The Duty To Make Amends to Victims of Armed Conflict

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In the past decade, calls for monetary payments by warring parties to the civilians they harm have become significantly louder and more prominent. The law of armed conflict permits parties to harm civilians as long as the harm is not excessive to the concrete and direct military advantage they anticipate gaining through an attack. This Article examines the current state of international law regarding duties owed to victims suffering harm as a result of lawful *combat operations, and it discusses the moral obligations these warring parties owe to them because they caused the harm. The Article notes that civilians who suffer incidental losses as a result of lawful acts during armed conflict are not currently entitled to any compensation or reparation and that the parties responsible for causing them harm typically ignore them. This Article argues that the solution proposed by international civil society groups and practiced by some states, known as "making amends," meets an important but long overlooked moral obligation on warring parties.*

 Senior Humanitarian Policy Advisor, Oxfam America. This Article was written to articulate the theoretical foundation for the norm-setting aspects of the work of the Center for Civilians in Conflict, where I worked as Making Amends Campaign Fellow from 2009-2011. I am grateful for both inspiration and input from my friends Sarah Holewinski and Marla Keenan at the Center, as well as insight and guidance from J.H.H. Weiler, Eyal Benvenisti, Philip Alston, Naz Modirzadeh, J. Benton Heath, and Marc Cohen. I also feel compelled to acknowledge the millions affected each year by armed conflict; the possibility of a better future, particularly for the most vulnerable among us, gives purpose and meaning to the this sort of academic analysis.

I. INTRODUCTION

Hussein and his family lived in the outskirts of Baghdad when the United States invaded Iraq in 2003.[1] When the U.S. military engaged Iraqi armed forces around Baghdad, seven of Hussein's family members were killed in the crossfire. His son, severely injured in the fighting, lost some of his eyesight and hearing and experienced excruciating pain for years following the incident. After the attack, Hussein waited for the United States to apologize for his terrible loss and offer to help his son. To his great surprise, nobody came. When he asked two Iraqis working for the United States for help, they promised to look into his case. Still, no help arrived. Hussein has relied on the help of friends and strangers to care for his son and cope with his loss. "I can't believe they haven't even said they were sorry," he told the Campaign for Innocent Victims in Conflict (CIVIC), a nongovernmental organization (NGO) that has since been renamed the Center for Civilians in Conflict.[2] "In our culture, we apologize when we hurt someone."[3]

His consternation and tremendous suffering notwithstanding, Hussein may not have been a victim of any violation of law.[4] His tragedy recalls one of the most striking and troubling tensions in the law of armed conflict:[5] the tension between the inviolability of civilians on one hand and military necessity on the other. The legal tool used to balance these competing interests in international humanitarian law (IHL) is the proportionality standard, which forbids attacks when the expected harm to civilians is "excessive in relation to the concrete and direct military advantage anticipated," even when a military target is the object of the attack.[6] Though the proportionality standard is framed as a protective

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1. Information in this Part is from an Interview by Kristele Younes, Field Dir., Campaign for Innocent Victims in Conflict, with Hussein (Mar. 2011).

2. *Id.*

3. *Id.*

4. The basic facts of this story indicate that Hussein and his family were not the targets of the attack; this analysis presumes that the attack did not create harm that is excessive in relation to the concrete and direct military advantage anticipated. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

5. I use the terms "law of armed conflict" and "international humanitarian law" (IHL) mostly interchangeably, though I use the term "humanitarian" more often to signify the modern law that features a commitment to humanitarian ideals. Additionally, I should note that because the relevant rules of international law are assumed to be the same with respect to international and noninternational armed conflicts, I shall cite sources relating to either in order to support propositions relating to both. *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 537 (2005).

6. Additional Protocol I, *supra* note 4, art. 51(5)(b).

measure in Additional Protocol I to the Geneva Conventions (Protocol I),[7] it can also be understood as a standard that permits the parties to cause harm to civilians, as long as the harm is not excessive.[8] Legal scholars, moral philosophers, and military lawyers have long debated how strict the proportionality standard ought to be,[9] but its goals are widely agreed: it must seek to maximize the civilians' protection while also taking care not to impose costs or constraints that parties are not realistically willing to bear during the prosecution of a war.[10] Two truths emerge from this calculation. First, as long as wars are fought, civilians will suffer. Second, paradoxically, in order to minimize civilian harm, the law of armed conflict cannot prohibit harming civilians.

While international law may have sanctioned the attack that injured Hussein's son, that is cold comfort to Hussein's family. Despite lacking a connection to any party to the conflict or any discernible stake in its outcome, Hussein has seen his and his sons' lives turned upside down. Hussein considers his son a victim of the conflict and the U.S. military, irrespective of the legality of its actions. Accordingly, he has demanded aid and an apology from the government. Had his suffering resulted from a war crime or some other violation of international law, he might have been entitled to receive compensation or some other form of reparation.[11] But as the victims of a legally permissible attack, he and his son have no such rights, and the U.S. government is legally entitled to turn a blind eye to him—literally adding insult to injury—as parties in its position often do.[12] Hussein's unfulfilled wishes illuminate, on the one hand, a profound gap between the expectations of the many victims, the intuitive notions of justice, and the lofty humanitarian aspirations of the law of armed conflict and, on the other hand, the actual positive law of armed conflict. In this Article, I explore the origins and contours of this gap and argue in favor of a solution proposed by a group of NGOs in 2010: warring parties ought to make amends by offering help and recognition to the victims of their lawful attacks.[13]

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7. *Id.*

8. *See* Hamutal Esther Shamash, *How Much Is Too Much? An Examination of* Jus in Bello *Proportionality*, 2 ISR. DEF. FORCES L.R. 103, 106 (2005-2006).

9. *See id.*

10. *Id.* at 106-07.

11. *See* Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 536 (2003).

12. *See id.* at 551.

13. This Article does not explore whether civilians who directly participate in hostilities are owed a moral duty of amends. For a discussion on the implications of direct civilian participation in hostilities, see NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). It

Part II traces the development of the protection of civilians in the international law of armed conflict. Protection ideas first gained momentum on the basis of Christian just war theory, chivalry, and sovereign equality, not the humanitarian ideals that drive the law's development today. This historical survey is intended to explain the counterintuitive and counterhumanitarian law of compensation that operates during armed conflict.

Part III continues by detailing the modern law of compensation. The law of armed conflict has, for the most part, continued to subject individual rights to the prerogatives of the state, and the law of compensation is no exception. Part III then confirms that the law offers no recourse to individuals who suffer incidental losses as a result of lawful attacks. In recent times, states have increasingly offered assistance and apologies to the victims of their lawful combat operations, but these practices have not demonstrated the emergence of a rule of customary international law.

Finally, Part IV makes the case that parties to armed conflict have a moral obligation to make amends to victims by offering help and respecting their dignity as persons. I make two basic arguments in favor of such an obligation. First, drawing on Michael Walzer's just war theory, I argue that the failure of warring parties to make amends to lawful victims is not justified on grounds of military necessity and is, therefore, morally required during war as an extension of the Doctrine of Double Effect (DDE). Second, I argue that victims who do not receive amends from the responsible party suffer an injury to their dignity in addition to any material losses they may suffer. Stephen Darwall's concept of a second-person perspective helps to explain the nature of the injury and the expectations of victims. The centrality of the second-person perspective to humanitarian principles means that without an obligation to make amends, there exists a substantial gap in the modern law of armed conflict. Part V concludes by documenting the incorporation of the amends concept in recent reports and political outcomes at the United Nations as a reflection of its growing normative appeal.

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seems obvious that civilians who are harmed while directly participating are not owed amends by the parties that harm them. However, it is unclear whether parties attacked with the help of civilians should make amends if they harm those civilians collaterally later, after they have ceased to participate in hostilities. This topic could benefit from further research.

II THE HISTORICAL ROOTS OF CIVILIAN INVIOLABILITY AND COLLATERAL DAMAGE[14]

A. Civilian Immunity: Not Originally a Humanitarian Principle

The concept of immunity from attack was present as early as the era of ancient Greece, where temples, clergy, and envoys were protected and some forms of attack, such as the poisoning of wells, were proscribed.[15] But as Christian theologians developed the law of armed conflict in Europe, the dignity and humanity of victims were not central concerns. The theory of just war, first espoused by St. Augustine, posited that war was righteous punishment for sinners on behalf of God and that the wicked side's noncombatants were just as deserving of retribution as its fighters.[16] Though St. Augustine advocated against cruelty, his code was driven more by a desire to foster just warriors than to respect the dignity of victims.[17]

For the next thousand years, St. Augustine's just war theory more or less governed the conduct of hostilities.[18] The most significant innovation in this period, for our purposes, was the *pax Dei* movement, which extended protection first to clergy and later to monks, nuns, and finally to widows and noblewomen traveling without their husbands.[19] The movement began toward the end of the tenth century in response to the collapse of the Carolingian Empire and the increased feuding, which took a great toll on the Church and peasantry, that followed.[20] In the early eleventh century, some local councils extended protection to unarmed noncombatants.[21]

The *pax Dei* movement was fueled by a collective aspiration toward Christian behavior, not as a measure of the worth of protected persons. In fact, as civilian protection gained steam, European societies committed to a normative agenda that justified and reinforced social hierarchy. Medieval European nobles believed (or at least publicly

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14. I focus narrowly on those legal developments that informed the modern law of armed conflict, most of which took place in Europe. Other regions also developed restrictions on the conduct of hostilities, but since they mostly do not inform the modern law, they cannot illuminate its current disposition toward civilian harm. *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 12-25 (Dieter Fleck ed., 1995).

15. *See id.* at 13.

16. Colm McKeogh, *Civilian Immunity in War: From Augustine to Vattel*, *in* CIVILIAN IMMUNITY IN WAR 62, 63-64 (Igor Primoratz ed., 2007).

17. *See id.* at 64.

18. *Id.* at 66-67, 73.

19. *Id.* at 67-68.

20. *Id.*

21. *Id.*

argued) that their greater virtue justified their elevated position in society; as a result, knights, who were responsible for most of the fighting, were increasingly expected to conduct themselves honorably toward all, despite the fact that they reserved most of their respect for their peers and not the lowly peasantry.[22] Courts still judged knights mostly according to their conduct toward other knights.[23] Their conduct toward noncombatant peasants was only relevant insofar as it reflected on their character; the actual harm peasants suffered was inconsequential.[24] As a result, chivalry and humanity were often competing values in this era with respect to the worth of the civilian.[25] And it was chivalry, not humanity, that first formed the primary foundation for the protection of civilians during war.[26]

In the early sixteenth century, the theologian Francisco de Vitoria explored the novel concept that civilians are presumptively innocent of their principality's guilt and thus not deserving of punishment in war.[27] Soon after, Hugo Grotius effectively struck what was to become the final blow to the Augustinian just war theory with his masterwork, *De Jure Belli ac Pacis*.[28] One of Grotius's most significant theoretical moves was to justify some wars on the basis of sovereign equality, natural law, and custom, and on those bases to extend equal *in bello* rights to all combatants regardless of the justness of their cause.[29] Grotius also embraced Vitoria's theory that unjust states may be punished while their civilians may not be.[30] Still, it is not at all clear that Grotius actually placed much independent value on the noncombatant. For example, he thoroughly endorsed nonpunitive confiscation of civilians' property on the basis of their participation in the covenant of the state.[31] And it is apparent that aspirations to honor and civilization, rather than to humanity and universal dignity, still served as the primary normative

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22. *See* MAURICE KEEN, NOBLES, KNIGHTS AND MEN-AT-ARMS IN THE MIDDLE AGES (1996).
23. *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 14, at 14-15.
24. *See* KEEN, *supra* note 22, ch. 11.
25. *Id.*
26. *See* McKeogh, *supra* note 16, at 66-67.
27. *Id.* at 71-72.
28. HUGO GROTIUS, DE JURE BELLI AC PACIS (1625), *translated in* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (A.P.C. Griffin ed., 1901).
29. *Id.* bk. 1, ch. 2.
30. *Id.* bk. 3, ch. 12.
31. *Id.* bk. 3, ch. 13.

bases for his *jus in bello*, as best illustrated by his distinction between virtuous and treacherous stratagems.[32]

As Colm McKeogh points out, Grotius's move to eliminate guilt from the *ad bellum* equation laid the foundation for the principle of noncombatant immunity.[33] But Grotius condemned only unnecessary violence against civilians, that is, violence not required for military success.[34] Only a century later did Emmerich de Vattel condemn the targeting of civilians, based partly on the principle of humanity.[35]

Importantly, the humanism of Grotius and even Vattel was more closely related to the values of charity and moderation of the medieval period than the humanism we celebrate today. Just as knights treated civilians with respect as a measure of their own virtue, Grotius and Vattel prescribed respect for civilians as a standard by which civilized nations might be judged.[36] Neither paradigm places independent value on civilians' lives or welfare.

B. The Principle of Humanity in the Modern Law of Armed Conflict

A consensus in favor of civilians' inherent worth emerged after the Enlightenment and has been incorporated incrementally—and incompletely—into the law of armed conflict ever since. The late nineteenth century saw the dispatch of war correspondents to the battlefield, which brought a new awareness of war's brutality to the general public.[37] With it came a demand for greater civilian protection.[38] The fabled Martens Clause in the Hague Convention of 1899 marked the formal beginning of the humanitarian strain of the codified law of armed conflict by appealing to "the laws of humanity[] and the requirements of the public conscience" regarding the protection of the population as well as combatants.[39] In the early twentieth century, new technology severely tested the principle of civilian inviolability—at least insofar as it was understood to prohibit states from knowingly causing civilian harm.

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32. *Id.* bk. 3, ch. 1.

33. *See* McKeogh, *supra* note 16, at 73-74.

34. *See* GROTIUS, *supra* note 28, bk. 3, ch. 12.

35. *See* E. DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] (1758), *translated in* 4 THE CLASSICS OF INTERNATIONAL LAW bk. 3, at 282-83 (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916).

36. *See* GROTIUS, *supra* note 28; DE VATTEL, *supra* note 35, bk. 3, at 282-83.

37. *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 14, at 95.

38. *Id.*

39. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1805.

While a great deal of warfighting before then took place on battlefields far from civilian populations, long-range artillery, poison gases, and especially aviation increased the likelihood that attacks directed at military objects might incidentally harm civilians. Further, it allowed warring parties to minimize risk to their soldiers by exposing noncombatants to greater peril. This meant that the community of nations had to confront, more directly than ever, the conflict between military objectives and civilian welfare at the tactical level. For the first time, the notion emerged that some attacks directed at military objectives might be impermissible if they caused disproportionate harm to civilians. The 1923 Draft of the Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare included prohibitions on indiscriminate and disproportionate bombardment.[40] Though never adopted, these Draft Rules stand for a significant evolution in thinking about armed conflict, since they contemplate that humanitarian considerations might sometimes trump military considerations when the two are in tension.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 represented a radical shift in thinking about the law of armed conflict, not only in their substance, but also in their foundational principles. They claimed an extraordinary devotion to the dignity of individual human beings. The surge in humanitarian considerations was closely tied to the emergence of the international human rights movement, formally inaugurated by the United Nations General Assembly's adoption of the Universal Declaration of Human Rights in 1948.[41] The Universal Declaration of Human Rights references the "inherent dignity and . . . the equal and inalienable rights of all members of the human family," "the right to recognition everywhere as a person before the law," and "the free and full development of . . . personality."[42] In the Geneva Conventions, the requirements of distinction and noncombatant immunity are codified and accepted as foundational for the legal regime.[43] And on the basis of human dignity, common article 3 establishes a minimum standard of treatment for all persons in the control of any party to the Conventions during armed conflicts not of an

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40. *Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare Drafted by a Commission of Jurists at the Hague*, ICRC art. 24 (Dec. 1922-Feb. 1923), http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=B9CA3866276E91CFC12563CD002D691C.

41. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

42. *Id.* pmbl., arts. 6, 29.

43. Additional Protocol I, *supra* note 4, art. 51.

international character.[44] In his commentary on the Conventions, Jean Pictet recalls:

> The principle of respect for human personality, the basis on which all the Geneva Conventions rest, . . . is concerned with people, not as soldiers but simply as human beings, without regard to their uniform, their allegiance, their race or their beliefs, without regard even to any obligations which the authority on which they depend may have assumed in their name or in their behalf.[45]

While there is no doubting the influence of the human rights movement or its humanitarian foundations, Pictet may have overstated the influence of the principle of respect for human personality. First, and most obviously, the Geneva Conventions do not provide for the full enjoyment of human rights during armed conflict.[46] The proportionality standard, rejected as a radical imposition to militaries in the 1920s and still considered one of the Geneva law's most costly and restrictive provisions to militaries, also presents a stark challenge to human rights by sanctioning sometimes massive harm to noncombatants without legal process.[47] Sadly, the tension between humanitarian and military imperatives in the law of armed conflict is not fully resolvable: as the law becomes more protective of civilians, it imposes greater costs and obstacles on militaries, which in turn makes compliance less likely and may contribute ultimately to increasing the civilian carnage. Tradeoffs between humanitarian and military requirements will continue to feature prominently in the law of armed conflict as long as deadly and destructive wars are fought. To be fair, I do not think that Pictet actually

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44. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

45. ICRC, COMMENTARY TO THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26-27 (Jean Pictet ed., 1958), *available at* http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument.

46. Like much of the law of armed conflict before them, the Geneva Conventions balance military requirements against general moral obligations. *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 14, at 32. The adoption of international human rights law gave new power to humanitarian arguments, as reflected in the Geneva law, but it remained a balancing act. The role of international human rights law in armed conflict is widely contested but the parameters of the conversation are widely agreed: at one end, with only a few notable exceptions, most scholars and states agree that human rights have some role to play in armed conflict and should be enjoyed as long as military necessity or the law of armed conflict do not require otherwise; at the other end, human rights advocates concede that human rights law does not operate in wartime as it does in peacetime. *See* Geneva Acad. of Int'l Humanitarian Law and Human Rights, *Interaction Between Humanitarian Law and Human Rights in Armed Conflicts*, RULE OF LAW IN ARMED CONFLICTS PROJECT, http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php (last visited Nov. 22, 2013).

47. *See* Additional Protocol I, *supra* note 4, art. 51(5)(b).

believed humanitarian considerations to be uncompromised under the Geneva Conventions; rather, I would imagine that he believed the Conventions were intended to respect human personality insofar as military necessity can allow.

This Article does not attempt to arrive at the proper balance between humanitarian and military imperatives or between human rights law and the law of armed conflict. Rather, it focuses on a less thoroughly explored challenge to Pictet's humanitarian triumphalism than military prerogatives: the residual presence of traditional, antihumanitarian values that deny the dignity and personality of individual civilians and are unrelated to military necessity.

While I will explore the idea of dignity later in this Article, it should suffice at this point to observe that the concept of dignity requires, at the very least, that individuals be treated as possessing value independent of the needs of their state of nationality. In the context of the law of armed conflict, this is a relatively novel idea. In his aptly titled article, *The Humanization of Humanitarian Law*, Theodor Meron notes that common article 6/6/6/7 of the Geneva Conventions moves in this direction by prohibiting states from disclaiming the rights of their protected persons.[48] Georges Abi-Saab similarly observes that universal criminal jurisdiction and the provisions on repression of grave breaches are intended to create individual accountability, which stems from a view of humans as dignified agents.[49] And in perhaps the most direct clash between the traditional and humanitarian strains, reprisals—an extremely effective instrument for restoring compliance between parties—are prohibited against protected persons in the Fourth Geneva Convention[50] and against the civilian population altogether in Protocol I[51] on the basis of dignity.

These humanizing developments are innovations in a legal tradition that, as we have seen, is far from humanistic. The law of armed conflict has historically favored social stratification over equality, states over persons, and honor over justice. Today, the principle of human dignity is ever present in the codification, commentary, and practice of IHL, but it is important to remember that the modern humanitarian law is painted on a canvas made from significantly different values. In some areas, the

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48. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 252 (2000).

49. Georges Abi-Saab, *The Specificities of Humanitarian Law*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 265, 269 (Christophe Swinarski ed., 1984).

50. Fourth Geneva Convention, *supra* note 44, art. 33.

51. Additional Protocol I, *supra* note 4, art. 51(6).

painting remains unfinished and the canvas still peeks through. In other areas, such as the law of compensation, there is no painting at all.[52]

III. THE LAW OF COMPENSATION DURING ARMED CONFLICT

A. Compensation for Violations of the Law of Armed Conflict

The jumping-off point for any conversation about the law of compensation in armed conflict must be general principles of reparation. In 1928, the Permanent Court of International Justice (PCIJ) proclaimed, "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[53] States have long observed that notion as a basic tenet of international law. The United Nations International Law Commission reaffirmed the principle in its Draft Articles on State Responsibility in 2001: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[54] In the context of armed conflict, the Hague Convention and then Protocol I confirmed that states must make compensation for violations of the law.[55] The International Committee of the Red Cross (ICRC) states that parties to armed conflict are under a customary obligation to make reparations to other parties that they injure through violations of IHL.[56]

The obligation of one state to repair a breach of an obligation owed to another state serves the traditional purposes of the law of armed

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52. I do not mean to suggest that the humanitarian and honor-based strains of the law of armed conflict are perpetually at odds with each other. Usually, they are not. For example, the prohibition of perfidy in Protocol I, which traces its roots back to Grotius's condemnation of treacherous killing, was adopted because negotiators frowned upon the manipulation and violation of confidence between adverse parties. *See* ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1505-15 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS]. Today, a significant purpose of the perfidy prohibition is generally thought to be keeping noncombatants out of harm's way. *See* 2 ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 147 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter 2 ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW]. Indeed, given the nearly millennium-long evolution toward greater civilian protection on the basis of honor, chivalry, and sovereign equality of states, it would be impossible to attribute many of the Geneva law's innovations exclusively to the influence of human rights ideas even though many of them serve humanitarian purposes.

53. Factory at Chorzów (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

54. United Nations, Gen. Assembly, Int'l Law Comm'n, Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 31, U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001).

55. *See* Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV]; Additional Protocol I, *supra* note 4, art. 91.

56. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 537-50 (discussing rule 150, which applies in both international and noninternational armed conflicts).

conflict quite well. It demonstrates sovereign equality by putting all states on equal legal footing; it serves interstate justice by restoring the status quo ante and ensuring that some states do not wrongfully externalize costs onto others; it contributes to a stable and reliable legal order by holding states accountable for their behavior and creating incentives to suppress future violations. But to what extent does the law of reparation also serve humanitarian interests by helping victims, who suffer harm directly and often have acute material needs? States generally pass along reparations they receive to individual victims, but they are under no obligation to do so (and sometimes refuse).[57]

Whether states responsible for violations owe reparations to their individual victims is a hotly debated question, though the weight of the evidence suggests that they currently do not.[58] Emanuela-Chiara Gillard notes that the Hague and Geneva provisions only address a responsibility to compensate and do not explicitly designate any particular right-holder, leaving room for the possibility of an individual right to compensation.[59] But the background norms are permissive to states, so any additional duty of reparation owed to individuals must be affirmatively demonstrated.[60] In her excellent essay on this topic, Gillard surveys the case law and state practice and finds that while a few isolated cases vindicate the individual claimant, most individual victims are precluded from directly obtaining reparations for violations of IHL.[61] In stark contrast, victims of human rights violations are explicitly entitled to reparations for harm suffered.[62]

The question of individual claims for compensation and the controversy that surrounds it are together products of the clash between the traditional and humanitarian strains of the law of armed conflict that we have considered above. When the Hague Convention first codified

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57. Sometimes states agree to offset the reparations owed to each other, leaving victims without the help they need and deserve. *See, e.g.*, Nemariam v. Fed. Democratic Republic of Ethiopia, 491 F.3d 470, 473 (D.C. Cir. 2007) (reviewing claims by victims whose claims were offset in proceedings before the Ethiopia-Eritrea Claims Commission).

58. *See* Gillard, *supra* note 11, at 536; *see also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (proclaiming a victim's right to reparation for harm suffered, but, confusingly, only "as provided for under international law"). *But see* HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 537-50.

59. Gillard, *supra* note 11, at 536.

60. *See* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18, 32 (Sept. 7).

61. *See* Gillard, *supra* note 11, at 535-45.

62. *See, e.g.*, International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171. *See generally* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999).

the duty of compensation, it was certainly only intended to create rights and obligations between states parties.[63] When Protocol I reiterated the Hague compensation language verbatim in 1977,[64] the content of the obligations was presumed to be the same even as the normative background and assumptions had radically changed. As the ICRC Commentary on Additional Protocol I illustrates, the tension between the two strains is palpable in compensation law.[65] It acknowledges what at this point is an unavoidable intuition that wronged persons are entitled to compensation, but adds that they may only receive it through their own government.[66] The "through their own government" requirement is nowhere explained or rationalized in the ICRC Commentary on the Additional Protocols.[67] It can best be described as a vestige of the traditional strain of the law of armed conflict that reinforces the primacy of states at the expense of individual rights.

The goal of this Article is not to argue for an individual right to reparation for violations of IHL, but the case seems obvious enough. For our purposes, it will suffice to observe that the nonexistence of such a right cannot be justified on grounds of military necessity and greatly offends the supposed basis of contemporary IHL: the principle of respect for human personality.[68] For precisely that reason, civil society groups have decried the absence of an individual right of reparation as a gap in international law and have agitated furiously to fill it, both in practice and in law.[69] That effort is relevant to this Article insofar as the absence of an individual right to reparation and the absence of recognition following incidental losses represents a similar normative gap.

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63. Hague Convention IV, *supra* note 55, art. 3.

64. *See* Additional Protocol I, *supra* note 4, art. 91.

65. *See* ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 52, at 1043-44. The commentary also asserts that article 91 is a reflection of customary international law.

66. *Id.*; *see also* Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 497, 506 (2003) (arguing that article 91 confers on victims a right of compensation but not the capacity to assert that right against wrongdoers).

67. *See* ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 52.

68. ICRC, *supra* note 45, at 36.

69. *See* Zegveld, *supra* note 66, at 498-500. The International Center for Transitional Justice, a large NGO, maintains a reparations program entirely focused on obtaining redress for individual victims. *See Reparations*, INT'L CTR. FOR TRANSITIONAL JUSTICE, http://ictj.org/our-work/transitional-justice-issues/reparations (last visited Nov. 22, 2013).

B. Compensation for Losses Resulting from Permitted Combat Acts Under the Law of Armed Conflict

As we have seen, the PCIJ's original articulation of the right of reparation was rooted in a concept of state responsibility for internationally wrongful behavior.[70] The basic premise that reparation is only owed in respect to breaches of international law has been reiterated and codified extensively, both generally and specifically with respect to the law of armed conflict.[71] It follows that as a general rule, only the violation of a rule of IHL gives rise to an obligation to make compensation.[72] The law of compensation codified in the Hague and Geneva Conventions, which specifically addresses violations, does not contemplate compensation for harm caused through lawful means.[73]

Through the traditional, statist lens, the rationale for requiring breach as a predicate for compensation between states is especially strong in the law of armed conflict. In the just war era, the law applauded harm as righteous punishment in service of higher Christian values; since then, and particularly since the St. Petersburg Declaration of 1868,[74] the law has viewed the weakening of enemy forces as a legitimate objective, indeed one that is necessary to accomplish in order for hostilities to come to an end. Throughout its history, the law of armed conflict has aimed to regulate—not proscribe—harm to individuals. Therefore, the suggestion that parties ought to offer compensation for damage they cause to each other through lawful means and in the pursuit of their just and necessary ends seems ludicrous.

But the picture becomes more complicated when we consider that these lawful means often involve significant collateral harm to civilians and that these civilians possess inherent worth as human beings. If compensation is required only in respect to a breach of IHL obligations, warring parties are entitled under the law to cause civilian losses and then turn a blind eye to the victims. This has been the traditional approach, but the number of states and specific legal regimes offering some form of redress for civilian losses resulting from lawful behavior is rapidly

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70. *See* Factory at Chorzów (Germ. v. Pol.), 1927 P.C.I.J. (Ser. A) No. 9 (July 26).

71. *See* Hague Convention IV, *supra* note 55, art. 3; Additional Protocol I, *supra* note 4, art. 91.

72. Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 186 (2009).

73. Hague Convention IV, *supra* note 55, art. 3; Additional Protocol I, *supra* note 4, art. 91.

74. Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 CONSOL. T.S. 297 (signed in St. Petersburg).

growing.[75] Though these states and regimes share the novel view that all victims deserve a measure of recognition, they differ in one significant respect. One set of approaches aims to offer material help as a measure of sympathy and apology, which this Article explores in greater detail later as the concept of making amends.[76] The other aims to provide assistance to all civilians affected by armed conflict, regardless of whether the party making the offering caused the harm.[77] While some of the examples I offer below of each approach are poorly or inconsistently implemented policies or isolated events, that should not detract from the radical nature of their departure from tradition.

The first approach is characterized by states' offering help and recognition to their victims; these gestures are meant to signify states' taking causal responsibility for the harm and helping to meet immediate needs without admitting morally or legally wrongful behavior. The United States has the longest well-documented tradition of recognizing and mitigating civilian losses as a matter of policy. Beginning with its engagement in the Korean War (1950-1953), the United States has given its commanders discretion in some armed conflicts to offer *solatia*, payments made to express sympathy toward war victims.[78] The decision to authorize *solatia* was motivated at least in part by strategic considerations and perceptions of local cultural expectations.[79] In 2001, the United States' failure to authorize *solatia* in Afghanistan immediately after it commenced operations exposed a strategic vulnerability and opened it to charges of indifference to the plight of civilians.[80] The United States remedied the problem by authorizing *solatia* in 2005, when it became clear that the Taliban was gaining an advantage by offering aid in the

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75. Though this Article is concerned with amends for incidental harm in combat, there is a much longer history of compensation for *accidental* and *non-combat-related* acts. *See, e.g.*, William R. Mullins, *The International Responsibility of a State for Torts of its Military Forces*, 34 MIL. L. REV. 59, 63-64 (1966) (describing U.S. practice and the emergence of the Foreign Claims Act); *see also* HCJ 8276/05 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Def. [2006] (2) IsrLR 352 (Isr.) (holding that a blanket legislative ban on compensation for noncombat harm in areas designated as combat zones by the Minister of Defense is unconstitutional).

76. *See Amends*, CTR. FOR CIVILIANS IN CONFLICT, http://civiliansinconflict.org/our-work/amends (last visited Nov. 22, 2013).

77. *Id.*

78. Marla Keenan & Jonathan Tracy, Campaign for Innocent Victims in Conflict, *United States Military Compensation to Civilians in Armed Conflict*, RELIEFWEB 3 (May 2010), http://www.reliefweb.int/sites/reliefweb.int/files/resources/A8F90B05D58DDE504925773B001EB07C-Full_Report.pdf; U.S. Dep't of the Army, Army Regulation 27-20, Legal Services, Claims, 10-5 (2008).

79. *See* Keenan & Tracy, *supra* note 78, at 3.

80. *See* 1 CTR. FOR LAW & MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 176, 179-81 (2004), *available at* http://www.fas.org/irp/doddir/army/clamo-v1.pdf.

wake of U.S. attacks.[81] The United States has since offered condolence payments and formal statements of apology in respect to civilian losses that it caused through institutionalized claims systems in both Afghanistan and Iraq, and more recently in Pakistan.[82]

In recent years, the practice of apologizing and offering assistance to victims of lawful attacks has proliferated at a startlingly fast pace. Nowhere is this more visible than in Afghanistan, where multilateral cooperation, the sharing of best-practices, civil society pressure, and the strategic dynamics of counterinsurgency have pushed most troop-contributing nations to the International Security Assistance Force in Afghanistan to help incidental victims of their combat operations.[83] The practice has gained ground outside Afghanistan as well. For example, as of 2009, Australia maintains a standing Tactical Payment Scheme permitting Australian officials to make payments when the Australian military causes harm, whether or not the harm results from unlawful conduct.[84] Others have made amends in this way in isolated instances only. Yemen, for example, apologized and promised assistance to forty-two civilians injured in an airstrike against al-Qaeda in 2010.[85] The Darfur Peace Agreement, which was signed in 2006 but never fully implemented, requires recognition and compensation on the basis of causal, not legal, responsibility for losses in armed conflict.[86] The African Union Peacekeeping Mission in Somalia (AMISOM), a party to an ongoing armed conflict,[87] offered apologies and monetary payments

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81. *Id.* at 182-84; *see also* Keenan & Tracy, *supra* note 78, at 4.

82. Keenan & Tracy, *supra* note 78, at 4; *US Offers Solatia Payments to Pak*, TIMES OF INDIA (Dec. 23, 2011, 1:21 PM), http://articles.timesofindia.indiatimes.com/2011-12-23/us/30550240_1_nato-strike-last-month-pakistani-soldiers-nato-supply-routes.

83. *See* Chris Rogers, *Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces*, CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT 1 (2012), http://www.civiliansinconflict.org/uploads/files/publications/Addressing_civilian_harm_white_paper_2010.pdf.

84. *See Defence Act 1903* (Cth) s 123H (Austl.).

85. The proportionality, and hence the legality, of this attack cannot be confirmed, but Yemen did not admit legal liability. *See Yemen Apologises for Killing Civilians in Qaeda Airstrike*, GULF TIMES 17 (Mar. 4, 2010), http://www.gulf-times.com/pdflinks/streams/2010/3/4/2_346578_1_255.03.10.pdf.

86. The agreement would have set up a compensation commission to hear all claims, without prejudice to the jurisdiction of courts, of "people of Darfur who have suffered harm, including physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict." *See Darfur Peace Agreement*, DEP'T OF PEACE & CONFLICT RESEARCH princ. 200 (May 5, 2006), http://www.ucdp.uu.se/gpdatabase/peace/Sud%2020060505.pdf. However, key rebel factions refused to sign the agreement and the Sudan Liberation Movement, which along with the government of Sudan originally signed, subsequently withdrew. *Id.*

87. The conflict in Mogadishu, which involves protracted armed violence between governmental authorities and organized armed groups, would be classified as an internal or transnational armed conflict according to the test set out in *Prosecutor v. Tadić*, Case No. IT-94-1,

for camels they killed in attacks on al-Shabaab in 2009 and 2010.[88] In 2011, AMISOM declared that it would create a mechanism to more systematically address civilian harm through the establishment of a Civilian Casualty Tracking, Analysis, and Response Cell, which as of this Article is in the process of being established.[89]

The second approach is characterized by states' offering aid to victims generally in an armed conflict. These measures do not represent a state's taking legal responsibility, as making reparations would, or even causal responsibility, as making amends would. They also differ from humanitarian assistance as it is traditionally understood, which aims to be needs-based. Because this kind of victim assistance is harm-based, it stands for the important proposition that, at least in some quarters, the quantum of combat-related suffering may matter more than the existence of a legal violation in determining the assistance-worthiness of individuals. In perhaps the most well-publicized example, Turkey passed Law No. 5233 in 2004, providing compensation for death, injury, property damage, and other losses resulting from Turkish counterterrorism operations.[90] Georgia also offered rebuilding assistance to South Ossetians displaced by Georgian and Russian operations in the 2008 war between the two countries.[91] Harm-based assistance is also prominently featured in international instruments such as the Guiding Principles on Internal Displacement,[92] the Kampala Convention on Internal Displacement, [93] and the Mine-Ban Convention,[94] all of which require states to offer aid to victims in their respective territories, even when

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Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

88. *Somalia: AU Gives Compensation to Camel Traders*, MAREEG, http://www.mareeg.com/old_site/fidsan.php?sid=13988&tirsan=3 (last visited Nov. 22, 2013). This and the event in 2010 were confirmed in an Interview with an AMISOM Official (July 27, 2010). I withhold his name here for reasons of professional comity.

89. U.N. Secretary-General, *The Protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶¶ 28-29, U.N. Doc. S/2012/376 (May 22, 2012).

90. The law also provides compensation for losses resulting from terrorist activity. *See* The Law on the Compensation of Damages That Occurred Due to Terror and the Fight Against Terror (Law No. 5233) art. 1 (2004) (Turk.).

91. *See* Charli Carpenter, *Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict*, FOREIGN AFF., Mar./Apr. 2011, at 146.

92. Representative of the U.N. Secretary-General, *Addendum on Guiding Principles on Internal Displacement: Rep. of the Representative of the Secretary-General*, Comm'n on Human Rights, princs. 3, 25, 29, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (by Francis M. Deng).

93. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) arts. 5(1), 9(1), 12(2), Oct. 23, 2009, 49 I.L.M. 86.

94. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 6, Sept. 18, 1997, 2056 U.N.T.S. 211.

other states or armed groups are responsible for victims' suffering and even when humanitarian assistance from outside is being provided.

The political influence and geographic diversity of states' undertaking to help victims of their lawful attacks under IHL, together with the rate at which the practice has grown, marks what promises to be an important and lasting change in the conduct of hostilities. In its work on reparations, the International Law Association (ILA) seems to have been unwilling to pronounce on whether there now exists a rule of customary international law requiring reparations for lawful, incidental losses. Its then-Committee on Compensation for Victims of War released a detailed report in 2008, proclaiming as broad principles: "The right to reparation—in whatever form—presupposes a violation of international law [and] the term 'victim' is meant to designate natural or legal persons, who suffer [serious] harm as a result of a violation of international law."[95] Yet the renamed Committee on Reparations for Victims of Armed Conflict later noted: "[I]ncidental losses might be caused by lawful conduct according to the rules of international law applicable in armed conflict, given that not every injury to civilians constitutes a violation of international law. It is as yet unclear whether a right to reparation is triggered in such a situation."[96] The ILA passed a final resolution in 2010 that confirmed reparations to be contingent upon a predicate violation, but then reaffirmed that the resolution must not be interpreted to limit the rights of "other persons who have suffered from the consequences of armed conflict."[97]

The ILA's ambivalence notwithstanding, there are a number of reasons to doubt the existence of a rule of international law requiring assistance and recognition in respect of nonexcessive, incidental losses. First, despite the growing number and impressive diversity of the states helping and recognizing their incidental victims, the practice is not yet broad enough to constitute general practice as an element of customary international law[98] or subsequent practice by states parties of a treaty (in this case, the Hague Convention and Protocol I) that would evidence a

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95. Int'l Law Ass'n [ILA], *Compensation for Victims of War*, 73 INT'L L. ASS'N REP. CONF. 459, 466, 468 (2008).

96. ILA, *Reparations for Victims of Armed Conflict*, 74 INT'L L. ASS'N REP. CONF. 291, 303 (2010).

97. ILA, *Reparation for Victims of Armed Conflict*, arts. 1(1), 14(1), ILA Conf. Res. 2/2010 (2010).

98. According to the Rome Statute of the International Court of Justice, now itself recognized as reflecting customary international law, a rule of international law may emerge if it reflects "general practice accepted as law." Rome Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993.

new interpretation.[99] Second, the policies employed by the various states are themselves quite diverse. Importantly, no state has employed a pure reparation model that seeks to restore as much as possible the status quo ante of the victims or compensate them based on the amount of harm done; instead, states have pursued different strategies to offer dignifying gestures and assistance at their own discretion. Their policies are not similar enough to each other to suggest the emergence of a uniform rule by themselves. Third, states regularly qualify these kinds of assistance as ex gratia. The ex gratia qualifications are a bit ambiguous though: on one hand, they could be denying that they owe any obligation toward the victim; on the other hand, they could simply be denying the commitment of any *violation* that would give rise to a legal obligation to make reparations to the victim, leaving open for the possibility that causing *lawful* harm might still have given rise to an obligation to help or recognize the victim. This ambiguity means that the ex gratia statements do not foreclose the possibility that these states act out of a sense of legal obligation, but neither do they confirm it. That is significant in light of the fourth reason for doubt, which is the absence of positive statements of *opinio juris*, especially considered in light of the likelihood that strategic considerations comprise at least part of the rationale for these policies.

Considering the background rule permitting states to ignore the collateral consequences of their lawful acts, recent practice does not evidence an obligation on states to help individuals whom they incidentally harm as a result of lawful combat operations. Also—and perhaps just as importantly—the coincidence of the rise of the practice with the proliferation of counterinsurgency campaigns, in which winning over hearts and minds is a strategic imperative, increases the possibility that states' recent inclination to help and recognize their incidental victims is based on enlightened self-interest and not humanitarian considerations. In 2010, a group of NGOs led by the Center for Civilians in Conflict began a campaign to highlight the normative significance of the practice, to illustrate the moral reasons behind it, and to ensure that it takes shape according to a conceptually coherent and appropriate model.[100]

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99. *See* Vienna Convention on the Law of Treaties art. 31(2)(b), May 23, 1969, 1155 U.N.T.S. 331. It should also be noted that some states mentioned, including most prominently the United States, have not ratified Protocol I.

100. The founding steering committee organizations were CIVIC, Human Rights Watch, and International Crisis Group. *See Amends*, *supra* note 76.

IV. THE MORAL OBLIGATION TO MAKE AMENDS

As articulated by the Center for Civilians in Conflict, the basic principle of making amends can be summarized in two propositions. The first proposition is that all victims of combat operations deserve help and recognition.[101] When the losses stem from lawful combat-related activities, the help and recognition owed to victims are termed amends, in comparison to reparations, which are only owed to victims of violations of law.[102] Amends must be calibrated to meet both the expectations of the victims and their communities.[103] The second proposition is that in order to fully respect the dignity of victims, the obligation of making amends must fall exclusively on the party responsible for causing the harm.[104] Parties make amends not to restore the status quo ante, but rather to meet the immediate needs of victims and, irrespective of material considerations, as a dignifying gesture. The Center for Civilians in Conflict argues that all parties to armed conflict have a *moral* obligation to make amends to their victims and therefore that the practice of making amends cannot be explained solely by *strategic* motivations.[105] In this Subpart, I hope to lay the foundation for a state's moral obligation to make amends and to demonstrate that by failing to require the making of amends, the international law of armed conflict fails to live up to its contemporary humanitarian aspirations.

A. The Second Intention

The case for a moral obligation to make amends has been made before, albeit in very general terms. In *The Lessons of Qana*, Michael Reisman argues:

> [W]ithout regard to the question of violation of the law of war, belligerents must compensate injured noncombatants or their survivors promptly, in proportion to the degree to which each caused the injuries suffered. . . . [I]t

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101. *Guiding Principles for Making Amends*, CEN. FOR CIVILIANS IN CONFLICT (June 14, 2013), http://civiliansinconflict.org/uploads/files/publications/Making_Amends_Principles.pdf.

102. *Id.* Some scholars argue, or allow for the possibility, that reparations ought to be made to victims of lawful combat acts. *See* ILA, *supra* note 95, at 466, 488. The Center for Civilians in Conflict instead uses the term "amends" for two main reasons. First, policy makers tend to find the concept of reparations for lawful activity confusing, leading some to believe that such reparation might actually admit legal liability. As such, the term "reparations" would present unnecessary obstacles to the achievement of campaign goals. Second, it is possible that amends are not oriented to achieving the status quo ante, as reparations are assumed to do. This question will be explored later in this Article.

103. *Guiding Principles for Making Amends*, *supra* note 101.

104. *Id.* Obviously, when multiple parties are responsible for harm, amends should be expected of all of them.

105. *Id.*

> is surely incompatible with the postulates of humanitarian law, indeed law in general, to allow an actor to externalize heavy costs onto innocent people—without engaging responsibility to compensate.[106]

Reisman frames the issue as one of distributional justice, hinting also at themes of legal consistency and a needs-based approach to humanitarian assistance.[107] Perhaps Reisman's most important contribution to this conversation, however, is his observation that externalizing heavy costs onto innocent people contravenes a general principle of law.[108] As we have seen, given the historical practices and the treaties on the law of armed conflict, there is an exception to this general principle during wartime in the Euro-American tradition.[109] Reisman assumes, as do other scholars,[110] that such an exception cannot be morally justified on the principles of IHL, but he does not attempt to prove it.

In order to determine what kind of moral obligations might be owed in respect to civilian losses, we might start with two basic principles of the contemporary law of armed conflict. The first is civilian immunity. As Henry Shue observes, civilian immunity in the law of armed conflict

> is a reaffirmation of the morally foundational "no-harm" principle. One ought generally not to harm other persons. Non-combatant immunity says one ought, most emphatically, not to harm others who are themselves not harming anyone. This is as fundamental, and as straightforward, and as nearly non-controversial, as moral principles can get.[111]

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106. W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 398 (1997).

107. *Id.* Reisman hints at the needs-oriented framework in a passage immediately preceding the one cited above by alluding to the necessity of making payments as soon as possible. *Id.*

108. *Id.* Presumably, Reisman refers here to basic principles of tort and delict in common and civil law systems. In both systems, proximately causing legally cognizable harm is highly probative of a violation that triggers a responsibility to compensate. This principle also finds expression in international law in the U.N. International Law Commission's Principles of Transboundary Harm. *See* Rep. of the Int'l L. Comm'n, 53rd Sess., April 23-June 1, July 2-Aug. 10, 2001, art. 2(b), U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

109. Other legal traditions have analogous doctrines, some of which even addresses no-fault compensation in war specifically. For example, the Ugandan rite of *mato oput*, a restorative justice ceremony, has required compensation for accidental killings during war. *See* COLLABORATIVE TRANSITIONS AFR., COMMUNITY PERSPECTIVE ON THE *MATO OPUT* PROCESS: A RESEARCH STUDY BY THE *MATO OPUT* PROJECT 13 (2009). Many societies with legal systems based on Islamic tradition utilize *diya*, or payments known as "blood money," as compensation for death, intentional and accidental. *See* George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives* (Kroc Inst. Occasional Paper #19:OP:2, 2000). *Diya* has been utilized to regulate incidental killings in wartime in Afghanistan through the traditional system of *Pashtunwali*, and it has long been a part of Somalia's customary legal system, known as *xeer*. *See Guiding Principles for Making Amends*, *supra* note 101.

110. *See, e.g.*, Gillard, *supra* note 11, at 551.

111. Igor Primoratz, *Civilian Immunity in War: Its Grounds, Scope, and Weight*, *in* CIVILIAN IMMUNITY IN WAR, *supra* note 16, at 21, 29.

The second principle is military necessity, which is, in moral terms, a form of excuse from adherence to ordinary morality in pursuit of the legitimate objective of military victory. Michael Walzer describes the war convention as a meeting point between these two principles: a moral framework intended to maximize the utility of violence and minimize collateral consequences in the pursuit of that objective.[112] Critically, Walzer also notes that while the war convention is based on states' agreement, it enjoys an independent foundation in morality.[113] Moral obligations in wartime deviate from those in peacetime no more than is required by necessity. And, as Walzer makes clear, wartime moral obligations are merely recognitions of "men and women who have a moral standing independent of and resistant to the exigencies of war."[114] Therefore, the war convention as a whole contemplates a trade-off in the rights and duties of soldiers (who gain the privilege of killing while sacrificing the right to life and liberty), but Walzer maintains that everyone else (noncombatants) retains their rights.[115] He extrapolates: "[The war convention] rests more deeply on a certain view of noncombatants, which holds that they are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose."[116]

If this is true—if noncombatants have rights and cannot be used for a military purpose—it seems difficult to justify incidental losses. The vehicle used to reconcile the foundational principles of civilian inviolability and military necessity in the law of armed conflict is DDE. DDE provides that an action with bad effects may be legitimate under the following conditions:

1. The action at issue must not itself be morally bad; nor should any intended effect of it be morally bad.
2. The anticipated bad effect must be genuinely unintended, and not merely secondarily intended (e.g., intended as a means to a further end).
3. The harm involved in the unintended outcome is not disproportionate to the benefit aimed at in the act.[117]

DDE is supposed to supply a moral justification for the proportionality principle in Protocol I,[118] though some scholars remain unconvinced.[119]

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112. *See* MICHAEL WALZER, JUST AND UNJUST WARS 135 (4th ed. 2006).
113. *Id.* at 131.
114. *Id.* at 135.
115. *Id.* at 136.
116. *Id.* at 137.
117. C.A.J. (Tony) Coady, *Collateral Immunity in War and Terrorism*, *in* CIVILIAN IMMUNITY IN WAR, *supra* note 16, at 136, 146.

Apparently recognizing, at least in a descriptive sense, that incidental losses are an inevitable and an accepted part of the war convention,[120] Walzer accepts DDE but insists upon a second intention to complement the second effect: parties to a conflict must not only want to achieve the good end; they must also want to minimize the bad effect as much as possible.[121] Walzer insists that in order to manifest their good second intention, they must accept costs to themselves, namely by accepting additional risk to their soldiers.[122] This is and has long been a controversial question, which I certainly cannot settle here.[123]

Whether or not parties are morally required to accept life-threatening risks to their soldiers in order to minimize civilian losses, Walzer's underlying point—that parties ought to manifest their good second intention through their acts—retains a great deal of persuasive force. The controversy surrounding it seems to lie in the assumption that the intention-manifesting acts may damage the prospects for military victory. That assumption holds true with respect to states' accepting life-threatening risks to soldiers, and it may also hold true, depending on the circumstances, with respect to making full compensation for all civilian losses. Yael Ronen argues that this sort of regime, which she calls a strict liability rule, could present an obstacle to military success such that it

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118. Additional Protocol I, *supra* note 4, art. 51(5)(b).

119. David Lefkowitz argues:

> The DDE does not provide a compelling justification for collateral damage. Even apart from any difficulties there may be in specifying the concepts of intended harm and merely foreseen harm (or harm as a side effect), it remains unclear why we should view the agent's intention as relevant to the rightness or wrongness of his act.

Stephen J. Rockel, *Collateral Damage: A Comparative History*, *in* INVENTING COLLATERAL DAMAGE: CIVILIAN CASUALTIES, WAR, AND EMPIRE 1, 16 (Stephen J. Rockel & Rick Halpern eds., 2009). Rockel argues that the legalization of incidental harm and its euphamization as collateral damage is intended to enhance and justify the military advantage of Western states with more powerful and advanced technology:

> As euphemism, it [collateral damage] served to legitimize what was no longer legitimate or lawful; killing on purpose became killing accidentally on purpose. . . . Killing could continue as business as usual, but shrouded in the mystique of military jargon. When questioned, it was always denied if unproven; when proven, it was regretted as an accident.

Id. at 4.

120. WALZER, *supra* note 112, at 156 ("War necessarily places civilians in danger.").

121. *Id.* at 155.

122. *Id.*

123. For an opposing view based on the principle of human dignity, see Eyal Benvenisti, *Human Dignity in Combat: The Duty To Spare Enemy Civilians*, ISR. L. REV., Summer 2006, at 81, 81.

might alter the economic calculus of warring states.[124] Ronen's most powerful prediction is that instituting the regime would increase the costs of the *ad bellum* decision to use force, including in pursuit of legitimate and worthy ends such as collective self-defense or humanitarian intervention.[125] Whether that shift might be morally or economically desirable and, if not, whether the resulting good to victims receiving compensation would outweigh the resulting harm are questions central to the determination of whether full compensation for losses stemming from lawful combat acts is morally required—again, questions that cannot be answered here. Additionally, we should observe that the strict liability regime would place a greater burden on parties with fewer resources. In other words, insisting that both poor and rich parties pay an amount that is fixed exclusively to the injuries of victims might substantially impose on the necessity of weaker parties and damage their capacity to prevail or reduce their willingness to comply.

Even if full compensation for lawful harm is ill-advised—and perhaps especially if it is—the case for a moral obligation to make amends remains strong. First, in comparison to full compensation, the goals of making amends are meeting urgent needs and dignifying victims, which, depending on local customs and expectations, may necessitate something less in material terms than the full restoration of the status quo ante.[126] In addition, the calculation of amends may also be tied to the capacity of the warring parties involved. As a result, making amends may not fully meet the needs of victims or alter the degree of caution paid to noncombatants who are vulnerable to incidental injury.

Making amends therefore allows parties to meet Walzer's second intention requirement without overly burdening their chances for military success. The second intention may require much more of parties, but at the very least, parties must accept those costs that do not meaningfully reduce their chances of victory in order to mitigate harm to civilians and demonstrate their good intention. For hypothetical state *Z*, which is engaging in self-defense[127] and whose treasury is literally empty, making

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124. *See* Ronen, *supra* note 72, at 208-09. The rule that Ronen evaluates requires compensation for all harm in a similar way to strict liability rules, but as Ronen herself points out, the regime maintains at least a reputational and status distinction between those who make compensation in respect of violation and nonviolators who pay compensation in respect of harm. *Id.*

125. *Id.* at 197-207. Ronen also raises the possibilities that strict liability could erase the distinction between lawful and unlawful conduct, reduce incentives for victims to take precautions, and create incentives for adversaries to put victims in harm's way. *Id.*

126. *See Guiding Principles for Making Amends*, *supra* note 101.

127. I incorporate self-defense in this hypothetical in order to maintain the plausibility of a warring state's being actually broke, not to suggest a kind of *ad bellum* righteousness.

full compensation to victims suffering losses from its lawful activity would be implausible. State *Z* has no money. But even state *Z* can evidence its good intentions by simply apologizing and offering condolences to civilians whom it knows it has harmed.[128] If a more robust measure is impossible under the circumstances, I cannot imagine that at least such an apology would not be required. When the task at hand is to demonstrate a good intention and an effort to mitigate harm, it is not too ambitious to ask parties to say to victims, "We have a good intention and we regret causing you harm." I suspect, however, that many warring parties have substantial resources available to fight, in which more substantial monetary payments would be appropriate for making amends.

In sum, making amends may not always satisfy Reisman's appealing demand that we prevent parties from externalizing massive costs onto innocent populations. It is a helpful, albeit imperfect, response to the distributional inequities of armed conflict and the acute humanitarian needs of victims in the wake of attacks. What making amends guarantees, over all, is the fulfillment of what Walzer calls the central command of wartime morality: to "recognize [noncombatants'] rights as best we can within the context of war."[129]

B. Victims as Second Persons

One of the more common doubts cast on the effort to establish a duty to make amends is that it proposes a normative solution to what is really a practical challenge.[130] International law is not the problem, skeptics argue; the problem is a lack of resources. After all, international human rights law and refugee law oblige states to provide many of the essentials that victims need most following an attack.[131] And international organizations, established and protected by law, are charged with providing humanitarian assistance to vulnerable populations.[132] According to the skeptics, if the resources and political will were

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128. This example also assumes that state *Z* has been able to confirm its role in harming civilians and that the costs of communicating an apology would not be prohibitively high.

129. *See* WALZER, *supra* note 112, at 152.

130. For reasons of professional comity, I do not identify the identities of these persons or their affiliations.

131. *See* International Covenant on Civil and Political Rights, *supra* note 62; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Representative of the U.N. Secretary-General, *supra* note 92, princ. 3.

132. Such organizations include the ICRC, U.N. Office for the Coordination of Humanitarian Affairs, U.N. High Commissioner for Refugees, and World Food Programme.

available to fully realize victims' human rights and the agendas of relief organizations, the needs of victims arising out of combat operations would be fully met and, therefore, there would be no need to focus on the failure of international law to oblige parties to make amends.[133]

But I submit that the victims of lawful combat operations who do not receive amends suffer an injury to their dignity in addition to a material injury. In other words, even if we could unfailingly restore victims to the status quo ante through human rights processes and aid mechanisms, we would not be able to fully effectuate the goals of the humanitarian law without an obligation to make amends. To see why, a closer examination of the concept of dignity itself is in order.

As a historical matter, the concept of dignity was born in the Roman Empire and evolved to acquire a number of different, but related, meanings.[134] Christopher McCrudden identifies an overlapping consensus on the contemporary meaning of dignity, which includes at least three elements: (1) "every human being possesses an intrinsic worth, merely by being human [the status element]"; (2) "this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth [the relational element]"; and (3) "recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being [the limited state element]."[135]

The movement to humanitarianize the law of armed conflict is largely an effort to satisfy the requirements of dignity's limited state element,[136] but I am more focused on the relational element (2) as a

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133. *See* Stephen Darwall, *Kant on Respect, Dignity, and the Duty of Respect*, *in* KANT'S ETHICS OF VIRTUE 175 (Monika Bertzler ed., 2008).

134. *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656-64 (2008). Dignity was used in various contexts to refer to one's relative status, rank, reputation, privileges, reflection of God's image, and inherent value. *Id.*

135. *Id.* at 679. Dignity apparently served as a placeholder in the Universal Declaration of Human Rights representing similar ideas on which human rights might be founded. This three-point overlapping consensus only emerged after the Declaration was adopted. *Id.* at 679; *see also* Universal Declaration of Human Rights, *supra* note 41.

136. *See* Meron, *supra* note 48, at 239-41. This is evident in the prohibition against disclaiming the rights of protected persons, in the adoption of common article 3, and in states' general move away from reprisals against civilians, to note a few examples. The debate over reparations, not just in IHL but in international law in general, can be framed as a debate over the limited state as well. Arguably, the principle of diplomatic protection confirmed in *Mavrommatis Palestine Concessions* stands for the proposition that only states, not individuals, suffer harm that is cognizable under public international law. *See* Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30). Notably, international human rights law and international criminal law have made significant strides toward the recognition of individual harm

foundation for the obligation to make amends. This language is commonly invoked to suggest that all people are entitled to the substance of particular rights, but the obligation to make amends is rooted in something conceptually antecedent to that substance and even more fundamental to human relations.

Immanuel Kant, who helped to popularize dignity as a concept in philosophical discourse, believed that dignity is associated with every person's capacity to legislate on the wills of others.[137] Kant also emphasized that every person's claims to authority must be limited as required by the equal authority in others.[138] Georg Hegel took a different perspective, viewing human interactions as intersubjective processes through which people elaborate their identities together.[139] While not speaking explicitly about dignity or respect, Hegel argued that our identities are constructed reflexively on the basis of recognition by others; nonrecognition or misrecognition results in a defective sense of self.[140] In this paradigm, recognition not only constructs the self, it provides the basis for integration into the wider social order and helps to define shared social norms. The overlap between Kant and Hegel seems to be a sensitivity to the harm done to a person when they are not treated according to their role, status, and essential characteristics, in particular their humanity. Kant might say that a state's refusal to make amends for harm done constitutes a failure to fulfill a duty of respect toward them; Hegel might call it a failure to recognize their humanity or status as a victim. Neither would deny that the injury they suffer exceeds the extent of material loss.

In articulating the nature of this injury, contemporary scholars have the benefit of Stephen Darwall's excellent and highly relevant book, *The Second-Person Standpoint*, which describes "the perspective you and I take up when we make and acknowledge claims on one another's conduct

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independent of harm to states. *See, e.g.*, International Covenant on Political and Civil Rights, *supra* note 62, arts. 2(3), 9(5), 14(b). Certainly, arguments can be made to show that the state as a corporate agent may benefit individuals by refusing to exercise diplomatic protection; there might be a fair and mutually beneficial contractarian justification for the continued survival of *Mavrommatis*.

137. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 56 (Thomas Kingsmill Abbott trans., Wilder Publ'ns 2008) (1785) ("Our own will, so far as we suppose it to act only under the condition that its maxims are potentially universal laws, this ideal will which is possible to us is the proper object of respect; and the dignity of humanity consists just in this capacity of being universally legislative . . . .").

138. *See* Darwall, *supra* note 133, at 194.

139. *See* Costas Douzinas, *Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?*, 29 J.L. & SOC'Y 379, 383 (2002).

140. *See id.*

and will."[141] He describes a difference between those reasons behind our feelings and those claims that are second-personal, which are addressed to others ("don't tread on me"), and those that are agent-neutral, which are not ("bring it about that people are not tread upon").[142] Reciprocal address, such as demands for apology and feelings of resentment, are second-personal in the sense that they presuppose accountability between persons and the possibility of person-to-person redress.[143] Dignity, then, has a second-personal element that includes the authority to demand appropriate treatment of other equals.[144] On this understanding, it is not difficult to see why, when a party to a conflict harms a civilian, the civilian often seeks acknowledgement and compensation from that party instead of (or in addition to) assistance from a third party. Furthermore, even when the victim is materially restored to the status quo ante by a third party (an unlikely outcome), the victim may still feel unjustly treated if his second-personal demand is unfulfilled.

Darwall also insists that dignity itself requires recognition respect, the acknowledgement of another person's second-personal authority.[145] Second-personal reactive attitudes like indignation, blame, or resentment are respect-seeking.[146] "They seek to engage the other second-personally, and they succeed when the other takes up the address, acknowledges its terms, and thereby respects the dignity of the addresser, both the demand she addresses *and her standing to address it*."[147] What is important here is that respect for a person's dignity requires that their standing be recognized independent of their demand. We must recall that Hussein did not only expect help from the United States; he expected an apology ("I can't believe they haven't even said they were sorry.").[148] To satisfy his demand, the United States would have had to offer help commensurate with his expectations. Separately, to respect his second-personal standing in response to his resentful attitude, the United States would have had to deal with Hussein directly and acknowledge his experience of their actions (suffering). Making amends contemplates a

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141. STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 3 (2006).

142. *Id.* at 7 n.13 ("If the reason is agent-neutral, then it should make no difference whether the agent performs the act without the other person's doing so or forbears the performance, thereby bringing about the other's performance. If it does make a difference, then the reason or principle is agent-relative.").

143. *Id.* at 8.

144. *Id.*

145. *Id.* at 123.

146. *Id.* at 86.

147. *Id.* (emphasis added).

148. Interview by Kristele Younes with Hussein, *supra* note 1.

confrontation and an accountability between victim and culprit that is reparative in and of itself.[149] By contrast, in refusing to make amends, the United States denied that Hussein is its equal, or that his suffering registers on its plane of values and priorities.[150]

Moreover, the failure of the law of armed conflict *itself* to require some sort of confrontation or accountability between victim and culprit further disrespects the victim's dignity and undermines their self-image as a person of worth. It cannot be justified on moral grounds. From a historical perspective, it is a vestige of the traditional strain of the law of armed conflict, which itself is a product of a chivalric order, that is premised on the *unequal* dignity of persons and subjects the needs and rights of the individual to the prerogatives of the state.[151] Manifestations of the traditional strain, such as the lack of an individual right to reparation, all reject the second-person perspective by refusing to recognize harm to individuals as anything more than a measure of harm to the state. But while this might be thinly justified on contractarian grounds as a fair and mutually beneficial arrangement to facilitate redress for individual harm,[152] the same cannot be said about the regime governing proportional, incidental damage because such damage does not register as harm at all under the law, even in terms of harm to a state. It fails to even provide a partly acceptable institutional substitute for second-personal redress. The lack of moral accountability between a state that engages in a lawful act and a civilian who suffers losses as a result not only compounds the injury to the civilian, it also calls into question whether IHL is fully committed to humanitarian principles.

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149. Darwall argues for a conception of morality as equal accountability, through which "moral norms regulate a community of equal, mutually accountable, free and rational agents as such, and moral obligations are the demands such agents have standing to address to one another and with which they are mutually accountable for complying." DARWALL, *supra* note 141, at 101.

150. Of course, the state as a corporate agent is not equal in status to the individual victims, but there are two responses to this objection. First, individual persons were responsible for causing harm to the victim, and between those persons and the victims, there is an equality of status that demands moral accountability and second-personal redress. Second, insofar as the state as a corporate entity is concerned, it must still fulfill the third prong of the overlapping consensus on dignity discussed in McCrudden, *supra* note 134, at 679-80, in order for the dignity of victims to be respected.

151. Throughout the Middle Ages, and even into the Enlightenment era, dignity was understood to mean rank, a marker of one's place in a social hierarchy. Royalty and nobles were classes that enjoyed higher degrees of dignity, while peasants enjoyed a lesser status. *See* Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thought*, 8 HIST. OF EUR. IDEAS 319, 321 (1987).

152. For an overview of contractarianism in the modern law of armed conflict, see Yitzhak Benbaji, *Justice in Asymmetric Wars: A Contractarian Analysis*, 6 LAW & ETHICS HUM. RTS. 172 (2012).

V. CONCLUSION

In its first three years of work on the subject, the Center for Civilians in Conflict has already begun to build substantial support for the making of amends on these normative grounds. U.N. Special Rapporteur Philip Alston singled out and applauded the practice of making amends, calling for further research and greater attention to the subject.[153] U.N. Secretary-General Ban-Ki Moon also noted the practice in a report on the protection of civilians[154] and then specifically praised its implementation in Somalia.[155] The making amends principle received an equally warm reception among Member States of the United Nations. At an open debate of the Security Council on the protection of civilians in November 2009, Uganda made an impassioned plea for all states to make amends to the victims of their lawful combat operations.[156] At the next open debate in July 2010, Austria,[157] Brazil,[158] Mexico,[159] and Turkey[160] joined Uganda[161] in voicing their enthusiasm. And later that year, a Presidential Statement of the Security Council proclaimed: "The Security Council emphasizes that all civilians affected by armed conflict, including those suffering losses as a result of lawful acts under international law, deserve assistance and recognition in respect of their inherent dignity as human beings."[162] While not perfectly reflective of the making amends principle, this Presidential Statement is the first instrument negotiated and adopted by U.N. Member States that explicitly recognizes the dignity and moral claims of victims of lawful attacks in armed conflict. As of this writing, according to the New York-based think tank Security Council Report, making amends is one of a handful

153. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶¶ 84-89, U.N. Doc. A/HRC/14/24 (May 20, 2010) (by Philip Alston).

154. U.N. Secretary-General, *Protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶ 93, U.N. Doc. S/2010/579 (Nov. 11, 2010).

155. U.N. Secretary-General, *Somalia: Rep. of the Secretary-General*, ¶ 69, U.N. Doc. S/2011/277 (Apr. 28, 2011).

156. U.N. SCOR, 64th Sess., 6216th Mtg. at 27, U.N. Doc. S/PV.6216 (Nov. 11, 2009).

157. U.N. SCOR, 65th Sess., 6354th Mtg. at 12, U.N. Doc. S/PV.6354 (July 7, 2010).

158. *Id.* at 27.

159. *Id.* at 18.

160. *Id.* at 26.

161. *Id.* at 20.

162. U.N. President of the S.C., Statement by the President of the Security Council on Nov. 22, 2010, ¶ 13, U.N. Doc. S/PRST/2010/25 (Nov. 22, 2010).

of emerging issues on the Security Council's protection of civilians agenda.[163]

None of these developments, by themselves or taken together, demonstrate the emergence of a new norm of international law.[164] Yet, it is clear that the normative arguments for making amends are well-received and gaining momentum.[165] These arguments offer an alternative, complementary rationale for making amends to the strategic rationale that is often understood to drive the practice. Should these arguments win the day and push more states to make amends, they would help to safeguard the dignity of persons, satisfy the rights and needs of victims, and enhance the conceptual and moral coherence of the normative framework governing armed conflict.

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163. *See Cross-Cutting Report on Protection of Civilians in Armed Conflict*, SEC. COUNCIL REPORT 23 (May 31, 2012), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/XCutting%20POC%202012.pdf.

164. The statements of U.N. officials and the adopted measures of U.N. bodies are various forms of soft law. Soft law refers to a set of normatively significant materials without the force of binding law as defined in the Statute of the International Court of Justice, *supra* note 98, arts. 59, 63. Soft law instruments are, however, often useful in articulating emerging norms and, their lack of binding authority notwithstanding, sometimes exert some compliance pull. As Jan Klabbers points out in his case against soft law, law is an intermediary mechanism whose function is, in part, to sort out which of our shared values have binding force and which are either contested, aspirational, or both. *See* Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381, 387 (1998). But the concept of soft law need not be so disruptive. Soft law instruments may enjoy normative relevance, create moral and political norms, and indicate the emergence of *opinio juris* or institutional practice that is binding under treaty law. That soft law is not directly enforceable in courts of its own force only illustrates that a coherent concept of international relations and international law must look beyond the courts to understand enforcement and compliance of international norms.

165. For a discussion of norm emergence and progression, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 888, 895 (1998).