Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict

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Abstract

The armed conflicts of the twenty-first century, which often take place among civilian populations rather than on traditional battlefields, push states to acknowledge and rectify the resulting harm to foreign civilians. In particular, asymmetric conflicts, which involve confronting non-state actors within civilian populations, tend to cause more of what has come to be known as ‘collateral damage.’ Such harm to civilians can be inflicted, for instance, in checkpoint shootings, drone attacks, or riot control efforts. How should these losses be addressed? This Article examines two competing models. The U.S. military provides compensation to civilians injured by its activity in Iraq and Afghanistan through a military-run program, governed by the Foreign Claims Act and condolence payments. In contrast, Israel enables non-citizen Palestinians injured by Israeli military actions to bring tort lawsuits before Israeli civil courts. Notwithstanding the differences between these two conflicts, both entail military forces engaging with civilians while assuming quasi-military or policing roles. Yet, scholars have not yet juxtaposed the distinct compensation mechanisms applied in each conflict, vis-à-vis the goals of monetary damages under tort law. This Article seeks to fill this gap. Drawing on tort theory, social psychology, and socio-legal studies, the Article examines the structure of domestic conflict compensation programs. It utilizes data from public records, interviews with relevant

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stakeholders, NGO reports, and Freedom of Information Act requests to compare the American and Israeli compensation paradigms. Through this analysis, the Article offers guidelines for designing compensation programs that address both government accountability and victims’ needs to effectively redress the harm modern-day conflict causes to civilians.

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I. INTRODUCTION

Twenty-first century armed conflicts often target non-state actors rather than another nation-state’s army. In particular, asymmetric conflicts—by which I mean conflicts between belligerents whose relative military power or strategy differ significantly—tend to move away from traditional battlefields and into heavily populated areas, causing more “collateral damage” to non-combatant civilians. Security forces may negligently cause incidental bodily injuries and property damages to civilians, for instance, in checkpoint shootings, drone attacks, riot control efforts, and even car accidents. This changing military landscape presses states to address the losses such warfare inflicts upon innocent civilians. This Article examines two civilian compensation models used in asymmetric conflicts—Israel-Palestine and U.S.-Iraq and Afghanistan. Notwithstanding the differences between the two conflicts, both share the characteristic of confronting non-state actors that operate from within civilian populations, often using them as a human shield. Furthermore, both involve

3 There are various types of asymmetric conflicts. In this Article, I discuss two types of such conflicts, both of which involve confrontation between military forces and non-state actors: prolonged military occupation and counterinsurgency operations (sometimes called “wars on terror”). See Michael L. Gross, Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict 13–20 (2010); Brad Roberts, Inst. for Def. Analyses, Defense Threat Reduction Agency: Asymmetric Conflict 2010 (2000) (noting the growing share of asymmetric conflicts in armed conflicts around the world).
5 At least those that respect the rule of law.
military forces performing policing and quasi-military—rather than strictly military—roles, such as controlling volatile riots. By comparing the compensation paradigms applied in each conflict, I offer guidelines for designing programs to effectively address the harm modern-day conflict causes to civilians.

Traditionally, scholars examined compensation for armed conflict victims either through International Humanitarian Law (IHL) and Human Rights Law (HRL) in an ongoing conflict, or through Transitional Justice (TJ) in the aftermath of a conflict. These international law frameworks are called upon since states typically fail to address this issue themselves. However, IHL norms of armed conflict tolerate (and do not demand compensation for) a civilian harm as long as there were reasonable attempts to ensure that the distinction between civilians and combatants was upheld. These attempts are reasonable if civilians are not deliberately targeted, and as long as harm to civilians, when it does occur, is deemed proportional to military objectives. HRL, in turn, tends to target intentional, gross human rights violations, such as torture, rather than negligent acts, which are the focus of this Article. Because of the limitations of IHL and HRL in protecting civilians, the overall weakness of international tribunals in a world still committed to state sovereignty, and the general focus of TJ on post-

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9 See discussion in Section B.1.


11 See, for example, the protection afforded to the right to life under the European Convention on Human Rights and Fundamental Freedoms (ECHR) during armed conflict. ECHR does not subject this right to the laws of armed conflict, thus limiting the scope of its protection. Furthermore, the right to bodily integrity is not expressly provided for, except where the violation of bodily integrity is intentional, as is the case when it constitutes torture, inhuman or degrading punishment, or medical experimentation. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 3, Nov. 4, 1950, E.T.S. No. 44, http://perma.cc/2SRW-Y9TM.

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(rather than amid-) conflict, there is a gap in current international law scholarship regarding government accountability for negligent acts conducted in ongoing asymmetric conflicts. This Article thus explores the role of existing domestic compensation tools, such as military payments and tort lawsuits, in promoting accountability in asymmetric conflicts between democratic, rule-of-law-adhering states and non-state actors.

In the U.S., the military provides payments to civilians injured in its operations in Iraq and Afghanistan in two ways: through an administrative program, governed by the Foreign Claims Act (FCA), and through solatia/condolence payments. The FCA provides the U.S. military its primary tool to compensate local civilians for losses unrelated to combat operations, like car accidents caused by security forces. Claims according to the FCA are evaluated by Foreign Claims Commissions, composed of military officers, in a standardized bureaucratic process. Since 2003, the average payment according to the FCA for loss of life is $4,200. Alongside the FCA regime, the military also grants condolence payments: symbolic, ex gratia payments offered in claims deemed related to combat, in amounts typically no higher than $2,500 per person killed. In contrast, in the Israeli-Palestinian Conflict, a unique mechanism enables non-citizen Palestinians from the West Bank and—until recently—the Gaza Strip (the Palestinian Territories; the Territories), to bring civil lawsuits for damages against the State of Israel before Israeli civil courts, for injuries resulting from Israel’s security forces’ actions in the Territories.

While the U.S.’s military engagement in Iraq and Afghanistan is a (relatively) short-term counterinsurgency operation conducted miles away from its territory and citizens, Israel’s presence in the adjacent Territories has continued, with changes in degree and scope, over the last fifty years, with no

13 In recent years there have been voices in TJ literature arguing that it should be applied to ongoing conflicts, but this area of scholarship is still nascent. See, for example, Cyanne E. Loyle, Transitional Justice During Armed Conflict, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2017), http://perma.cc/GQ7G-7CZL; Par Engstrom, Transitional Justice and Ongoing Conflict, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS 41–61 (Chandra Lekha Sriram et. al. eds., 2013) (discussing ways in which TJ is increasingly embedded in conflict resolution efforts and evaluating the recent trend towards judicial intervention in ongoing conflicts).

14 See discussion in Section III.B.2.

15 Id.


17 Smaller amounts are allocated for bodily injury and property damage. See Section III.B.

18 I refer to non-Israeli citizen Palestinians, as opposed to Israel’s Arab minority. Foreign nationals are also entitled to bring claims, but since these are less common, and for brevity, I refer to plaintiffs as Palestinians.
end in sight. Arguably, the Israeli occupation imposes on Israel a different set of obligations towards Palestinians compared to those owed by the U.S. to Iraqi and Afghan civilians.\textsuperscript{19} Despite these differences, it is fruitful to compare the compensation models each conflict represents and examine them vis-à-vis the goals of monetary compensation under tort doctrine and the unique characteristics of conflict settings.\textsuperscript{20} Not only will this comparison illustrate the dilemmas involved in designing victim compensation programs in asymmetric conflict, it will also illuminate the motivations underlying such programs. The U.S. Army trumpets damages payments as one way to win the hearts and minds of civilians in war zones.\textsuperscript{21} But do these payments actually help achieve this goal? And should such a goal even underlie victim compensation programs? Israel, conversely, does not purport to win Palestinians’ hearts and minds, but rather describes Palestinians’ access to its courts as an unparalleled, generous standing given to them as parties to an armed conflict.\textsuperscript{22} However, Israel has significantly restricted Palestinians’ access to civil justice over the last fifteen years.\textsuperscript{23}

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\textsuperscript{19} In this sense, while Israelis see themselves as the ingroup and Palestinians as the outgroup, in the U.S./Iraq and Afghanistan relationships both sides seem to be outgroups. This categorization may affect decision-making in various contexts, including compensation. Cf. Lawrence A. Messe et. al., \textit{Group Categorization and Distributive Justice Decisions}, in \textit{JUSTICE IN SOCIAL RELATIONS} 227 (Hans Werner Bierhoff et al. eds., 1986) (exploring how group categorization processes can mediate the perceived applicability of one's sense of justice to reward distribution decisions).

\textsuperscript{20} While other countries, including the U.K., Australia, Canada, Germany, and the Netherlands, offer payments to injured civilians, less information is available concerning these mechanisms. With respect to Canada, for example, evidence of payments was leaked out by way of a report to the Receiver General in 2010, which revealed that C$650,000 was distributed in Afghanistan between 2008 and 2009. However, further information has been difficult to acquire. \textit{See AMSTERDAM INT’L LAW CLINIC & CTR. FOR CIVILIANS IN CONFLICT, MONETARY PAYMENTS FOR CIVILIAN HARM IN INTERNATIONAL AND NATIONAL PRACTICE} (2013), \textit{http://perma.cc/2PN2-HCXB}; Tristana Moore, \textit{Anger Mounts in Germany Over Its Afghan Air Strike}, \textit{TIME} (Dec. 10, 2009), \textit{http://perma.cc/5NQE-374V}. The U.K.’s system is similar to the U.S.’s. Like the U.S., the British used in Iraq and Afghanistan a “table of standard injury and death payments to guide them. It includes suggested awards of $200 for minor injuries, $240 for the loss of a toe, $1,000 for the loss of an eye and $7,000 for the amputation of both feet.” Crina Boros et al., \textit{A Few Thousand Dollars: The Price of Life for Civilians Killed in War Zones}, \textIT{THOMSON REUTERS FOUNDATION} (Jul. 16, 2014), \textit{http://perma.cc/HTWT-7LKG}; \textit{Iraq War Compensation Total at £9m}, \textit{THE GUARDIAN} (Jun. 16, 2010). While the Israeli model is rare, its basic structure bears similarities to claims brought in the U.S. under statutes like the Alien Tort Claims Act, the Torture Victim Protection Act, the Anti-Terrorism Act, and the Foreign Sovereign Immunities Act.

\textsuperscript{21} U.S. ARMY & MARINE CORPS, \textit{COUNTERINSURGENCY FIELD MANUAL} 1–2 (2007) (presenting damages payments as an important tool in asymmetric conflicts). This tool is used alongside development strategies such as economic reconstruction. \textit{See} Eli Berman et. al., \textit{Can Hearts and Minds Be Bought? The Economics of Counterinsurgency in Iraq}, 119 J. POL. ECON. 766 (2011) (discussing reconstruction spending in Iraq as part of a “winning hearts and minds” strategy).

\textsuperscript{22} \textit{See} Position paper by the Chief Military Prosecutor, submitted on Dec. 19, 2010 to the Public Commission for Examining the Maritime Incident of May 31, 2010 headed by former Supreme Court Justice Jacob Turkel, 75–77, \textit{http://perma.cc/N9HX-MM46}; Interview with GL9, IDF,
The Article draws upon originally collected and publicly available data, including interviews with relevant stakeholders; Freedom of Information Act (FOIA) requests; reports by non-governmental organizations; and legislative materials to evaluate each of the models. In so doing, the Article demonstrates that, while both compensation models have significant problems, Israel’s original tort-based model promises to better promote the threefold goal of adequate compensation, government accountability, and victim participation. Not only does the Article help grapple with the consequences of simmering, intractable asymmetric conflicts, it also explores the role of domestic tools on issues often left to the international legal system.

The Article proceeds in five Sections. Section II examines the benefits and flaws of tort-based and no-fault compensation, both in general and as applied to asymmetric conflicts. Section III provides background on Israel’s and the U.S.’s compensation programs. Section IV compares these two models. Section V offers guidelines for designing compensation programs based on the tort system, while acknowledging its limitations and allowing an opt-out option for victims who prefer an administrative compensation program. Finally, the conclusion puts forward future research recommendations, suggesting that we need more empirical data on victims’ needs in conflict settings to better shape our compensation and accountability regimes.

II. TORT LITIGATION VS. NO-FAULT MECHANISMS IN ASYMMETRIC CONFLICT

What are the promises and perils of tort law and how do the unique characteristics of asymmetric conflict affect these objectives? To what extent do

(Dec. 2016) (notes on file with author) (noting that it is impossible for the Israeli military to win the hearts and minds of the Palestinian population through money damages given the long-standing animosity between the two peoples).


24 Originally collected interviews refer to the Israeli-Palestinian case. I conducted the interviews during four trips to Israel between June 2014 and July 2016, and in phone or Skype calls. I analyzed and anonymized the interview transcripts, which were originally in Hebrew (rarely in English), using the mixed methods application “Dedoose.” Government lawyers (GL) include three sub-groups: lawyers from the District Attorney’s Office (DA) who represent the State in court; lawyers from the Israeli Ministry of Justice (MOJ) involved in legislation proceedings; and lawyers from the Israeli Ministry of Defense (MOD), the defendant in the claims. Plaintiffs are represented by private lawyers (PL) or human rights NGO lawyers (NGOL) licensed to practice in Israel.
alternative compensation models better respond to victims’ needs? This Section addresses these questions.

A. The Objectives and Benefits of Tort Law

Tort law has a variety of aims, including deterring harmful behavior, offering a mechanism for remedying wrongs, allocating the costs of injuries, and providing compensation to those who are injured.25 Traditional accounts of tort law focus on its result-oriented objectives. Some scholars mark deterrence as the primary objective, namely creating incentives for desirable behavior and disincentives for unacceptable behavior,26 while others theorize that the primary goal is to accomplish corrective justice: restore the moral balance between parties and communicate a message about the wrong that was done.27

These traditional objectives—much like economics, behaviorist psychology, and public choice theories—emphasize the outcomes of tort litigation. The mass media and the legal literature perpetuate this view that monetary


26 Under an economic model focused on deterrence, tort liability aims to minimize the combined cost of accidents and accident prevention by forcing actors to take into account the consequences of their decisions to act or not to act, through requiring them to pay compensation to injured victims. See generally Robert Cooter & Thomas Ulen, Law and Economics 189–90 (6th ed. 2012); Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970); Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972); Steven Shavell, The Economic Analysis of Accident Law (1987); Howard A. Latin, Problem Solving Behavior and Theories of Tort Liability, 73 Cal. L. Rev. 677 (1985).

27 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 6 cmt. d (2010) (articulating a rationale for tort liability based on “corrective justice; imposing liability remedies an injustice done by the defendant to the plaintiff”); see generally Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349 (1992). This marks a key difference between deterrence and corrective justice theories: while the former typically does not emphasize the link between plaintiff and defendant (see Ernest J. Weinrib, Deterrence and Corrective Justice, 50 UCLA L. Rev. 621, 627–28 (2002) (giving examples of the decoupling of compensation and liability)), the latter does and argues that restoring the balance entails allocating plaintiffs’ losses to defendants (see, for example, Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403 (1992); Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348 (1990); Michelle Chernikoff Anderson & Robert J. MacCoun, Goal Conflict in Juror Assessment of Compensatory and Punitive Damages, 23 Law & Hum. Behav. 313 (1999)). Yet, deterrence and corrective justice theorists have in common their emphasis on other goals apart from compensation itself, in other words, making the plaintiff whole through money damages. See Nora Freeman Engstrom, An Alternative Explanation for No-Fault’s Demise, 61 DePaul L. Rev. 303, 355–56 (2011) (explaining that one of the reasons for the demise of no-fault compensation was the rise of deterrence and corrective justice theories—compensation was no longer “king”).
outcomes drive legal behavior, judgments, and evaluations of the legal system. But a major drawback of this analysis is its tendency to ignore procedural, process-related considerations. Contrary to these outcome-driven theories, I underscore in this Article objectives derived from the process of tort litigation. As explained below, I view these as particularly important in asymmetric conflict settings, where monetary compensation on its own often does not suffice to provide complete redress for victims. For instance, civil recourse theorists distinguish the idea of corrective justice, which emphasizes restoring the equilibrium between injurer and injured, from the notion of tort law as a vehicle for civil recourse: “In permitting and empowering plaintiffs to act against those who have wronged them, the state is... relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor . . . .”

Additionally, the process of claiming reveals and transmits information about hazards and injuries. Plaintiffs often recite the desire for information about what happened to them as a reason for filing a lawsuit. As Alexandra Lahav notes, the litigation process can combine the facts and the law to produce narratives and explanations of past events, frameworks for addressing hurtful events that are ongoing, and opportunities for healing. Even when these narratives are not fully satisfactory, they may help participants come to terms


with the past.\textsuperscript{33} The tort system also provides a forum in which plaintiffs can have their “day in court,” which is an important part of procedural justice.\textsuperscript{34} Moreover, tort litigation provides participants with an official form of governmental recognition. Even if a party loses her case, the fact that she can assert her claim and require both a government official and the person who has wronged her to respond is a significant form of recognition of her dignity and autonomy.\textsuperscript{35} The opportunity to stand on equal footing with injurers is of crucial importance too.\textsuperscript{36}

These goals and benefits,\textsuperscript{37} apart from being related to process rather than outcome, are also characterized by a mixture of private and public orientations. Despite tort law’s traditional focus on relationships between individuals,\textsuperscript{38} its roles can be expanded to the public realm, including the enlistment of tort


\textsuperscript{34} Tyler, Lind, and their colleagues showed that decision-making procedures, including civil litigation, not only deliver outcomes; they also convey information about our relationship with the group and its authorities. Individuals are especially attuned to the procedure’s neutrality, third parties’ trustworthiness, and signals of social standing, such as having a voice in the process. Tom R. Tyler & E. Allan Lind, \textit{Procedural Justice}, in \textit{Handbook of Justice Research in Law} 65–88 (Joseph Sanders & Lee Hamilton eds., 2000); E. Allan Lind & Tom R. Tyler, \textit{The Social Psychology of Procedural Justice} 230 (1988).

\textsuperscript{35} See John C. P. Goldberg, \textit{The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs}, 115 \textit{Yale L.J.} 524 (2005). Relatedly, in explaining the key roles of litigation, including recognition, Lahav relies on Hannah Arendt’s “right to have rights”—the ability to assert that one is entitled to respect as a moral agent, a foundational form of recognition from the state. Lahav, supra note 33, at 1668–69.

\textsuperscript{36} See Jason M. Solomon, \textit{What is Civil Justice}, 44 \textit{Loy. L.A. L. Rev.} 317 (2010) (relating the civil recourse aspects of tort law to concepts of democratic equality). In the words of Attorney Rhon Jones, a lawyer representing claimants eschewing the Gulf Coast Claims Facility following the Deepwater Horizon oil spill: “There's only one place where a waitress or a shrimper can be on equal footing with a company the size of BP, and that's a courtroom.” Debbie Elliot, \textit{BP’s Oil Slick Set to Spill into Courtroom}, NPR, \textit{Morning Edition} (Feb. 16, 2012), http://perma.cc/39GF-6LET.

\textsuperscript{37} For a discussion of these and other benefits of the tort system, including the tort system’s role as a public space for society to debate how tort obligations should be defined, see Scott Hershovitz, \textit{Harry Potter and the Trouble with Tort Theory}, 63 \textit{Stan. L. Rev.} 67 (2010); John C. P. Goldberg, \textit{Twentieth-Century Tort Theory}, 91 \textit{Geo. L.J.} 513 (2003).

\textsuperscript{38} Goldberg, supra note 37, at 516–20 (discussing the traditional account of tort law that described tort actions as personal to the victims, and money damages as personal redress to victims).
litigation towards social change. A tort lawsuit, in this sense, can be part of a broader political campaign, raising awareness of an issue and encouraging policymakers to deliberate on it. This argument applies, perhaps with greater force, to torts brought against governments, which are the focus of this Article. Given tort law’s deterrent effect, tort lawsuits can induce a change of practices in cases where fundamental rights are at stake. Imposing liability on the state through an individual lawsuit may incentivize the state to change its practices to avoid paying tax revenues as damages to individuals. While the issue of government liability also raises significant practical and theoretical difficulties, civil society organizations in the U.S. and elsewhere manage to leverage tort litigation towards social change struggles.

See, for example, Tsachi Keren-Paz, Torts, Egalitarianism and Distributive Justice (2007) (arguing, from a normative perspective, for the incorporation of an egalitarian sensitivity into tort law and private law more generally); Yifat Bitton, Women and Torts: Between Discrimination and Suspension: Thoughts Following CC (Bet-Shemesh) 41269-02/13 Philip vs. Albuttal, 41 MIVZAK HIFARAT PSIKA 4, 5–10 (2015) (Hebrew) (discussing the benefits, and complexities, of using torts as a vehicle to achieve social change). As John Goldberg explains, social justice theory conceives of tort as a device for rectifying imbalance in political power, which corrects for pathologies of interest-group politics. By arming citizens with the power to sue corporations and other powerful actors for misconduct outside of the legislative and regulatory process, tort law permits judges and juries to hold such actors accountable. Goldberg, supra note 37, at 560–62. See also Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law 9 (2001); Richard L. Abel, Questioning the Counter-Majoritarian Thesis: The Case of Torts, 49 DEPAUL L. REV. 533 (2000) (arguing that judges better represent the interests of the people than do legislators and regulators).


For justifications for using torts to promote social justice, see, for example, Gregory C. Keating, Distributive and Corrective Justice in the Tort Law of Accidents, 74 S. CAL. L. REV. 193 (2000); Tsachi Keren-Paz, An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness 16 CAN. J.L. & JURIS. 91 (2003).

Bitton, supra note 39, at 7–8 and references there.

Bitton, supra note 39, at 8. Social justice theory has also been criticized, both for its lack of descriptive power and for treating the political process as systematically skewed against plaintiffs. See Goldberg, supra note 37, at 562. Moreover, P.S. Atiyah in his critique of English tort law notes that, though the tort lawsuit is ostensibly conducted between a particular plaintiff and defendant, in practice the public pays for the damages (through insurance premiums when the defendant is a private individual or corporation, and through taxes when the defendant is a public body), and plaintiffs are “in effect jumping the queue” by determining which topics are given political salience. P.S. Atiyah, The Damages Lottery 114–16, 171 (1997).

See, for example, Ronen Shamir, Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility, 38(4) L. & SOC’y REV. 635 (2004) (arguing that Alien Tort Claims should be understood as part of broader competing strategies for regulating corporate obligations); Richard Abel, Civil Rights and Wrongs, 38 LOY. L.A. L. REV. 1421 (2005) (arguing that civil rights and torts are powerful allies); Martha Chamallas, Discrimination and Outrage: The Migration from Civil Rights to Tort Law, 48 WM. & MARY L. REV. 2115 (2007) (discussing the use of torts to combat discrimination and harassment in the workplace). See also Pamela S. Karlan, The Paradoxical
I thus argue that given its benefits—in particular, the combination of monetary compensation on the one hand and process on the other—tort litigation should have a significant role in promoting government accountability and victim rehabilitation in asymmetric conflicts. That said, below I highlight the criticism of torts and apply it to asymmetric conflicts.

B. At the Intersection of Tort Litigation and Asymmetric Conflict

1. Characteristics of asymmetric conflict and their implications for civilian compensation

How do the various objectives and benefits of tort law play out in the context of asymmetric conflict? Are some goals more important in tort claims brought by victims of such conflicts? As noted, this Article focuses on situations in which security forces (that is, military or police forces) are operating within civilian populations to combat non-state actors or otherwise manage a military occupation. In these conflicts, injuring states perceive their opponents as a mixture of potential allies and enemy insurgents, and often maintain a visible presence among civilian populations, assuming both military and police-like roles. Such situations are particularly prone to causing property damage and bodily harm to uninvolved civilians. These consequences are related, at least in part, to the difficulty distinguishing combatants and non-combatants in asymmetric conflict, where insurgents operate from within civilian areas and where civilians sometimes assume combatant-like roles.46

Another common complexity in these scenarios is the increasingly difficult distinction between combat and non-combat actions performed by security forces. This distinction is important since, as explained below, each type of action prompts a different victim compensation regime. Civilians in asymmetric conflicts may be injured in a broad range of incidents, which result from either full-fledged military, quasi-military, or even police-like activities performed by security forces, including a car accident caused by military vehicles, a (failed or successful) drone attack, riot control efforts, or a pursuit that does not place security forces in danger.47 As illustrated below through the two models, the

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45 In Afghanistan, for example, the U.S.’s objectives have been broader than merely military counterinsurgency and include nation- and state-building and reconstruction. Ronen, supra note 12, at 215–16.

46 Gross, supra note 3, at 13.

47 In the Beni Uda case in Israel, the Court ruled that a pursuit by military forces that does not place the soldiers in danger was not combat-related. However, the legislators’ dissatisfaction with this
salience of borderline combat/non-combat scenarios involving civilians enhances the need for a compensation regime that has objective fact-examining capabilities and can account for these complexities in asymmetric conflicts. I argue that a court-based process would do a better job in this respect than a no-fault, administrative compensation program.

It should be noted that compensation to individual conflict victims is rare under the international legal system. First, as Yael Ronen notes, international tribunals for individual claims are quite limited. The European Court of Human Rights and the Inter-American Commission and Court of Human Rights have narrow mandates, circumscribed by their constitutive documents, and it is unclear whether the laws of an armed conflict can be applied within these mandates. Moreover, while the International Criminal Court’s Rome Statute creates a compensation fund for victims, entitlement depends on individual responsibility under the Statute, which requires intentional harm, rather than mere negligence, as discussed here. Second, under international law the right to compensation would normally attach to the targeted state, so that any compensation would belong to the state itself rather than to injured individuals. As a result, state claims do not guarantee that injured individuals will receive compensation. In this sense, domestic mechanisms remain an important tool.


49 See Ronen, supra note 12, at 218.

50 By which I refer to the common legal definition, in other words, failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. See Negligence, WEX LEGAL DICTIONARY, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, http://perma.cc/LX8Q-W3EJ.


52 This is particularly risky when it comes to an ethnic minority. Further, claims would not apply to victims who are not residents of the targeted state. Ronen, supra note 12, at 220.
for government accountability and victim compensation, especially when it comes to democratic, law-abiding states involved in asymmetric conflicts.

2. Benefits of tort litigation in asymmetric conflict

Domestic civil litigation has emerged as a prominent means for the promotion of international human rights norms, particularly in countries such as the U.S. Though human rights abuses represent more extreme misconducts than those addressed in this Article, as they typically involve intentional rather than merely negligent or otherwise wrongful acts, this analogy sheds light on the issue before us. In particular, scholars have studied the benefits of tort litigation for addressing human rights violations conducted against the backdrop of internal or external conflict. Beth Van Schaack and Beth Stephens have both noted the potential of tort litigation to restore and promote a sense of agency—the impression that we exercise some control over the processes and events that affect us—especially when that sense was destroyed by the conduct that is the subject of the suit. Since such abuses often involve denial of dignity, liberty, choice, and autonomy, the mere act of re-conceptualizing oneself as a holder of rights can offer a sense of empowerment. It can provide victims with an “exercise in self-determination,” inverting the victim/perpetrator status.

In addition, as noted, tort litigation provides victims with access to a narrative forum that enables them to name their experience and situate it

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55 See Beth Van Schaack, With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change, 57 Vand. L. Rev. 2305, 2318 (2004) (discussing the “profound impact” civil cases in U.S. courts can have on victims of human rights violations and their communities); Stephens, supra note 54, at 45, 52 (noting plaintiffs’ general control over tort litigation as opposed to criminal prosecutions, with some exceptions).


within a larger policy or practice. Tort rhetoric invites the attribution of legal responsibility and moral blameworthiness, thus contributing to the alleviation of victims’ feelings of guilt. These discursive processes of “naming, blaming, and claiming” are important features of civil litigation, as compared with criminal prosecutions.

These processes are especially crucial where the responsible government has denied a remedy. Indeed, the effectiveness of criminal remedies depends upon state discretion, and the government with criminal jurisdiction over the offender may be unwilling to prosecute for evidentiary or political reasons. Further, even when criminal prosecutions are brought, civil suits provide an effective complement to such proceedings as they “offer victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system.” Unlike criminal proceedings, civil cases also involve the victim directly participating in the legal process. The victim chooses to initiate the proceeding and then plays a central role throughout, which can be empowering and restore a sense of justice. In comparison to a criminal suit, a civil suit may better preserve a collective memory and “permit a more thorough airing of victims’ stories . . . along with an expression of judicial solicitude.” In this regard, a criminal proceeding is focused on the culpability of the perpetrator at the expense of the harm suffered by the victim, which is key to the civil process. In my view, this makes the civil proceeding not only a second-tier complement, or replacement when criminal remedies are unavailable, but rather a meaningful option in its own right.

60 William L. F. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming, 15 LAW & SOC’Y REV. 631 (1980).
62 Van Schaack, supra note 61, at 156.
64 Van Schaack, supra note 61, at 156.
66 However, tort law, even in its corrective form, may be limited in providing victims with a sense of retribution, which, as observed below, is key to some victims’ motivations.
Furthermore, being accorded fair procedures before a neutral and respectful decision-maker may provide a surrogate for apology and repentance from responsible parties. The very process of a court determining the validity of a claim forces an examination of the historical record, even if the outcome is ultimately not successful. Where it is successful, tort litigation also offers the promise of a reordering of one’s worldview of good and evil that ascribes new meaning to a traumatic experience. Thus, litigation can generate a form of collective memory, particularly in the face of counternarratives that would deny violations or portray victims as blameworthy. Finally, in most personal injury suits, the enforcement of the applicable legal right is achieved through a money judgment quantifying the harm. A damage award as a medium of social meaning marks a “spiritual victory,” recognizes concrete damage to individuals, and is symbolic of a plaintiff’s loss. Where an award can be enforced, money damages provide economic support to enable rehabilitation and reintegration into society and confer social standing on plaintiffs.

Violent asymmetric conflicts—particularly those marked by a racial, ethnic, or religious divide—bear similarities to the situations discussed above from both the victims’ and the perpetrators’ perspectives. They are often characterized by chaotic situations, commonly leaving victims with lack of information about what happened to them or their loved ones. Such conflicts sometimes involve concerns and frustrations resulting from grievances that transcend the specific

69 See generally Jules Lobel, Success Without Victory: Lost Legal Battles and the Long Road to Justice in America (2003) (discussing the impact of failed cases on processes of social change). This judicial record can then enhance and further focus the fact finding and reporting efforts of human rights documentation groups. Terry Collingsworth, The Key Human Rights Challenge: Developing Enforcement Mechanisms, 15 Harv. Hum. Rts. J. 183, 197 (2002) (“The often thorough and well-documented human rights reporting that is occurring today will finally have a specific context for assisting in the enforcement of human rights norms.”).
70 Sarat, supra note 58, at 366 (“[T]he litigated case can be used to create a record, and the court can become the archive in which that record services as the materialization of memory.”); Mark Osiel, Mass Atrocity, Collective Memory, and the Law 209–39 (1997) (discussing the role of law—particularly of trials involving state abuses—in forging collective memory).
71 Lobel, supra note 69, at 8.
dispute at hand. In this sense, though victims’ claims are individual, they are part of a larger dispute—that is, the conflict itself. Resolving the dispute may thus require responding to such underlying concerns, similar in some ways to a class action.⁷²

Thus, while some of the benefits of the tort system do not apply to asymmetric conflict settings more generally as they do to human rights abuses, many of them do. For instance, the opportunity to receive information about the events that transpired and stand on equal footing and confront a much more powerful adversary,⁷³ are key in both. In addition, the need for official recognition, through an apology or money damages, may well apply to civilians injured by another country’s security forces, particularly against the backdrop of deep political, ethnic, or religious divides.⁷⁴ In this sense, I argue, the tort system provides three key benefits in asymmetric conflict settings, flowing from both its outcome and process: compensation (outcome), victim participation (process), and government accountability (process). However, as discussed below, these situations are also prone to the same problems tort systems typically raise.

3. Flaws of tort litigation in asymmetric conflict

For all their benefits, tort systems also suffer from many flaws, which may make the process of bringing a civil lawsuit particularly frustrating and unsatisfying for conflict victims, and difficult to navigate from the injuring state’s perspective. Lawsuits tend to drag on for years, during which victims do not receive any form of remedy for their injuries.⁷⁵ Litigation is costly, too.⁷⁶ Beth Van Schaack describes the difficulties plaintiffs face:

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⁷² See Van Schaack, supra note 55, at 2323–24 (“while individual suits involve the allegations of only the named plaintiffs, such suits often manifest a representational quality and as such are capable of accommodating a more contextual and comprehensive consideration of repression beyond that suffered by the body and to that suffered by the body politic.”) However, oftentimes claims are not sufficiently similar in their fact patterns to justify consolidating them into an actual class action. On the Israeli case, see Section III.A, supra.

⁷³ As Jason Solomon puts it, this is not an aspiration for an “eye for an eye”-style justice, but rather “eye to eye justice.” Solomon, supra note 30, at 1822.

⁷⁴ For an account of the complex relationship between conflict (be it ethnic, religious or political) and dispute (usually legal) resolution, see Carrie Menkel-Meadow, The Historical Contingencies of Conflict Resolution, 1 INT’L CONFLICT ENGAGEMENT & RESOL. 32, 37 (2013).

Parties to a civil suit are constrained by the imposed order of procedural and evidentiary rules and plaintiffs may find conforming their testimony to justiciable legal claims and admissibility rules to be limiting and alienating. In particular, plaintiffs may not be allowed to reenact their whole story or emphasize aspects that are important to them but “irrelevant” from the perspective of the legal process.

In addition, litigation may also retraumatize victims, especially considering power differences between plaintiffs and defendants that are common in asymmetric conflicts. Since litigation is inherently adversarial, defendants are entitled to defend against the accusations leveled at them. In practice, defendants’ line of defense may involve attempts to discount a plaintiff’s account through rigorous cross-examination and the presentation of contrary or impeaching evidence. Where conflict victims do not relate the memories of their experiences in a consistent sequential manner, a defendant’s aggressive cross-examination on credibility and accuracy can do real damage.

As Jamie O’Connell explains, “[l]ots of survivors compartmentalize the issues and retrieve the memories in disjointed fashion to protect themselves from being overwhelmed by the whole memory of their trauma. For them, explaining meticulously what happened would require putting these pieces together and could bring the whole memory flooding back.”

Litigation is particularly costly when it comes to negligence. See Richard A. Posner, Economic Analysis of Law 181 (7th ed. 2007). There are indications that trials are very costly and that this cost sometimes outweighs the likely return. Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 517–18 (2004). However, studies of discovery costs (based on lawyer surveys) indicate that these costs—often thought to be very high—are generally proportional to the value of the case. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules 28, 43 (2009).

For instance, the prohibition on presenting evidence regarding the defendant’s actions beyond those contained in the lawsuit, which is considered prejudicial, even though it may seem quite relevant to the victim/plaintiff.

Van Schaack, supra note 55, at 2320.

See Jamie O’Connell, Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?, 46 Harv. Int’l L.J. 295, 323–26, 331–32 (2005) (noting the potential for a legal proceeding—both civil and criminal—to adversely affect victims by resurrecting psychological difficulties that they were already able to set aside).


See generally Jane Herlihy et al., Discrepancies in autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study, 324 Brit. Med. J. 324, 324 (2002) (presenting research showing that discrepancies in accounts by victims of extreme trauma is not necessarily indicative of a lack of credibility).

See O’Connell, supra note 79, at 333 (citing an interview with clinical psychologist Mary Fabri).
Furthermore, the plaintiff must be prepared to lose her case, regardless of the harm suffered, which can create deep anxiety over the course of the suit and upon the announcement of a negative verdict. Although some measure of anonymity may be available, civil litigation also forces plaintiffs into the public eye, which can render them and their loved ones vulnerable to social sanctions. Such ramifications may occur within plaintiffs’ own community, as suing for money damages could be considered legitimizing foreign involvement. Another key issue is settlements reached in the shadow of the tort system, which, as discussed below, was common under the Israeli compensation regime during the 1990s.

Out-of-court settlements are a prevalent feature of civil litigation, which presents a barrier to leveraging tort lawsuits towards public goals. As Ellen Berrey and her colleagues note regarding labor cases, secret settlements under the adversarial system often prevent plaintiffs from vindicating their rights and from experiencing litigation as a tool to restore their dignity. Furthermore, as indicated by the term “asymmetric,” these conflicts entail an inherent power imbalance between the parties—military forces facing individual, often

83 See Van Schaack, supra note 55, at 2321 for examples.

84 In the Israeli-Palestinian context, one plaintiffs’ lawyer noted a tragic case in which a Palestinian plaintiff who won a case was later murdered, presumably by relatives who were after her money. Interview with PL17 (Feb. 2016). See also Van Schaack, supra note 55.

85 This concern has been voiced in the Israeli-Palestinian context. See George E. Bisharat, Courting Justice? Legitimation in Lawyering under Israeli Occupation, 20 LAW & SOC. INQ. 349, 364 n.64 (1995) (noting lawyers’ concern that joining the Israeli bar would acknowledge the permanency, if not the legitimacy, of Israeli occupation).

86 See Section III.A., supra.

87 On the prevalence of settlements in tort litigation, and the challenges they present, see Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994) (questioning the assertion that settlements are better than trial); Nora Freeman Engstrom, Sunlight and Settlement Mills, 86 N.Y.U. L. REV. 805 (2011) (arguing that while high-volume personal injury firms are accomplishing many of the goals of no-fault mechanisms, they do so out of the light of day, which creates ethical issues); Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 JUDICATURE 161, 162–64 (1986) (analyzing 1649 cases in five federal judicial districts and seven state courts and examining how they were resolved).

88 ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 265 (2017). Relatedly, when discussing the U.S. Army’s compensation mechanism for injured civilians in Iraq and Afghanistan, John Witt notes the use of “grids and tables that provide guidance on the way to resolve the kinds of cases that recur again and again.” John Fabian Witt, Form and Substance in the Law of Counterinsurgency Damages, 41 LOY. L.A. L. REV. 1455, 1477 (2008). This analogy speaks to the similarities between a no-fault and a tort-based mechanism that relies heavily on out-of-court settlements. This issue is further discussed in Section IV, supra.

Finally, a common argument against the use of tort law in conflict settings is that the tort system is ill-equipped to handle the unique set of risks involved in combat.\footnote{See, for example, the view expressed by Chief Justice Aharon Barak in HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 1 (2006) (Isr.), and Justice Amit in CA 1459/11 The Estate of Hardan v. The State of Israel—Ministry of Defense (2013) (Isr.). See also Atif Rehman, Note, \textit{The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act}, 16 IND. INT’L & COMP. L. REV. 493, 517–18 (2006) (arguing that tort law is an inappropriate tool for dealing with damage caused by military activity).} Critics contend that the risks in times of war are greater in scope and more diverse in kind than in times of peace, and that there are significant difficulties obtaining evidence in cases concerning war damage.\footnote{See the respondent’s arguments in \textit{Adalah}, supra note 90. Further, since military activity is routinely hazardous, the presumption of ultra-hazardous activity is inapplicable, as are other evidentiary rules of tort law. Ronen, supra note 12, at 219. In this context, a case that merits mentioning is \textit{Johnson v. Eisentrager}, 339 U.S. 763 (1950). In this World War II case, the U.S. Supreme Court expressed deep skepticism about allowing claims against military officials during wartime because the Court was concerned that such claims would interfere with the military’s ability to conduct the war effectively. The case was later cited in many of the “war on terror” cases that were litigated in the U.S. between 2002 and 2008.} Tort law also envisages a dispute between two individuals, while military activity typically generates mass claims, and involves governmental policy and budgetary considerations that are difficult to adjudicate.\footnote{Ronen, supra note 12, at 220.} As John Witt notes, from the state’s perspective, there is an inherent difficulty to reconciling the goals of tort law with strategic war goals.\footnote{Witt, supra note 88, at 1467.} However, the combat exclusion, included in many countries’ tort legislation, may be sufficient to adapt the law of torts to conflict situations and release the state from liability only for those claims arising from full-fledged warfare, as opposed to a variety of other incidents that occur in low-intensity, simmering asymmetric conflicts.\footnote{See the Court’s opinion in \textit{Adalah}, supra note 90, at ¶ 41.} In other words, I argue that the diverse incidents that can cause civilian injury in asymmetric conflicts, such as car accidents, checkpoint abuses, and use of riot control techniques, do not justify a blanket denial of liability for all conflict-related situations.
C. No-Fault as an Alternative

That said, these disadvantages of the tort system may suggest that a more streamlined process, such as a claim facility or compensation fund, are better suited for this setting. A “no-fault” mechanism, which does not require showing fault or negligence on the part of security forces involved, promises to be less costly and much faster than tort litigation. A no-fault system would potentially reduce variability between tort lawsuits, promoting horizontal equality and eliminating windfall awards and the combative, adversarial nature of the tort system. However, such a no-fault system typically would not provide information to claimants, nor would it allow them to have their “day in court” or experience empowerment through the legal process. It thus gives precedence to efficiency and economy over values such as participation, accountability, and transparency. Arguably, military considerations may need to circumscribe the latter values. But is this trade-off worthwhile?

While studies of victim compensation regimes in other contexts often focus on monetary interests as the main objectives for victims, multiple other

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95 As discussed below, such payments are considered “ex gratia” (out of kindness) as there is no proof of liability. Marian Nash Leich, Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis, 83 AM. J. INT’L L. 319, 319–24 (1989); Harold G. Maier, Ex Gratia Payments and the Iranian Airline Tragedy, 83 AM. J. INT’L L. 325, 325–32 (1989) (discussing compensation offered by states for mistakenly targeting civilians).

96 See Rolph, supra note 25. However, such programs often do not deliver. See, for example, critique offered by Freeman Engstrom, supra note 87.

97 See generally critiques on the tort system, supra note 75.

98 Linda S. Mullenix, Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far, 71 LA. L. REV. 819 (2011). However, at times, such mechanisms do allow victim participation through meetings with the Special Master. In the 9/11 case, victims were given this opportunity, which many seized. Kenneth Feinberg, Special Master of the 9/11 Victim Compensation Fund (VCF), apparently met with nearly 1000 families. Robert M. Ackerman, The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy, 10 HARV. NEGOT. L. REV. 135 (2005). Victim participation can also be achieved through a town-hall format, as done in the Gulf Coast Claims Facility for the BP oil spill. See Mullenix, supra note 98.

99 However, according to Nora Freeman Engstrom, the promises of no-fault mechanisms often go unfulfilled, as was the case with the Vaccine Injury Compensation Program (VICP) and auto no-fault regimes in the U.S. See Nora Freeman Engstrom, A Dose of Reality for Specialized Courts: Lessons from the VICP, 163 U. PA. L. REV. 1631 (2015); Engstrom, supra note 27.

100 This was a common approach towards the VCF for those who were injured or lost a family member in the September 11, 2001 terrorist attacks. Following the 9/11 tragedy, victims were faced with a choice between cash payment available through VCF and the (limited) pursuit of tort litigation. Viewing this choice in the expected value terms that are standard in legal scholarship and the economic analysis of litigation (see Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LIT. 1067 (1989), and Section II.A., supra), Feinberg saw it as “a classic trade-off between administrative speed and efficiency and rolling the
incentives drive victims. Conflict-related wrongs, in particular, often involve not just wrongful injury to material worth—harm that can be relatively easily quantified by a no-fault mechanism—but also injuries deserving of nonmonetary responses, such as acknowledgment and apology. Furthermore, legal nonprofits representing victims may wish to instrumentally use tort litigation to expose wrongs on a political—rather than only personal—level. A no-fault mechanism, especially when it fails to include other process-related features offered by the tort system, would not support such needs.

Gillian Hadfield’s work on VCF empirically supports this argument. From surveys of and interviews with claimants who chose to litigate following injuries caused by the 9/11 attacks, who constituted only 3% of claimants, several interesting findings arise. First, in listing the reasons that led them to litigate, respondents did not mention the potential for obtaining a higher payout. Instead, they recited considerations such as punishing those responsible, wanting to find out more about what happened, and a desire to promote change and prevent similar events from reoccurring. Hadfield, supra note 32, at 661–62. Furthermore, litigating respondents perceived the money from VCF as “hush money.” Id. at 661. The reasons to file with VCF emerged as capitation to immediate financial need; capitation to age (in other words, litigation would take years); being skeptical of litigation’s ability to achieve its desired goals—especially given the caps and limits Congress had imposed; and difficulties obtaining legal representation. Id. at 666–69. Hadfield’s findings imply, then, that claimants were interested in accountability and information, yet most were forced to succumb to more mundane considerations. In this view, civil litigation serves a variety of functions for plaintiffs that exceeds its capacity to offer compensation. Of
Lastly, when considering the alternative of no-fault vis-à-vis tort litigation in asymmetric conflicts, it is important to examine the potential impact on defendants. Indeed, a trial provides the ultimate vehicle for individual accountability. Individual defendants’ lives are disrupted while they are forced to either defend their actions, often at a considerable cost, or accept a default judgment. Moreover, a plaintiff’s verdict in the civil context assigns legal and moral responsibility, even where the judgment remains unexecuted. In addition, as mentioned, tort litigation can have broader effects. It requires defendants to expose evidence, answer questionnaires, and often testify in open court, which carries positive externalities in the sense of “[s]unlight is . . . the best of disinfectants.” When it comes to institutional defendants such as security forces, discovery and evidentiary requirements may push for greater accountability than payments provided on a no-fault basis and encourage change of practices on the part of units that are repeatedly implicated.

With this in mind, I now turn to examining two examples representing different types of asymmetric conflicts, with injuring states choosing to handle compensation to civilians in two different ways: Israel’s tort-based mechanism for compensating Palestinian civilians injured as a result of Israel’s actions in the Territories, and the U.S.’s FCA and condolence payments, used to compensate local civilians for losses suffered by U.S. military actions in Iraq and Afghanistan.

III. CIVILIAN COMPENSATION IN ASYMMETRIC CONFLICT BY ISRAEL AND THE U.S.

A. Israel-Palestine

On January 16, 2007, in Anata, a Palestinian village north of Jerusalem, Abir Aramin, a 10-year-old Palestinian girl, was walking home from school. She


104 In this context, it is important to bear in mind that a key motivation for VCF was the desire to protect airlines from going bankrupt. See Mullenix, supra note 98. This may differ when suing a state.


106 As famously put by Justice Brandeis in LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1913).

107 See Schwartz, supra note 33 (discussing information gathered by police departments through civil proceedings and how it is used in performance-improvement efforts).
was then fatally wounded by a dull object, allegedly a rubber bullet shot by
Israeli soldiers controlling a volatile protest in her village. While Israeli
authorities decided not to bring criminal charges against the soldiers involved,
Abir’s parents filed a civil lawsuit against the Israeli Ministry of Defense. The
Jerusalem District Court awarded the family $430,000 in damages for their
daughter’s wrongful death.  

Abir’s family utilized a unique mechanism that enables non-Israeli citizen
Palestinians to bring civil actions for damages against the State of Israel before
Israeli civil courts, for property damage, bodily injury, or wrongful death
resulting from the actions of security forces in the Territories (the Claims). Claims are brought for incidents ranging from the use of riot control techniques during protest, to military counterinsurgency actions, checkpoint shootings, drone attacks, and full-fledged military operations. Indeed, the Claims are part of a broader Israeli policy originating in 1967 to allow Palestinians to petition Israel’s courts to challenge actions of the military regime. As such, the Israeli case presents a rare exception to typical bars on bringing claims against the injuring state in the context of armed conflicts, including in the U.S. As for


109 Israel’s security forces include the Israeli military (IDF), police forces (typically Border Police Unit (BPU)), and the General Security Service. MOD data cited below refer only to IDF incidents (including BPU), while the other authorities do not maintain independent records regarding tort lawsuits by Palestinians.

110 Importantly, Israel has a different relationship with the West Bank and Gaza. While in the former Israel still controls, to various degrees, both civil and security matters, in the latter, since 2005, Israeli involvement has significantly diminished. See generally EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2d ed. 2012).

111 Such as Operation Cast Lead—also known as the Gaza War—a three-week armed conflict between Gaza Palestinians and Israel during 2008–09.


113 Ronen, supra note 12, at 217 (noting that an individual lawsuit mechanism—like Israel’s—is rare in armed conflict settings). This exception stems, among other reasons, from the special status of the Territories as occupied and the lack of alternative recourse to Palestinians’ home forum. According to international law, Israeli control in the Territories is defined as a ‘military occupation’ and treated as temporary until a just and lasting peace in the Middle East will allow a withdrawal of Israel’s armed forces. Consequently, Israeli activity in the Territories is constantly criticized by the international community. For more on the Territories’ status, see BENVENISTI, supra note 110. Importantly, Palestinians are barred from bringing claims against Israel before Palestinian courts. MICHAEL KARAYANNI, CONFLICTS IN A CONFLICT: A CONFLICT OF LAWS CASE STUDY ON ISRAEL AND THE PALESTINIAN TERRITORIES 239 (2014) (discussing Palestinians’ lack of access to justice).
suing the State in torts, according to the Civil Wrongs (Liability of the State) Law (the Act), Israel is not immune to civil liability. Therefore, the State is not liable for an act performed through Combat Action, an exclusion that has been significantly expanded over the past fifteen years.

The Claims have several key characteristics. They represent individual cases—rather than a class action—and are based on injuries that resulted from different circumstances, much like typical personal injury lawsuits. The common cause of action is negligence, though Claims can also be brought for violation of statutory duty or assault. Claims are litigated at first instance in either magistrate or district courts, depending on the plaintiffs’ estimate of their damages. Only few make it to the Supreme Court on appeal, and they are rarely covered by the media. Damage awards range from approximately $1,000 in the smallest, property-related cases, to approximately $500,000 in the largest, personal injury cases. Finally, prior to the Second Intifada—a violent Palestinian-Israeli confrontation that started in September 2000—most

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114 See note 139.

115 It should be noted that alongside the civil proceeding, IDF sometimes opens a criminal investigation when a suspicion arises for soldier misconduct. Such investigations rarely result in an indictment. See Yesh Din, Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers against Palestinians (2011), http://perma.cc/8JE9-YVV5; Yesh Din, Exceptions: Trying IDF Soldiers Since the Second Intifada and After, 2000-2007 (2008), http://perma.cc/R9NU-UL3D.


118 Furthermore, when the fact patterns for a large group of cases are sufficiently similar to justify consolidating them into a class action, the cases are likely to fall under the combat exclusion discussed below.

119 The current threshold for bringing a case before district courts is 2,500,000NIS (~$670,000; exchange rate date Dec. 6, 2018).

120 Alongside its role as a High Court of Justice, the Israeli Supreme Court considers cases on appeal on decisions made by district courts. Decisions in Claims that were first litigated in magistrate courts are appealed before the district court. The Court rarely grants a right to appeal, for the second time, a magistrate court decision. Courts Law (Consolidated Text) 5744-1984.

121 Interview with NGOL9 (Mar. 2016) (notes on file with author). High-profile cases are typically those related to foreign nationals, and the attention given to those cases often prompts the State to settle them. Interview with GL8, MOD (Dec. 2015) (notes on file with author); Interview with PI9 (Dec. 2015) (notes on file with author); Interview with GL7, MOD (Jan. 2016) (notes on file with author).

122 Data are based on a content analysis I conducted of court decisions in the Claims towards a previous paper. See Bachar, The Occupation of the Law, supra note 117.
successful Claims ended with an out-of-court settlement.\footnote{Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author). According to plaintiffs’ lawyers, settlements accounted for 99 percent of their successful Claims. Interview with PL2 (Sept. 2014) (notes on file with author); Data regarding cases represented by PL2’s firm in the Claims, March 2015 (on file with author). One rare exception was PL14, who noted that most of his cases ended with a court decision. Interview with PL14 (Mar. 2016) (notes on file with author).} The tendency to settle Claims during those years is related to evidentiary challenges that both plaintiffs and the State face in the Claims,\footnote{For instance, Palestinians typically do not maintain records of their property, rendering property damage caused by Israeli soldiers difficult to prove. Interview with PL4 (Mar. 2015) (notes on file with author); Interview with PL2 (Sept. 2014) (notes on file with author); Second interview with PL7 (Aug. 2014) (notes on file with author). Changes in the nature of the Conflict, from a popular uprising during the First Intifada, to a full-fledged armed conflict in the Second Intifada, exacerbated these challenges, given the use of fire arms by both sides. Interview with PL2 (Sept. 2014) (notes on file with author); Interview with PL3 (Jul. 2015) (notes on file with author).} but also to the State’s desire to prevent public embarrassment by keeping incidents of security forces’ misconduct under a veil of confidentiality.\footnote{Interview with PL1 (Jul. 2014) (notes on file with author) (noting that 95% of his cases ended with a settlement, as it is cheaper, saves time, safer, and prevents public embarrassment); Interview with GL5, DA (Aug. 2015) (notes on file with author) (mentioning the State’s tendency to settle cases during the First Intifada era—70% of the Claims according to her estimate were settled—which stemmed, among other things, from a desire to protect national security).}

Beginning in the Second Intifada,\footnote{Since the outburst of the Second Intifada, the Conflict had generally been on a path of deterioration, with attacks from, and casualties on, both sides. See Michele K. Esposito, The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years, 34(2) J. PALESTINE STUD. 85 (2005) (giving a detailed account of the events of the Second Intifada); Johannes Haushofer et. al., Both Sides Retaliate in the Israeli–Palestinian Conflict, 107(42) PROC. NAT’L ACAD. SCI. U.S. 17927 (2010) (analyzing the Conflict’s escalation as a result of mutual retaliation).} though, the regime governing the Claims changed dramatically. While between 1992 and 2002 Palestinian plaintiffs were successful in 39 percent of the Claims adjudicated by the courts, between 2002 and 2012 they prevailed in only 17 percent.\footnote{Interview with PL2 (Aug. 2014) (notes on file with author). This change resulted from two main developments. First, the combat exclusion was expanded by the Israeli legislature.\footnote{Bachar, supra note 117.} Second,}
following a failed attempt to replace the Claims’ mechanism with a blanket immunity to the state for actions undertaken on its behalf in what is defined, even retroactively, as a “conflict zone,” which was struck down by the High Court of Justice, the state introduced numerous procedural requirements that limit Palestinians’ access to Israeli civil courts. As a result of these developments, it is currently almost impossible for Palestinians to successfully seek redress for injuries caused by Israeli security forces in the Territories through the courts. Two alternatives to the court-based mechanism set forth by the Act remain. First, claimants can submit an application for compensation to a committee comprising three Ministry of Defense (MOD) employees (the Ex

12/25/2001, 6/24/2002, 6/26/2002 (Hebrew). Consequently, after the Second Intifada erupted in 2000, resulting in massive harm to Palestinians and a high volume of Claims, Amendment (no. 4) was enacted. Under the Amendment, the Israeli legislature added a broad definition of ‘Combat Action,’ “including any action conducted to combat terrorism . . . and any action whose stated aim is to prevent terrorism, hostile actions, or insurrection committed in circumstances of danger to life or limb.” Pursuant to this Amendment, then, the pool of events considered combat-related—and thus exempt from liability—increased significantly. See Bachar, supra note 117, at 585–86.

This change was enacted in Amendment (no. 7) (the 2005 Amendment). According to the 2005 Amendment’s supporters, since both sides are in the midst of an armed conflict, each party should be responsible for its own damages. See Protocol of the Knesset’s Constitution, Law, and Justice Committee of 6/30/2005 (Hebrew). Rather than the financial burden the Claims imposed, the motivation for the Amendment was the sense that Israel is engaged in an armed conflict with the Palestinians, a context with which tort law is incompatible. Interview with GL7, MOD (Jan. 2016) (notes on file with author). See also Interview with GL9, IDF (Dec. 2016) (notes on file with author) (noting the IDF “checked what is happening in other countries and we saw that in many countries the road [for suing] is blocked . . . so we said why not block it too?”); Interview with GL12, MOJ (Mar. 2016) (notes on file with author); Interview with GL5, DA (Aug. 2015) (notes on file with author). However, the High Court of Justice (HCJ) declared the 2005 Amendment unconstitutional for violating Palestinians’ constitutional right to property. While the HCJ acknowledged that tort law “is not suited to dealing with damage caused in a time of war,” it did not accept the exemption that the State sought for combat and non-combat activities in the Territories, holding that “case by case examination should not be replaced by a sweeping exemption from liability.” Adalah, supra note 90, at 379, 383.

The policy that ensued from the HCJ’s decision essentially recreated the 2005 Amendment by using procedural obstacles, including shortening the limitations period on Claims and requiring the deposit of bonds as a pre-condition for litigation. For a detailed account of these procedural requirements, see Bachar, Access Denied, supra note 23 (describing the barriers Palestinians face in bringing claims against the Israeli government). As of 2014, Gaza residents are no longer eligible to bring Claims, as Gaza was declared “enemy territory.” Civil Tort Ordinance (Liability of the State) (Declaration of Enemy Territory—the Gaza Strip), 7431-2014 (Isr.). Passed in October 2014, the Ordinance applies retroactively, starting in July 2014. This Ordinance has been challenged in a lawsuit brought in the case of Nababin (CC (Be’er Sheva) 45043-05-16). As of this writing, the District Court has not ruled on it.

Gratia Committee). The Ex Gratia Committee has discretion to recommend awarding small amounts of compensation to Palestinians and foreign nationals injured by Israeli security forces, either based on independent appeals to the Ex Gratia Committee or following a court’s recommendation. The cases under the Ex Gratia Committee’s mandate are defined as “irregular and unique humanitarian instances” in which the State was not liable under the law. Second, a Claims Headquarters Officer (‘Kamat Tov’anot’) at the MOD also has the authority to compensate Palestinian claimants due to damage caused by military actions. Per MOD officials, though, this function is rarely invoked. Given the limited scope of these alternatives, they do not suffice to provide redress for injured Palestinians.

In sum, while the Israeli tort system managed to compensate a significant number of injured Palestinians during the 1990s, mostly through confidential out-of-court settlements, over the last 15 years, due to an expansion of the combat exclusion and procedural restrictions applied to Claims, it has become extremely limited. The data I collected emphasized the politicization of the Claims as a key explanation for their demise. Since alternative paths for compensation are also quite limited, Palestinians are left nowadays without any real prospects for redress.

B. U.S.-Iraq and Afghanistan

On May 29, 2006, on a steep road leading down from Bagram Air Force Base into Kabul, the brakes of a twenty-ton armored truck in an American
convoy failed. The truck crashed into the city, killing at least one person and injuring dozens of others. An angry crowd gathered at the scene and a riot began. In the crossfire, bullets that the Pentagon later traced to American weapons killed at least six young Afghan men, including a 13-year-old boy selling pizzas on the street. \(^{138}\) Since, contrary to the Israeli model, it is nearly impossible for foreign nationals to bring a tort lawsuit against U.S. military forces before U.S. courts, \(^{139}\) military claims commissioners paid damages to the families of the six men under a different mechanism—the Foreign Claims Act (FCA), \(^{140}\) which provides the U.S. military its main tool to compensate local civilians for losses unrelated to combat operations. \(^{141}\)

1. The Foreign Claims Act (FCA)

Offering monetary payments to foreign civilians harmed by U.S. military operations is a long-established practice, conceived of as a way to build the good will of the local population and help the military achieve its objectives. \(^{142}\) Civilian claims for harm became a part of military operations when Congress passed the Indemnity Act (American Forces Abroad) in 1918, which allowed U.S. military forces to provide monetary payments to civilians injured by U.S. military vehicles in France. \(^{143}\) Due to the geographical limitations of the 1918 Act, which focused on remunerating citizens of allied countries, Congress passed the Armed Forces Damages Settlement Act in 1942, later adjusted to become the FCA in

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139 This is due to a host of limitations, including a justiciability limitation on political questions and a broad immunity enjoyed by the U.S. government and service members. See Kenneth Bullock, United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation, 58 LAW & CONTEMP. PROBS. 139, 145–53 (1995) (discussing the various limitations on U.S. liability for harm caused to foreign civilians). For a recent, rare example of a successful case, see On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on behalf of Three Torture Victims, ACLU (Aug. 17, 2017), http://perma.cc/S3B8-32DK (last visited Oct. 27, 2018). Another historical exception is the Abandoned and Captured Property Act. This federal statute authorized individuals to file claims against the U.S. to obtain compensation for property seized during the Civil War. See Elizabeth Lee Thompson, Reconstructing the Practice: The Effects of Expanded Federal Judicial Power on Postbellum Lawyers, 43 AM. J. LEGAL HIST. 306 (1999) (discussing the Act and its impact on lawyers and courts). The Court of Claims decided more than 1500 cases arising under this statute between 1868 and 1875. Id. See also James G. Randell, Captured and Abandoned Property During the Civil War, 19 AM. HIST. REV. 65 (1913); Thomas H. Lee & David L. Sloss, International Law in the U.S. SUPREME COURT: CONTINUITY AND CHANGE 131–32 (David L. Sloss et al. eds., 2011).


141 Witt, supra note 88, at 1456.

142 Id.

143 Id. at 1458.
1956. The revised version made the Act available to any civilian who might be considered ‘friendly’ to U.S. interests. This change was especially important during the Vietnam War, when the FCA was mobilized to support non-insurgents.

The purpose of the FCA is “to promote and to maintain friendly relations through the prompt payment of meritorious claims.” It only allows payments to civilians harmed by “negligent or wrongful act[s]” committed by uniformed personnel or civilian employees of the Department of Defense, excluding contract employees. While the FCA applies all over the world, including in active combat zones, much like the Israeli Act it forbids payments for harm resulting directly or indirectly from combat, an exception known as the “combat exclusion.” Furthermore, the FCA is perceived by the U.S. as an ex gratia program, as payments are not distributed based on any legal obligation.

FCA claims may be filed for damage to real or personal property, personal injury or death incurred by acts carried out by U.S. military forces. The claims-making process is fairly standardized. When harm to civilians occurs as a result of military actions, soldiers are instructed to provide victims with information on

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144 AMSTERDAM INT’L LAW CLINIC & CTR. FOR CIVILIANS IN CONFLICT, supra note 20, at 29. Under the 1942 Foreign Claims Act a maximum of $1,000 could be awarded to a successful claim. However, when that amount proved too small to fulfill the law’s purpose, the War Department (which in 1947 split into the Department of the Army, Department of the Navy and Department of the Air Force) offered support for a change to the legislation, and successfully convinced Congress to amend the FCA. Id.

145 Foreign claims offices became so important in Vietnam that when payments were delayed in 1970, a riot broke out. Witt, supra note 88, at 1468. Importantly, the FCA should be distinguished from the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. The FTCA is the principal mechanism for individuals to bring tort claims against the U.S. government for torts committed by federal agents. 28 U.S.C. § 2680 includes a set of exceptions, including the “combatant activities” exception and the “foreign country” exception. 28 U.S.C. § 2680(j)–(k). For more on the FTCA, see generally GREGORY SISK, LITIGATION WITH THE FEDERAL GOVERNMENT (2016).


147 US Dep’t of Army, Reg. 27-20, Claims, Feb. 8, 2008, ¶ 10-3(a).


149 Combat activities are defined as “[a]ctivities 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.” US Dep’t of Army, Reg. 27-20, supra note 147, at 107.

150 See KEENAN & TRACY, supra note 16.

151 TRACY, supra note 148.

152 See KEENAN & TRACY, supra note 16.
how to seek a claim. Such information is sometimes distributed on a card containing instructions in English and the local language. Victims then need to complete a claims form, which can be obtained in Government Information Centers and includes date, name, age, citizenship, place of residence, and employment details for victims as well as details regarding the incident itself.\footnote{A separate victim report may also be sought, with interpreters called upon to facilitate.” Emily Gilbert, \textit{The Gift of War: Cash, Counterinsurgency and ’Collateral Damage,’} \textit{46 Security Dialogue} 403, 405 (2015), citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-699, \textit{Military Operations: The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan} (2007), http://perma.cc/GB99-EY4F, at 33–34.} At times, sworn affidavits by soldiers at the scene are included. Most important to the claims process are the written significant act reports (or spot reports filed by phone) that U.S. soldiers are mandated to complete whenever an incident involving harm to civilians occurs, since more credence is placed on evidence provided by the U.S. military.\footnote{TRACY, supra note 148, at 56. Other documents that may be included in an FCA claim are journal entries, maps or hand-drawn diagrams of the scene, and photographs of damaged vehicles and sometimes victims. Gilbert, \textit{supra} note 153, at 406.} Once a claim has been submitted, it is reviewed by a Department of Defense attorney to determine whether it meets the necessary criteria, which requires, in addition to the non-combat condition, that the claimant would not be an enemy of the U.S. or provide aid to an enemy.\footnote{Also, the claim must be filed within two years of the date the harm was incurred, similar to the Israeli limitations period. TRACY, supra note 148, at 74.} Claims are evaluated by Foreign Claims Commissions (FCCs), composed of one to three officers, usually judge advocates.\footnote{The Department of Defense designates one branch of the military to adjudicate claims for a particular location. 10 U.S.C. § 2734.} Claims up to $10,000 may be approved by an officer or employee appointed by the secretary concerned (namely, the Secretary of the Army, Navy, Air Force, or Marines). Claims above that amount require a higher approval through the chain of command. In general, claims are capped at $100,000. However, if the Secretary concerned believes that a claim exceeding that amount is meritorious, the amount in excess can be reported to the Secretary of the Treasury for payment.\footnote{AMSTERDAM INT’L LAW CLINIC \\& CRT. FOR CIVILIANS IN CONFLICT, supra note 20, at 29.}

Since 2003, the average payment for loss of life under the FCA is $4,200.\footnote{KEENAN \\& TRACY, supra note 150.} In Iraq and Afghanistan, $30–35 million have been awarded under the FCA between 2001 and 2007.\footnote{See id.; Paul von Zeilbauer, \textit{Confusion and Discord in U.S. Compensation to Civilian Victims of War}, N.Y. Times (Apr. 12, 2007), http://perma.cc/6VRV-2F8Q.} Of the 490 claims made between 2005 and 2006 in these countries, 404 were denied.\footnote{Witt, supra note 88, at 1471.} This considerable figure may be related to...
problems applying the FCA standards in a consistent fashion.\textsuperscript{161} Not only is the “friendliness” of a victim difficult to determine—especially in a counterinsurgency context, where, as noted, the line between civilian and combatant is often blurred—but so are the boundaries of the combat exclusion, which is a common basis for denying claims.\textsuperscript{162} For instance, damages arising out of terrorist assassinations—which are likely excluded by the FCA—may be denied in one case, but compensated in another.\textsuperscript{163} While some checkpoint shootings are treated as combat exclusion cases, others are resolved on the merits as either negligent or benign shootings.\textsuperscript{164} As Jonathan Tracy concludes, these inconsistencies create the distinct sense of arbitrariness in the application of the FCA.\textsuperscript{165}

2. Condolence payments

Since the Korean War, the U.S. has also maintained the ability to pay for civilian damages in incidents deemed combat-related through an alternative tool, called “solatia” or “condolence” payments.\textsuperscript{166} The main difference between solatia and condolence is that solatia payments are funded by a unit’s Operations and Maintenance fund,\textsuperscript{167} while condolence payments come from the Commanders’ Emergency Response Program fund.\textsuperscript{168} Both types of payments are given to civilians as an expression of sympathy for the harm they suffered.\textsuperscript{169} Each time

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\textsuperscript{161} Keenan & Tracy, supra note 16.

\textsuperscript{162} Gilbert, supra note 153, at 406. As stated in one rejected claim, “[t]he U.S. cannot pay your claim because your brother’s death was incident to combat. I am sorry for your loss, and I wish you well in a Free Iraq.” Tracy, supra note 148, at 3. See also Major Michael D. Jones, Consistency and Equality: A Framework for Analyzing the “Combat Activities Exclusion” of the Foreign Claims Act, 204 MIL. L. REV. 144 (2010) (offering a critique, based on the author’s experience as a Chief of Clients Services in Iraq in 2006, on the way the FCA is applied, and suggesting a framework for analyzing claims involving the combat exclusion).


\textsuperscript{164} Compare id. at Army Bates No. 785 - 786, with id. at Army Bates No. 762. In at least one case, army claims personnel stated that there is a presumption of combat exclusion when U.S. soldiers fire weapons. Id. at Army Bates No. 656 - 659. And yet, other claims for shooting deaths and injuries were compensated without mentioning such a presumption. Id. at Army Bates No. 385 - 388.

\textsuperscript{165} Civile, Adding Insult to Injury: US Military Claims Systems for Civilians 3 (2007), cited in Witt, supra note 88, at 1473 (noting that “The FCA ‘combat exclusion’ appears to be applied arbitrarily”).


\textsuperscript{167} Army regulations provide the authority for payments: “Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands.” U.S. Dep’t of Army, Reg. 27-20, Claims, Jul. 1, 2003, ¶ 10-10.

\textsuperscript{168} Tracy, supra note 148.

\textsuperscript{169} These payments were also customary in Vietnam, when the “going rate for adult lives was $33. Children merited just half that.” Cited in Gilbert, supra note 153, at 407.
the U.S. goes to war, a decision is made as to whether payments to victims or their families are appropriate in that country.\textsuperscript{170} In its report on monetary payments, the Amsterdam Law Clinic explains how “[a]t the beginning of both the Afghan and Iraq wars, U.S. Central Command [] declined to authorize the payments, leaving no claims system” outside the FCA regime.\textsuperscript{171} Later on, though, the Department of Defense determined that payments are customary in both countries.\textsuperscript{172} After that determination, until 2007, U.S. armed forces paid approximately $30 million in condolence payments to Iraqi and Afghan civilians.\textsuperscript{173} In Iraq, maximum individual payments are $2,500 for a death, $1,000 for a serious injury, and $500 for property loss or damage.\textsuperscript{174}

Like FCA payments, condolence payments are considered a gesture of \textit{ex gratia}, intended to ease civilian suffering, rather than provide formal reparation, legal compensation, or admission of fault or negligence.\textsuperscript{175} The individual or unit involved in the damage has no legal obligation to grant these payments, and, in fact, the soldiers or Marines who were present at the time of the aggrieving incident do not participate in the process at all.\textsuperscript{176} Compared to an FCA claim, there is a lower evidentiary threshold for condolence payments, and payments can also be made when an FCA claim has been denied.\textsuperscript{177} However, even once condolence payments were introduced in Iraq and Afghanistan, the U.S. army


\textsuperscript{171} AMSTERDAM INT’L. LAW CLINIC & CTR. FOR CIVILIANS IN CONFLICT, \textit{supra} note 20, at 14.

\textsuperscript{172} This determination was based on a cultural evaluation of whether such payments would be considered appropriate. In September 2003, the highest level of Command in Iraq (Combined Joint Task Force-7) authorized what it called “solatia-like” payments. In November 2005, condolence payments were approved for use in Afghanistan. \textit{Id.} While a November 2004 memo by the Defense Department authorizes condolence payments in Afghanistan and Iraq, other sources suggest that the army began making condolence payments in Iraq in September 2003, five months after the invasion. Witt, \textit{supra} note 88, at 1463.


\textsuperscript{174} U.S. ARMY, JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCHOOL, OPERATIONAL LAW HANDBOOK 270 (2007), http://perma.cc/38Y5-UEB4; Witt, \textit{supra} note 88, at 1463. Payments may be authorized up to $10,000 by a higher command. AMSTERDAM INT’L. LAW CLINIC & CTR. FOR CIVILIANS IN CONFLICT, \textit{supra} note 20, at 15.


\textsuperscript{176} Joseph, \textit{supra} note 170, at 244.

referred only a small fraction of the combat-excluded cases for condolence payments. Payments are distributed shortly after an aggrieving incident occurred, are generally nominal, and are paid either in cash or as in-kind expressions of sympathy through goods and services.

There are many examples of inconsistencies with respect to condolence payments. A condolence payment is viewed as precluding a subsequent FCA claim in one case but not in the next, though the FCA seems to support the latter approach. In one case, when a U.S. forces car killed two members of the same family, a maximum of $7,500 should have been claimable. However, extraordinary circumstances were found, and—for undetermined reasons—a total of $10,000 was awarded. As Ganesh Sitaraman concludes, “[b]ecause the condolence process is discretionary and decentralized to the level of particular commanders, the procedures and application have been inconsistent and largely ad hoc.” As a result, much like the FCA regime, the condolence process is highly uneven in application.

IV. PROMISES AND PERILS IN CIVILIAN COMPENSATION: EVALUATING THE MODELS

How should we think about these two distinct models for civilian compensation, against the backdrop of the goals and benefits of tort law on the one hand, and its limitations on the other? Which model provides more effective remedies? Which one better responds to victims’ needs and motivations and to the unique difficulties asymmetric conflict settings entail? And how does each do in terms of promoting government accountability? Through the two models, I consider the role monetary compensation assumes in asymmetric conflict, offering implications for designing programs that address the harm such conflicts cause to civilians.

178 Army judge advocates appear to have granted condolence payments in only 70 of the 233 combat-excluded claims in the ACLU FOIA request files from 2005 and 2006. Witt, supra note 88, at 1472.
179 Joseph, supra note 170, at 224.
180 Witt, supra note 88, at 1463.
181 Id. at 1472–76. The differential values attributed to death and injury appear to be the result of an “arbitrariness” of accounting. Id. at 1472.
183 GAO-07-609, supra note 153, at 25.
184 Gilbert, supra note 153, at 409.
185 Sitaraman, supra note 12, at 1794. Geographical location or the kind of incident—night raid or airstrike, for example—can also impact the access to soldiers to make a claim, providing yet another reason for inconsistency. Gilbert, supra note 153, at 410.
As explained above, the Israeli model has gone through significant changes, resulting in a much more restrictive compensation policy. In many ways, the changes this mechanism underwent are related to its susceptibility to public opinion, as the relative transparency of the claiming system exposed it to political pressures. This susceptibility may be considered in and of itself a flaw of this model—a side effect of the injuring state judging its own actions during an ongoing conflict. Yet, it is also an inevitable feature of any system rooted in democratic values. In this Part, though, I reflect—from a normative perspective—on the values promoted and problems evoked by the Israeli mechanism when it was still functional, during the pre-Second Intifada era. I seek to conduct this reflection behind a veil of ignorance as to the eventual demise of this model.

I first examine the potential benefits derived from the Israeli model in its original form. These benefits can be ascertained through Palestinian plaintiffs’ motivations to pursue tort litigation in Israeli courts. My interviews with such plaintiffs and their lawyers suggest that a variety of motivations undergirded their decision to pursue litigation. First, acknowledgement of wrongdoing on the part of the State of Israel. As one lawyer put it, “even when the State doesn’t pay, it’s a process of taking responsibility, acknowledging wrongdoing.” Second, information seeking; the hope that through the legal proceeding, particularly the discovery process, plaintiffs will learn more about what happened to them or their loved ones. In the words of one lawyer, “there is the issue of knowing what exactly happened. It’s not that [the plaintiffs] don’t know what happened but still the legal process allows lots of information they don’t have to become available and that means a lot to people who have lost their loved ones or that were injured themselves.” Third, vindication of rights; the opportunity to stand on equal footing with state representatives, those they view as responsible for the incident. This is also related to victims’ desire to act upon a perceived injustice, and the realization that other courses of action are unavailable. A final motivation was compensation itself, particularly in situations in which the victim was the breadwinner or when plaintiffs lack other

186 Interview with GB, Plaintiff (Jul. 2015) (notes on file with author); Interview with PL9 (Dec. 2015) (notes on file with author); Interview with PL16 (Mar. 2016) (notes on file with author).
188 Interview with CF, Plaintiffs (Jul. 2015) (notes on file with author).
189 Interview with PL9 (Dec. 2015) (notes on file with author).
190 Interview with BA, Plaintiff (Jul. 2015) (notes on file with author); Interview with PL2 (Sept. 2014) (notes on file with author).
191 PL9 noted that some people direct their frustration towards violence, while others seek legitimate, non-violent ways to cope with it. Interview with PL9 (Dec. 2015) (notes on file with author).
resources to recuperate from the incident. As one plaintiff explained, “[i]t was never my intention to file except my husband was the breadwinner.”192 Though the Israeli tort system did not always deliver on all these promises, its capacity to do so encouraged plaintiffs to resort to the courts.

Another benefit of the Israeli model is its potential to promote accountability for military actions in the Territories and in some cases even a change of practices. Plaintiffs’ lawyers emphasized the significant role tort litigation plays in this regard, particularly since criminal charges are rarely ever brought against soldiers.193 Senior lawyers in the field noted the gradual change in the military’s approach towards maintaining records of actions in the Territories; primarily how record keeping became much more rigorous. The lawyers noted further that the military introduced more careful rules of engagement and supervision of soldiers’ conduct. They attributed this change, at least in part, to the wave of lawsuits brought against the military following the First Intifada.194 The role of the Claims in inducing this change was acknowledged by government lawyers too.195 One government lawyer provided a concrete example. She mentioned that, in the 1990s, there were many checkpoint-related aggrieving incidents between Border Police Unit soldiers and Palestinians. Soldiers humiliated individuals during physical searches, cursed, and spat. Through the Claims, the DA became aware of these incidents and began pushing the Unit’s commanders to revise procedures and increase soldier supervision. According to that lawyer, these incidents did wane in later years.196

Yet, lawyers on the State’s side have also noted the difficulties associated with managing a tort case under the circumstances of conflict. A senior MOD lawyer mentioned the severe lack of information on the defendant’s side due to the inability to verify the reliability of medical records provided by plaintiffs. As he put it, “I’m often fighting with my hands tied.”197 These difficulties are exacerbated by soldiers’ lack of cooperation: either they are hard to get a hold of after being released from duty, do not remember what happened during a

193 Interview with PL4 (Mar. 2015) (notes on file with author); Interview with PL2 (Sept. 2014) (notes on file with author); Interview with NGOL2 (Aug. 2014) (notes on file with author).
194 Interview with NGOL7 (Mar. 2016) (notes on file with author); Interview with PL17 (Feb. 2016) (notes on file with author); Interview with PL2 (Sept. 2014) (notes on file with author); Interview with PL3 (Jul. 2015) (notes on file with author).
196 Interview with GL2, DA (Aug. 2014) (notes on file with author). GL2 mentioned that some lawsuits have even resulted in disciplinary proceedings to soldiers involved.
197 Interview with GL7, MOD (Jan. 2016) (notes on file with author). See also Interview with GL9, IDF (Dec. 2016) (notes on file with author).
chaotic situation, or are reluctant to take part in the legal proceeding. Finally, the State often experiences difficulties getting to the scene of the incident to investigate the case, as this may involve mortal danger. These evidentiary problems, the State argued during legislative proceedings, give rise to “situations of practical inability to defend against lawsuits, as well as false claims and plaintiffs’ attempts at fraud, while the state lacks the means to expose falsehoods and distinguish them from claims that are based on facts that did occur.”

As discussed above, these difficulties in applying tort litigation to conflict-related settings prompt the competing no-fault model, used by the U.S. military. This model does not require elaborate discovery, soldiers’ oral testimonies, nor damages calculation. Like insurance, these payments are bureaucratic—based on information recorded on standardized forms and administrators’ decision-making. Yet, here too, there are drawbacks, which I argue are even more troublesome. There is no recognition of responsibility on the part of security forces in appropriate cases, nor is there an opportunity for victims to articulate their stories, experience empowerment, or solicit information from the other side. The amounts allocated are ordinarily limited in size, and—particularly when it comes to symbolic payments—may be perceived as unsatisfactory, even insulting, compared to the scope of injury.

198 Interview with GL4, DA (Aug. 2014) (notes on file with author); Interview with GL7, MOD (Jan. 2016) (notes on file with author); Interview with GL8, MOD (Dec. 2015) (notes on file with author) (noting the use of polygraph as one way to handle evidentiary gaps).


200 Cited in STEIN, B’TSELEM, supra note 7, at 43.


202 These challenges reportedly led the State to push for a sweeping no-fault mechanism to replace the tort-based system in the 2005 Amendment. See Section IILA supra. Unlike the existing Ex Gratia Committee, which typically addresses non-combat incidents (Working Procedure, supra note 135; Interview with GL7, MOD (Jan. 2016) (notes on file with author); STEIN, B’TSELEM, supra note 7, at 15), the 2005 Amendment purported to apply to both combat and non-combat incidents. Ronen, supra note 12, at 218 n.171.


204 As Ronen notes, the practice of ex gratia payments “demonstrates that even when payment is voluntary and entirely at the discretion of the states, they do not exhibit great benevolence.” Supra note 12, at 216.
It should not come as a surprise, then, that not all victims welcome these payments. For instance, in response to a massacre conducted in 2012 by a U.S. soldier in the Panjwai district, near U.S. military Camp Belambay in Afghanistan, the brother of one of the victims was recorded as stating: “I don’t want any compensation. I don’t want money, I don’t want a trip to Mecca, I don’t want a house. I want nothing. But what I absolutely want is the punishment of the Americans. This is my demand, my demand, my demand and my demand.” In another incident in Helmand province, Habiburrahman Ibrahimi reports that one of his Afghan interviewees, Ismail, was ‘enraged’ by monetary payments offered by the military. In his words, “Afghans must seem like animals to the Americans if they can put prices on them . . . . If someone killed an American and offered to pay $10,000, would they accept it? These statements speak to victims’ desire of retribution, the lack of accountability attached to the U.S. model, and the payments’ small size. In this sense, since money can and does indicate an acknowledgement of responsibility, symbolic amounts can be perceived as an insult to victims; an attempt on the injurer’s side to trivialize the gravity of the injury. Worse yet, monetary payments can constitute a ‘license to injure’ of sorts, allowing states to risk causing harm to civilians so long as they subsequently buy out their injuries. Paired with the lack of evaluation of the cause undergirding the claim, these payments can be viewed almost as a cost of doing business, precluding any real potential for accountability. These concerns also relate to the question of who decides when and how much to pay. No matter the quality of training provided to military officers in charge of distributing payments, it is still the case that those responsible for the harm inflicted are being tasked with making decisions regarding how that harm should be valued and who should pay for it. There are no mechanisms in place for review or monitoring, and, as noted, little transparency is provided regarding the process of allocating payments. These

206 Habiburrahman Ibrahimi, Afghan Anger at US Casualty Payments, INSTITUTE FOR WAR AND PEACE (Apr. 9, 2010), http://perma.cc/PW8H-EYFG.
207 Id. Relatedly, recalling his experiences as a military judge advocate in Iraq from January 2002 to April 2005, Jonathan Tracy noted that ‘every Iraqi I spoke with on the issue expressed shock and disbelief I could only offer $2,500 for the death of a human being. Not one Iraqi ever said the amount made sense, or was equitable.’ Tracy later became an advocate at the Campaign for Innocent Victims in Conflict. See his 2009 testimony Assistance for Civilian Casualties of War: Hearing Before Subcomm. Of the Comm. on Appropriations, 111th Cong. 37 (2009) (statement of Jonathan Tracy, Associate Director, National Institute of Military Justice) http://perma.cc/H5UX-CVRT.
208 As the FCA stipulates, “[b]y accepting payment, claimant releases the U.S. government, and its employees and contractors, from future liability or claims.” GAO-07-609, supra note 153, at 51.
209 Gilbert, supra note 153, at 410.
characteristics cast doubt on the extent to which such a mechanism can effectively promote accountability. In the absence of serious post-event assessment of liability as a check on soldiers’ behavior, a concern arises for moral hazard; that soldiers will not take all necessary precautions to avoid anticipated harm and venture unwarranted risks.

Furthermore, the process by which military payments are paid does not allow victims to experience the aforementioned benefits. As Jeremy Joseph notes, since condolence payments are handed out with minimal interaction between soldiers and victims, there is no process of reconciliation. In this context, a comparison to the practice of *diya* payments in Islamic legal doctrine (*fiqh*) is informative. Rather than turn to the death penalty in the event of a murder, victims can choose to accept *diya*: fixed but generous monetary values determined based on a sliding scale, similar to that used with condolence payments. Yet, military payments differ considerably from *diya* with respect to process, as the latter is used to express forgiveness. Not only does the perpetrator acknowledge responsibility for the harm caused, but the decision to accept payment is determined in consultation with victims. This attention to victims’ perspective is absent from the military payments system.

The lack of victim participation is closely tied to the goals behind these payments, which are not conceived of as an obligation but rather as an expression of sympathy, humanity, and goodwill, aimed at supporting the military objective of “winning the hearts and minds” of the local population. The target audience of the payments is thus the Afghani or Iraqi public rather than the direct victim. The term frequently used to describe these payments, *ex...
"ex gratia", is Latin for “out of kindness,” denoting the lack of legal duty attached to them. Resentment towards this approach to victim compensation is expressed in the perceptions of Israeli plaintiffs’ lawyers towards the Ex Gratia Committee discussed above, which is used as an alternative to the Israeli court-based mechanism.216 According to several lawyers, these proceedings are perceived as demeaning, as they reflect the view that victims can be dismissed with no more than symbolic payments that underestimate the full extent of their suffering.217 Some plaintiffs’ lawyers also doubted the objectivity of the Committee218 and expressed concern that it allows the State to “have the cake and eat it too,”219 in the sense that it projects so-called consciousness to victims’ suffering without constituting a meaningful check on military decision-making. As Israeli MOD officials themselves acknowledged, it is also problematic from the victims’ perspective that their claims are decided by military personnel, whom they view as part of the system responsible for their injury.220 Given these views, it is not surprising that this mechanism is rarely used.221 These perceptions of ex gratia

216 See Section III.A, supra.

217 Interview with PL4 (Mar. 2015) (notes on file with author) (noting he refuses to take part in these proceedings); Interview with PL12 (Dec. 2015) (notes on file with author) (noting with regard to the Ex Gratia Committee that he is unwilling to participate in this “ugly game” and that he views it as “condescending.”); Interview with PL7 (Aug. 2014) (notes on file with author) (mentioning an instance in which the State was unwilling to offer an ex gratia payment, since the case had received much public attention and there was concern that such a payment would imply accepting responsibility for the incident). PL13, who typically represents Palestinian corporations, noted that the small amounts paid by the Committee would not assist in restoring the damage caused to his clients. Interview with PL13 (Mar. 2016) (notes on file with author).

218 Interview with PL10 (Dec. 2015) (notes on file with author).

219 Interview with NGOL9 (Mar. 2016) (notes on file with author); Interview with PL9 (Dec. 2015) (notes on file with author) (noting that the Committee does not grant victims any acknowledgment of the State’s wrongdoing as there is no admission of guilt on the part of the State).

220 See remarks by GL7 with regard to the military function of ‘Kamat Tov’anot’ noted in Section III.A., supra. Interview with GL7, MOD (Jan. 2016) (notes on file with author). See also Interview with GL8, MOD (Dec. 2015) (notes on file with author).

221 Interview with GL7, MOD (Jan. 2016) (notes on file with author); Interview with GL8, MOD (Dec. 2015) (notes on file with author) (also noting the scarcity of information available on the Committee); supra note 135. Interestingly, my conversation with a senior MOD lawyer revealed that the State believes Palestinians are not applying to the Ex Gratia Committee because they have other sources of compensation available. Interview with GL7, MOD (Jan. 2016) (notes on file with author). A noteworthy example of a case in which the Committee did provide compensation is that of 3-year-old Maria Amman, who was severely injured and lost her family in a targeted killing attempt in Gaza. She received a legal immigration status in Israel, a substantial monthly stipend from the Israeli MOD, and full coverage of her extensive medical treatment in Israel. See Interview with PL17 (Feb. 2016) (notes on file with author); Jacky Hu, HCJ: The Palestinian Girl Maria Amman Remains in Temporary Status for Two More Years, HA’ARETZ (Mar. 25,
compensation highlight this model’s ineffectiveness from the victims’ perspective and its inability to promote government accountability.

Table 1 below summarizes the differences between the two models, highlighting the advantages and drawbacks of each model:

Table 1: Outcome- and Process-related Features of the Two Models

<table>
<thead>
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<tbody>
<tr>
<td>Process Variables</td>
<td></td>
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</tr>
<tr>
<td>Legal Representation</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Claimants’ Voice and Participation</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Transaction Costs</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Process Lengthiness</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Transparency</td>
<td>+.*</td>
<td>-</td>
</tr>
<tr>
<td>Third Party Neutral</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Vulnerability to Political Pressures</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Outcome Variables</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liability/ Blame-Placing</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Adequate Compensation</td>
<td>+</td>
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</tr>
</tbody>
</table>

+ = process ranks better on the criterion in question
* considering confidential out-of-court settlements, which are not transparent

As evident in Table 1, the administrative, no-fault model prioritizes efficiency and durability over process and outcome fairness. The adjudicatory model lies at the opposite side of this trade-off. The next Section discusses a potential path forward considering the drawbacks of both models.

2015), http://perma.cc/G5MX-FSTP. This case attests to the type of exceptional cases in which the Committee tends to intervene.
V. PATH FORWARD: DESIGNING EFFECTIVE VICTIM COMPENSATION PROGRAMS IN ASYMMETRIC CONFLICT

Arising from these tensions is the question: Which system better responds to the complexity of asymmetric conflicts? I contend that a compensation program, apart from effectively providing compensation, needs to balance government accountability and transparency with victims’ other needs and motivations, including recognition, information, voice, and control. My analysis suggests that there is real merit to a tort-based system, despite its flaws, given its capacity for fact-finding, addressing victims’ needs, and prioritizing transparency and accountability. As argued above, tort law’s process-related objectives and benefits are just as important as—if not more important than—its outcome-oriented goals of monetary compensation, particularly in asymmetric conflict settings. In some cases, tort lawsuits can even promote a change in military practices. These significant benefits make the tort model, as a normative matter, more attractive for the settings in question. While I do not purport to suggest an elaborated, “one-size-fits-all” model to address civilian harm in asymmetric conflict, nor do I believe such a uniform model is desired, I offer below several guidelines policymakers ought to follow when designing compensation programs in such settings. Importantly, these process-related recommendations should be adopted alongside the guiding principle of providing adequate compensation to injured civilians when there was fault in security forces’ actions.

Recommendation 1: Incorporating Victim Participation

The process must incorporate some form of victim participation, the exact scope of which should be context-dependent. Indeed, tort litigation provides a platform for injured, disempowered individuals to use their voice—even if they do not ultimately prevail at trial. Forcing a court to seriously and publicly consider a plaintiff’s position is in and of itself a dignifying experience for the aggrieved. Furthermore, as civil recourse theory explains, plaintiffs are empowered through the opportunity to stand on equal footing with and confront their injurers. Therefore, when designing compensation programs in asymmetric conflicts, policy makers should include a process for victim participation, allowing victims to appear before the decision-maker, share their stories, and hear from government representatives.

222 See also Bachar, supra note 23 (arguing that a key component of the right to access to justice is the right to the litigation process, rather than only its outcome).

223 Granted, victim participation can also be achieved through alternative dispute resolution (ADR) procedures, like mediation. A mediation process may help obtain an apology from an official state representative more effectively than litigation, and this may be very significant to some victims. A story shared by an Israeli plaintiffs’ lawyer suggests the value of mediation in this respect. He mentioned a case of a foreign human rights activist, killed by an Israeli military sniper in Gaza.
Recommendation 2: Requiring Information Sharing

Litigation is also a platform for conducting factual and legal analyses of military activity in ongoing asymmetric conflict, activity that is often only quasi-military or even police-like in nature, and thus does not fall into the combat exclusion. Policymakers should thus include in the process an opportunity for plaintiffs to receive information about what happened to them or their loved ones during conflict incidents. On the flip side, government representatives should be required to expose such information except when deemed by a neutral third party as confidential. Even in the latter case, there might be an option of exposing partially redacted documents. This requirement will promote transparency, accountability, and may even lead to change of practices in appropriate cases.

Recommendation 3: Assuring the Neutrality of Third-Party Neutrals

It is crucial for policymakers to carefully consider the identity of third-party neutrals given potential impediments to their objectivity. In particular, further research is needed to assess the capability of judges from the injuring state to successfully fulfill this role, and the conditions under which domestic civil courts can assume this function. Taking into account political pressures that may be in play, there is also a need for constitutional checks on states’ ability to erode a tort-based compensation mechanism through procedural limitations, as was done in Israel. The failure of the Israeli mechanism should serve as a cautionary tale, emphasizing the need to carefully adapt the tort system to the reality of asymmetric conflict. One option for such adaptation would be a panel of decision-makers that includes a representative of the injuring state, a representative of the injured individual(s), and a third-party neutral. Granting the decision-making power, at least partially, to an objective third party, rather than keeping it exclusively in the hands of the injuring state’s security forces, can deemphasize the state’s power to wield discretion over harm that it has itself inflicted.

The case was referred by the court to mediation, and following a mediation session, the government lawyer turned to the victim’s mother to say that he is awfully sorry about what happened to her son, who seems to have been an incredible person. In response, the mother burst into tears and said that she has been waiting to hear those words for six years, since the legal proceeding was first initiated. The case was eventually settled, like many other cases in the pre-Second Intifada era. Interview with PL9 (Dec. 2015) (notes on file with author). Yet, as explained below (supra note 230), such procedures would have other significant drawbacks in asymmetric conflicts. Finally, victim participation can also be incorporated into criminal accountability mechanisms. See, for example, Erin Ann O’Hara, Victim Participation in the Criminal Process, 13 J.L. & Pol’y 229 (2005) (discussing the trend of victim involvement in the U.S. criminal justice system). However, since the focus of this Article is on civil accountability, criminal accountability tools exceed its scope.
Recommendation 4: Devising an Opt-out Option

Despite the deficiencies of the no-fault system, the program design should offer an opt-out option to turn to no-fault compensation.¹²²⁴ Such an opt-out option will allow victims who value efficiency and speed more than they care about the process elements of the program, such as participation and information, to choose the no-fault route.

A persisting concern, though, is the prevalence of out-of-court settlements in the shadow of the tort system.¹²²⁵ Under a settlement, similarly to a no-fault model, while money is being disbursed that might be interpreted as an acknowledgement of wrongdoing, there is often no explicit admission of guilt on the part of security forces, nor is there an assessment of cause or intent.¹²²⁶ That said, before a case is settled under the tort system, the stronger party—the state—is still ‘dragged’ into court by much weaker plaintiffs.¹²²⁷ Furthermore, a settlement may include a stipulation for a private apology. This suggests that even considering out-of-court settlements, the existence of an objective decision-maker still differs from a no-fault model, both in holding security forces accountable, and in addressing victims’ needs. A tort-based system that includes a process of negotiation and compromise also better ensures that compensation is not projected as an act of generosity as under a no-fault model, but as redress owed to victims in cases where there was fault in the state’s conduct.¹²²⁸

¹²²⁴ The opting-out process should be carefully considered, though, given the 9/11 VCF experience noted above, where plaintiffs had the opposite opportunity—to opt-out of the no-fault fund and bring a tort lawsuit (under significant limitations)—and scarcely made use of this option. See Hadfield’s findings, supra note 32.

¹²²⁵ As Witt points out, the decision-making in the U.S.’s military payments system is actually similar to “personal injury lawyers and insurance company claims adjusters: using cash to settle civilian claims against the armed forces.” Witt’s analogy to lawyers and insurers is made in an earlier version of his 2008 article (Witt, supra note 88). See also H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 232–34 (1980); Samuel Issacharoff & John Fabian Witt, The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law, 57 VAND. L. REV. 1571, 1602–06 (2004).

¹²²⁶ In this sense, payment is “unconditional and contractual, no longer based on the notion of one party’s responsibility.” Daniel Defert, ‘Popular Life’ and Insurance Technology, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 211 (Graham Burchell, et al. eds., 1991).

¹²²⁷ See Interview with PL4 (Mar. 2015) (notes on file with author) (noting benefits of the Israeli system, even when cases are eventually settled); Interview with NGOL9 (Mar. 2016) (notes on file with author); Interview with PL9 (Dec. 2015) (notes on file with author) (noting the process leading up to the settlement of some claims before the Second Intifada era, which included the State acknowledging its wrongdoing towards Palestinians). From a theoretical perspective, as civil recourse theory argues, since tort law confers individuals a power to pursue a legal claim alleging that they have suffered an injury flowing from a legal wrong to them by another, it is a matter for the injured individuals to decide how they pursue their claim.
Several vexing questions remain. First is the issue of confidentiality. As we have seen through the Israeli model, confidentiality is often a requirement in out-of-court settlements involving security forces, as it allows the state to avoid public embarrassment in cases of misconduct. But should the state be allowed to demand confidentiality as a pre-condition for compensation? Obviously, confidentiality compromises accountability. In this sense, informal negotiations and alternative dispute resolution (ADR) proceedings such as mediation—conducted behind closed doors—would risk disadvantaging weaker parties. That said, confidentiality may allow authorities to admit guilt and acknowledge wrongdoing in private in appropriate cases, which may be more important to some victims than public accountability. Future research should thus gauge conflict victims’ perceptions of confidential out-of-court settlements to better assess this tool. Second, what should be the composition of the panel adjudicating claims? Who should third-party neutrals be and how should they be selected? Can the courts of the injuring state successfully serve? As noted, more research is required to evaluate the adjudicatory body’s impartiality in such contexts. Finally, various practical and procedural issues need to be addressed, including legal counsel, translation services, the nature and scope of victims’ participation, and an appropriate physical environment to conduct hearings. The availability of legal counsel, in particular, can help bridge some of the inherent power imbalances pervading asymmetric conflicts.

Importantly, my recommendations should be applied based on the specific conflict’s characteristics. A key feature to be considered is the purpose of

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229 See discussion in Section IV, supra.

230 Indeed, using an ADR-based model would raise a host of concerns in this respect. As Owen Fiss notes in his famous critique of ADR, these procedures often involve a good deal of coercion, much like a civil analogue of plea bargaining (see Owen Fiss, Against Settlement, 93 YALE L.J. 1073, 1075 (1984) (critiquing the ADR movement for its pressure towards reaching a settlement)), and tend to disadvantage weaker parties, particularly ethnic and racial minorities subjected to negative biases (see Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359 (1985) (arguing that because ADR procedures frequently incorporate features that social science research has identified as facilitating prejudice, the procedures would produce biased outcomes); and more recently, Gilat J. Bachar & Deborah R. Hensler, Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don’t Know, 70 SMU L. REV. 817, 818 (2017) (reviewing empirical research testing Delgado et al.’s hypothesis and arguing that, “[i]n an era of increasing economic inequality and ever louder expressions of racial, ethnic, and gender prejudice, we have a responsibility to learn more about how public policies that continue to favor alternative dispute resolution are affecting less powerful groups in U.S. society.”)).

231 A related fundamental psychological question, which is beyond the scope of this Article, is whether societies (Israeli, American) can successfully judge their own actions amidst an ongoing conflict in which each side is entrenched in its own victimhood.
compensation, which, in turn, depends on the relationship between the injuring state and the civilian population in question—be it a prolonged occupation or a short-term military engagement. By examining the defining features of the conflict and avoiding “one-size-fits-all” solutions, we can improve the design of victim compensation programs to effectively address the implications of asymmetric conflicts worldwide.\textsuperscript{232}

VI. CONCLUSION

The complex reality of asymmetric conflicts, taking place outside the traditional battlefield and amongst civilian populations, prompts us to reconsider adequate paths for coming to grips with harm to civilians. This Article compared two archetypical models used by Israel and the U.S. to compensate civilian victims in the context of such conflicts, bearing in mind the differences between the type of military engagement in each case: a prolonged military occupation of adjacent territories versus a short-term operation, miles away from the country. On the one hand, as Witt maintains, “Tort law was hardly designed with the functional imperatives of the military in mind.”\textsuperscript{233} The incompatibility between tort law and military strategy raises difficulties in applying conventional tort principles to claims arising from conflict settings. In the Israeli case, this argument was used to justify curtailing tort lawsuits by Palestinians through both procedural limitations and expansion of the combat exclusion, demonstrating this model’s susceptibility to popular pressures. Moreover, even assuming we could reconcile the basic tenants of tort law and the reality of twenty-first century conflicts, tort law often struggles to achieve its goals even in areas where it is expected to do best.\textsuperscript{234}

On the other hand, the competing no-fault model raises even more significant problems, in particular lack of accountability and transparency and disregard towards victims’ role in the process. Though aimed at providing more horizontal equality than torts, such programs are also characterized by inconsistency,\textsuperscript{235} both in application of the rules governing eligibility and in

\textsuperscript{232} For an alternative, see the model suggested by Maya Steinitz for an International Court of Civil Justice that would have jurisdiction to adjudicate transnational corporations’ human rights abuses. See Maya Steinitz, Back to Basics: Public Adjudication of Corporate Atrocities Mass Tort, 57 HARV. INT’L L.J. (2016) (Online Symposium).

\textsuperscript{233} Witt, supra note 88, at 1467.

\textsuperscript{234} Id. (citing E. Allan Lind et al., In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System, 24 LAW & SOC’Y REV. 953 (1990) (surveying domestic litigants’ (dis)satisfaction with the tort system)). See also critiques on the tort system, supra note 75.

\textsuperscript{235} See Engstrom, Lessons from the VICP, supra note 99 (arguing that no-fault regimes are no panacea, as evident in the VICP case that failed to ensure predictability and speedier redress as it has promised).
damages allocation, leaving massive discretion to the military representatives charged with decision-making. This comparison is further intricated by the introduction of confidential out-of-court settlements between military representatives and conflict victims under the tort system, which bear resemblance to a no-fault system in their lack of transparency and failure to promote accountability.

This complexity necessitates more empirical research surveying and interviewing asymmetric conflict victims to evaluate their legal needs and motivations. Studies emerging from the legal consciousness and dispute processing traditions provide initial insights into such an evaluation. Gillian Hadfield’s findings on the 9/11 Victim Compensation Fund, for example, indicate that litigating respondents were searching for recourse more than they were keen on having their voice heard in court or on a higher payout. Yet, these findings require testing in an asymmetric conflict setting that would allow evaluating victims’ motivations to pursue tort litigation, their perceptions of a no-fault program, and additional aspects such as how victims conceive of their losses, who (or what) they blame, and how they perceive the legal process they encounter in terms of fairness and justice. Moreover, future research should assess the ability of the injuring state’s courts to successfully serve as decision-makers in conflict-related claims, vis-à-vis other potential third-party neutrals.

I argued in this Article that, despite the flaws of the tort system, tort law is valuable for asymmetric conflicts, due to its capacity to promote, in addition to monetary compensation, both government accountability and victim participation. Based on this finding, the Article offered several recommendations that policy makers ought to follow when designing compensation mechanisms in asymmetric conflicts.

Importantly, we must replace the ethos of providing compensation as a tribute of ex gratia, with an entitlement owed to victims by states involved in asymmetric conflicts in cases where there was fault on security forces’ part. Notwithstanding the difficulty to reconcile tort law with the reality of the battlefield, states involved in such conflicts should keep in mind that prudent military strategy does not align with lawlessness and lack of accountability.

236 See, for example, HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990).
237 See Section II.C., supra.
238 Lind et al., supra note 234.
239 It is possible that more data would encourage us to consider other forms of third party neutral-led processes rather than courts. Such processes would still be costlier than a no-fault system, perhaps to the extent of serving as a deterrent from unnecessary military harm.
Indeed, the traditional norms of protecting civilians in armed conflict as expressed in IHL and HRL were not designed with the characteristics of twenty-first century warfare in mind, a reality that entails mundane, quasi-military, and even police-like contact with civilians. Addressing the needs of civilian victims and the imperative of government accountability should thus be an inseparable part of confronting the challenges of modern warfare.