction and proportionality.¹⁰³ Distinction requires the differentiation between civilians and combatants, with only the latter being valid military targets.¹⁰⁴ Proportionality prevents the use of force which causes “incidental civilian casualties that are disproportionate to the military advantage from the operation.”¹⁰⁵

The principle of distinction requires that a military “never make civilians the object of attack” by targeting them directly,¹⁰⁶ but acknowledges the reality of war by allowing for civilian casualties “incidental to a lawful military attack (collateral damage)” and even the direct targeting of civilians “for as long as they take a direct part in hostilities.”¹⁰⁷ In the context of the global “War on Terror”, differentiating between innocent civilians (who cannot be targeted), civilians who are taking a “direct party in hostilities” (and therefore can be targeted), and combatants (who can be targeted) is crucial.

⁹⁹ *Id.* at 443

¹⁰⁰ *See Id.* at 278 (“As things stand now, states and lawyers struggle to apply IHL to [non-international] conflicts, and state militaries may in practice simply treat all armed conflict the same. ... IHL norms in international and non-international armed conflicts ‘have become nearly indistinguishable.’”) (citing Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 39 *Israel Y.B. on Hum. Rts.* 307, 308 (2009))

¹⁰¹ *See Dycus et al., supra* note 72, at 313 (IHL “has evolved alongside domestic and other international law to govern the conduct of states and individuals during armed conflicts”)

¹⁰² *Id.* at 277; *see supra* note 75

¹⁰³ *See Id.* at 443 (“The use of force must be necessary to achieve legitimate military objectives and proportionate (e.g., the incidental loss of civilian lives must be justified by the legitimate military benefit of the attack).”)

¹⁰⁴ *See Id.* at 277

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 443

This differentiation is critical in determining who can be targeted in a drone strike – ISIS soldiers and terrorists themselves can obviously be targeted as enemy combatants, but what about civilian cooks, drivers, and even propagandists who support the fighters?

The U.S. military’s targeted killing program fails to clearly distinguish between types of civilians and combatants, and thereby fails IHL’s “distinction” standard. During the second intifada, Palestinian groups carried out terrorist attacks against Israeli civilians and Israel responded by launching preventative strikes against suspected individual Palestinian terrorists.¹⁰⁸ The Supreme Court of Israel, in H CJ 769/02 Public Committee Against Torture in Israel v. Israel, 46 I.L.M. 375 (2006), interpreted and applied IHL to determine when civilians are “taking a direct part in hostilities” and therefore become lawful military targets (and by analogy for our purposes, lawful targets of targeted killings).¹⁰⁹

The court stated that “hostilities” are acts “which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” or harm to civilians.¹¹⁰ The court explained that it is not necessary that the civilian use a weapon or bear arms in order to take part in “hostilities”, and taking a “direct part” in hostilities is something that can only be evaluated on a case-by-case basis.¹¹¹

However, the court did provide some general guidelines: a civilian is taking a “direct part” in hostilities when they collect intelligence on the army, transport combatants to or from the hostilities, or service or operate weapons for the combatants.¹¹² In contrast, a civilian is not taking a “direct part” in hostilities when they sell food or medicine to combatants, provide general strategic analysis or

¹⁰⁸ See Id. at 299

¹⁰⁹ See Id. at 300-09

¹¹⁰ Id. at 303

¹¹¹ See Id. at 304 (The meaning of taking a “direct part” in hostilities is open to interpretation; “to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.”)

¹¹² See Id. at 305 (All of those civilians are “performing the function of combatants.”)

financial support, or distribute propaganda supporting the combatants.¹¹³ Finally, the court declared that for purposes of the temporal requirement (*for so long as* they take direct part in hostilities), a civilian who has adopted the combatant organization as his “home” and committed multiple acts of “hostilities” loses their civilian protection status and can be lawfully targeted by military operations.¹¹⁴

The U.S. targeted killing program is arguably unlawful under IHL’s “distinction” standard because it targets civilians who indirectly support ISIS and other terrorist organizations. Like Israel in Public Committee, the U.S. military’s targeted killing program seeks to eliminate terrorist threats in a preventative manner by targeting combatants who are thought to be planning future terrorist attacks against U.S. civilians. However, the U.S. military targets individuals who are not taking “direct part” in hostilities according to the court in Public Committee by targeting nodes in “terror cells” regardless of their combat functions, like propagandists and financiers.¹¹⁵ Although the U.S. military would likely argue that circumstances have changed because of the role propagandists play in stocking terrorist organizations’ ranks and calling others to commit acts of violence, the fact remains that the U.S. has broadened the definition of taking “direct part” in hostilities to include far more activities than those considered in cases like Public Committee.

The U.S. targeted killing program is also unlawful under IHL’s “proportionality” standard, which requires that any incidental loss of civilian life “must be justified by the legitimate military

¹¹³ See Id. (If such persons are injured, however, the attacking military “is likely not to be liable for it, if it falls into the framework of collateral or incidental damage.”)

¹¹⁴ See Id. at 306 (“[A] civilian who has joined a terrorist organization which has become his ‘home,’ and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.”)

¹¹⁵ See Hartig, *supra* note 94 (We analyze the structure of terrorist networks and target individuals within those networks based on the impact their death would have on the network. In many cases, those individuals “may be couriers, bodyguards, or propagandists” who may not pose a continuing threat to the U.S.); see also Owen Bowcott, *Is the targeting of Isis member Sally Jones legally justified?*, THE GUARDIAN (Oct. 12, 2017) <https://www.theguardian.com/world/2017/oct/12/is-targeting-of-isis-member-sally-jones-legally-justified> (Sally Jones was “an active Isis recruiter and propagandist . . . The reported death of her 12-year-old son, Jojo, alongside her also raises concerns about the legality of the attack because he would be classified as a non-combatant.”)

benefit of the attack.”¹¹⁶ Adhering to the principle of proportionality requires a judgment call every time a drone strike is ordered in close proximity to civilians, which is extremely common as ISIS strategically positions military targets in locations where drone strikes will unavoidably lead to the loss of civilian life.¹¹⁷

In Public Committee, the court noted that finding the balance between civilian harm and military advantage is difficult, and gave as an example a terrorist sniper shooting at soldiers “from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed.”¹¹⁸ Finally, the court noted that in questionable cases, a meticulous examination is required and the military advantage must be “direct and anticipated” because under international law “the ends do not justify the means.”¹¹⁹

The U.S. targeted killing program fails to satisfy the IHL standard of proportionality because the U.S. military follows policy guidelines which fail to ensure that the legitimate military advantage gained by a drone strike exceeds the harm to civilians. President Obama’s Presidential Policy Guidance (“PPG”), which lays out guidelines for use of military force and has been largely adhered to by the Trump administration, states that lethal force can only be used when commanders on the ground can determine with “near certainty” that civilians will not be harmed in the operation.¹²⁰

¹¹⁶ Dycus et al., *supra* note 72, at 443; *see* Khan & Gopal, *supra* note 1 (Under IHL, “it is legal for states to kill civilians in war when they are not specifically targeted, so long as ‘indiscriminate attacks’ are not used and the number of civilian deaths is not disproportionate to the military advantage gained.”); *see also* Ben Jones, *Despite Obama’s new executive order, U.S. drone policy may still violate international law*, THE WASHINGTON POST (Jul. 7, 2016) https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/07/obamas-new-executive-order-on-drones-means-the-u-s-may-still-violate-international-law/?noredirect=on&utm_term=.4e17aa33136f (IHL “requires proportionality (the foreseen harms of force do not outweigh the military objective it aims to achieve) and distinction.”)

¹¹⁷ *See* Dycus et al., *supra* note 72, at 308 (Evaluating proportionality is a values-based test “based upon a balancing between conflicting values and interests”); *see also* Malley & Pomper, *supra* note 21 (ISIS has “hid among civilians, used them as human shields, and did what it needed to do either to deter coalition airstrikes or ensure they would come at high cost... Exposing innocents to harm is at the core of their tactics.”)

¹¹⁸ Dycus et al., *supra* note 72, at 308

¹¹⁹ *Id.*

¹²⁰ *See* Hartig, *supra* note 94

In practice, this seemingly strong standard was found satisfied and a strike was ordered on two civilian homes after ninety-five minutes of drone surveillance “confirmed” intelligence reports that the homes were ISIS command centers simply by observing a “military-age male” opening a gate for a guest vehicle.¹²¹ No “overtly nefarious activity”, no weapons, and no individuals dressed as combatants were observed; the burden of proof had been on the civilians “to demonstrate to a drone watching them from above that they were civilians – guilty until proved innocent.”¹²² In this one instance alone, four civilians lost their lives and no military advantage was gained by the strike. It cannot be assumed that this was a remote occurrence; therefore, the U.S. targeted killing program fails the IHL standard of proportionality by failing to follow policy guidelines which ensure that the legitimate military advantage gained by a drone strike exceeds the harm to civilians.

C. CONCLUSIONS

The U.S. military’s targeted killing program is unlawful under both HRL and IHL. HRL forbids governmental killings “unless the government uses no more force than absolutely necessary as a last resort to defend a person from imminent unlawful violence”,¹²³ but the U.S. military targets suspected members of terrorist organizations who are thousands of miles away from the U.S. persons they might target, and does so by destroying entire buildings at a time. This constitutes a heavier use of force than absolutely necessary, and the U.S. military has stretched the “imminent” standard beyond any meaningful boundaries.¹²⁴

Furthermore, IHL requires that a military’s use of force be “necessary to achieve legitimate military objectives” and that the force used be proportionate in terms of the military advantage outweighing harm to civilians.¹²⁵ The U.S. military’s targeted killing program is unlawful under the

¹²¹ See Khan & Gopal, *supra* note 1

¹²² *Id.*

¹²³ *Supra* note 84

¹²⁴ See *supra* note 92

¹²⁵ See Dycus et al., *supra* note 72, at 443

IHL framework because it targets civilians who are not taking a “direct part” in hostilities and fails to ensure that the military advantage of a drone strike outweighs harm to civilians.

As a result, the debate over which body of law should apply in active combat areas (like Iraq and Syria) versus non-active combat areas (like Pakistan and Somalia) is irrelevant, because the targeted killing program is unlawful as currently applied in both arenas.¹²⁶

IV. CONDOLENCE AND COMPENSATION PAYMENTS TO CIVILIAN VICTIMS OF TARGETED KILLINGS

As we have seen, the U.S. military utilizes a number of condolence and compensation payment programs to manage its relationships with foreign civilians and make amends for the harm caused by military operations and personnel. We will now consider the obligations the U.S. has to use those programs to aid civilian victims of targeted killings, examine how difficult it is for victims to access those funds, and make suggestions for improvement so that the U.S. military’s targeted killing program can be utilized in a manner which is wholly consistent with the military’s stated objectives.

A. THE U.S. MILITARY SHOULD COMPENSATE CIVILIAN VICTIMS OF TARGETED KILLINGS, EVEN THOUGH IT HAS NO LEGAL OBLIGATION TO DO SO

As mentioned previously, the U.S. is under no legal obligation to provide compensation to foreign civilians for collateral damage arising from legal activities during armed conflict.¹²⁷ This includes civilian victims of targeted killings, because although we have concluded that the targeted killing program is carried out in an unlawful manner, the international community has not yet formally arrived at this conclusion.

Despite the lack of a legal requirement to do so, the U.S. military should make compensation and condolence payment programs available to civilian victims of targeted killings across the globe.

¹²⁶ See Creede Newton, *Trump must make known ‘deadly’ changes to US drone policy: NGOs*, AL JAZEERA (Mar. 8, 2018) <https://www.aljazeera.com/news/2018/03/trump-deadly-drone-policy-ngos-180307204617166.html> (Discussing the debate concerning the application of HRL in non-active combat areas like Pakistan and Somalia and IHL in active combat areas like Iraq and Syria, and concluding that in “either scenario, drone strikes can violate international law.”)

¹²⁷ See *supra* note 5

The support of local populations is critical in the counterinsurgency context,¹²⁸ and the U.S. can hardly maintain a favorable view amongst the international community if it tracks and attacks terrorist across the globe without taking responsibility for its actions when it causes harm to civilians in the process.

Traditionally, the U.S. military has argued that condolence payments are not an admission of legal liability, which is critical in avoiding the accidental creation of a new legal norm obligating a country to pay for damage caused by its military.¹²⁹ However, the international community is beginning to see military accountability to civilian populations as a standard which should be upheld and promoted, as evidenced by the growing consensus that HRL and its increased civilian protections should apply to govern military actions during all armed conflict.¹³⁰ Additionally, the court in Public Committee even advocated the use of compensation payments to civilian victims of military aggression in the IHL context.¹³¹ This is especially significant given IHL's reduced protections for civilians, as compared with HRL. Given this trend and the military benefits that accompany the proper use of compensation and condolence payment programs, it is in the U.S. military's best interests to make these payment programs available to all civilians worldwide.¹³²

B. CASE STUDY: BASIM RAZZO

When contemplating suggestions for improving the use of compensation and condolence payment programs, an examination of one civilian's struggle to access these programs is helpful in identifying areas for improvement. After Basim Razzo's house in Mosul, Iraq was destroyed and four of his family members were killed by a U.S. drone strike, he sought an explanation as to why his

¹²⁸ See *supra* note 7

¹²⁹ See Adams, *supra* note 6, at 343 ("It is crucial to distinguish between condolence payments and compensation payments" in order to avoid creating a new legal norm "that there is an obligation to pay for combat damage.")

¹³⁰ See *supra* note 77

¹³¹ See Dycus et al., *supra* note 72, at 307 (After an attack on a civilian "suspected of taking an active part ... in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent. In appropriate cases *it is appropriate to pay compensation as a result of harm caused to an innocent civilian.*") (Emphasis added)

¹³² See *supra* Section II

family was targeted.¹³³ He eventually learned that his family's houses were mistakenly identified as ISIS command centers, and the faulty intelligence led to a U.S. airstrike that left him widowed and without a home in ISIS-controlled Mosul.¹³⁴

After recovering from his injuries, Basim sought a meeting with American military authorities to seek compensation for the losses he endured. Basim was not sure how much the U.S. military would offer, but he “had spent hours calculating the actual damages: \$500,000 for his and [his brother's] homes, furnishings and belongings; \$22,000 for two cars; and \$13,000 in medical bills from Turkey,” where he received medical care and recovered from the drone strike.¹³⁵ Over a year after first contacting the U.S. Embassy in Iraq, Basim finally received an e-mail from the U.S. military which acknowledged the attack, apologized for the loss of life, and stated that the U.S. was prepared to offer a monetary expression of its sympathy and regret.¹³⁶

When Basim met with U.S. military representatives on March 17, 2017, an Army attorney started by saying, “We just wanted to start by expressing our deepest sympathies ... We do take the closest care in what we do here, but it's high risk, and sometimes we make mistakes. We try our best to prevent those mistakes, but we hope that since we did make a mistake here, *we do everything we can to right it*, as best we can.”¹³⁷ Basim told the attorney that “[t]he only thing that cannot be returned is the loss of life,” but everything else could be rebuilt.¹³⁸ The attorney told Basim that the U.S. military was prepared to offer him a condolence payment, which is “not meant to recompensate you for what you've lost, or for rebuilding or anything like that. It's just meant to be an expression of our

¹³³ See *supra* Section I at 3

¹³⁴ See *supra* Section III(B)(2) at 28

¹³⁵ Khan & Gopal, *supra* note 1

¹³⁶ See *Id.* (Also noteworthy is the fact that the U.S. military denied responsibility for the strike, despite being provided proof by the New York Times. The Times presented the military with a YouTube video uploaded by the American coalition which showed the strike and claimed responsibility therefor. It was only after this video was taken offline by the coalition, and provided for a *second time* by the Times, that the coalition conceded that the strike did in fact occur.)

¹³⁷ *Id.* (Emphasis added)

¹³⁸ *Id.*

sympathy,” and offered Basim \$15,000, which he said he was insulted by and refused to accept, bringing the meeting to a swift ending.¹³⁹

Even when the U.S. military took every step they thought necessary to demonstrate their sympathy towards Basim and explain the condolence payment to him, he still left the meeting feeling insulted. Despite the fact that Basim received an opportunity most civilians are never offered – an in-person meeting with a military representative physically expressing remorse for the military’s actions – the process was not explained well enough to accomplish the program’s goals. Rather than fostering a positive relationship between the military and Basim, the administration of the condolence payment left Basim with the feeling that the U.S. had offered him a minimal payment which did not adequately address the military’s wrongdoing.

Basim was never told that he was not *eligible* for a payment which would compensate him for what he had lost (because of the FCA’s combat activity exclusion); he was simply told that he was not being *offered* compensation for what he lost, but only an expression of the U.S. military’s sympathy. An explanation regarding the FCA’s combat activity exclusion may not have satisfied Basim that the U.S. military was properly “righting its wrongs”, but it would have done more to prevent him from feeling personally insulted by the military’s low offer. This example shows that even when the military makes a concerted effort to administer civilian payment programs in a sincere and heartfelt manner, the programs fail to accomplish their objectives and foster positive relations between the U.S. military and foreign civilians.

C. A BETTER WAY FORWARD: PERMANENT PROGRAMS APPLIED CONSISTENTLY

The U.S. military’s fragmented approach to handling civilian claims for damage to property and loss of life is administered in a piecemeal fashion and without consistency, leading to resentment among the foreign populations the programs are intended to benefit. In order to resolve this issue and

¹³⁹ Id.

allow the programs to fulfill their intended purposes, civilian claims should be processed in a timely, organized, and consistent fashion. Claims arising from combat activities and non-combat activities alike should be awarded fair compensation in a structured system that does not allow claims which are eligible for one payment but not another to slip through the cracks.

The solatia payment system and the FCA should be re-organized into a single program that does not require re-evaluation each time the military begins operations in a new country. ISIS and other terrorist organizations ignore country borders, and the U.S. military must be able to track and neutralize threats as efficiently as possible. As a result, it is imperative to quickly commence operations when necessary while maintaining the support of local populations so that they do not aid the enemy. This requires the ability to quickly process civilian claims without waiting for country-specific authorization to do so.¹⁴⁰ A permanent claims system which evaluates claims for both compensation and condolence payment eligibility would streamline the claims process and, by explaining that distinction to claimants, provide transparency that the current system lacks.

In addition, the FCA's combat activity exclusion should be eliminated so that innocent civilians who suffer debilitating property damage, like Basim Razzo, are eligible for full compensation for their loss. Although the FCA was designed to address problems caused by a different type of warfare in a distant era,¹⁴¹ its application to modern warfare requires modern adaptation. Similarly, the limitations on solatia payments should be enlarged or eliminated so that foreign civilians are not offered offensively low payments for the death of loved ones. Solatia payments should also be more regularly accompanied by an expression of condolences, determined by local custom, so as to communicate authenticity and sincerity.¹⁴²

¹⁴⁰ See Adams, *supra* note 6, at 355

¹⁴¹ See *supra* note 24

¹⁴² See Adams, *supra* note 6, at 360-62 (Acknowledging that “[s]imply dispensing money to victims does not meet the intent of condolence payments” because “[w]hen the actual payment method of condolence is culturally appropriate, it is more likely to meet the aim of enhancing U.S. security. For example, in Iraq, when a *diyya* payment is made, members of both tribes then sit together for coffee or a meal. In Iraqi tribal culture, it is against

The consolidated compensation and condolence payment program should also be permanently financed by the Department of Defense as a part of its regular budget so that Congress cannot interfere with the program's administration.¹⁴³ The creation of a localized administrative body to handle claims quickly and efficiently would also streamline the process.¹⁴⁴ Military experts and legal scholars have offered many more specific suggestions for the administration of such a consolidated program, and the Department of Defense would be wise to follow their suggestions.¹⁴⁵

V. CONCLUSION

The U.S. military's targeted killing program is unlawful under both the IHL and HRL paradigms. This unlawful program is unaccountable to civilian victims who are ineligible for compensation for damage caused by drone strikes. Furthermore, the use of condolence compensation programs to express sympathy for these civilian victims is wholly inadequate and often serves to breed resentment among the foreign populations they are intended to benefit. As a result, the U.S. military's compensation and condolence payment programs require consolidation and modernization in order to fulfill their legitimate military objectives.

custom to share food with someone involved in an outstanding dispute. Iraqis intending to take revenge against Americans despite having received payments would have been unlikely to share meals with them, yet Iraqis did eat with Americans who delivered payments.”

¹⁴³ See Adams, *supra* note 6, at 367-68 (advocating for an overhaul of the compensation and condolence payment system and independent financing)

¹⁴⁴ See *Id.* at 363-65

¹⁴⁵ See *Id.* at 355-71; see also Campaign for Innocent Victims in Conflict, *supra* note 36, at 9-13