

2009

Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict

Yael Ronen

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#), [Litigation Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Yael Ronen, Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict, 42 *Vanderbilt Law Review* 181 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss1/4>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict

Yaël Ronen*

ABSTRACT

Under international law, civilians suffering injuries that are incidental to a lawful attack on a military objective are left to bear the cost of their losses. In recent years there have been calls for a change in policy that would entitle victims of military attacks to compensation, even if their losses are incidental and non-fault-based. This Article explores the notion of such a quasi-strict liability rule, which is likely to disrupt the existing balance of powers and interests under the laws of armed conflict. Following an exploration of the conceptual basis for such an obligation, the Article examines the effect of a strict liability rule on the conduct of parties to a conflict, inter alia through economic analysis. A final question is how to ensure that the liability of the injuring party translates to an effective mechanism for securing compensation. This Article concludes that if the moral commitment to victims justifies a strict liability rule, considerations of utility require a fine-tuning of the obligation and its implementing mechanisms.

* Ph.D. (Cantab), Vidal Angel Research Fellow, Minerva Center for Human Rights, Hebrew University in Jerusalem. Email: yael.ronen@cantab.net. I thank the following persons for sharing with me thoughts and comments on this article: participants in the conference "Complementing IHL: Exploring the Need for Additional Norms to Govern Contemporary Conflict Situations" organized by the Minerva Center for Human Rights at the Hebrew University in Jerusalem, the ICRC and the Konrad Adenauer Foundation (Jerusalem, June 1–3, 2008); Mr. Ben Clarke, Dr. Amichai Cohen, Dr. Assaf Jacob, Prof. David Kretzmer, Dr. Roger O'Keefe, M. Bruce Oswald, Col. Adv. Daniel Reisner, Dr. Robbie Sabel, Mr. Guy Shany; and especially Dr. Tomer Broude, Prof. Yuval Shany, and Brig-Gen. Kenneth Watkin. I am also grateful to the editorial board of the VANDERBILT JOURNAL OF TRANSNATIONAL LAW for their excellent, meticulous work. Usual disclaimers apply.

TABLE OF CONTENTS

I.	INTRODUCTION: INCIDENTAL INJURY TO CIVILIANS AND THE LAWS OF ARMED CONFLICT	183
II.	FRAMING AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY	188
A.	<i>Incidental Injury as an Excused Breach</i>	188
B.	<i>Incidental Injury as an Injurious Consequence of an Act Not Prohibited by International Law</i>	192
C.	<i>Summary</i>	195
III.	THE EFFECT OF AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY ON THE CONDUCT OF PARTIES TO AN ARMED CONFLICT	195
A.	<i>Economic Analysis and the Laws of Armed Conflict</i>	195
B.	<i>An Incentive to Reduce Activity Levels</i>	197
C.	<i>A Disincentive to Take Action and the Ius ad Bellum/Ius in Bello Distinction</i>	202
D.	<i>The Distinction Between Legal and Illegal Attacks</i>	207
E.	<i>Conflicts with Non-State Actors</i>	209
F.	<i>Summary</i>	212
IV.	AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY AS A MEANS OF RECOVERY OF LOSSES.....	212
A.	<i>The Bearable Cheapness of Life and Limb</i>	212
B.	<i>Claim Mechanisms</i>	216
1.	Institutions for Individual Claims.....	217
2.	State Claims.....	219
3.	A Combined Mechanism.....	221
4.	Political Enforcement	223
5.	Conclusion	223
V.	SUMMARY.....	223

I. INTRODUCTION: INCIDENTAL INJURY TO CIVILIANS AND THE LAWS OF ARMED CONFLICT

Civilian injury and death resulting from conflict are by no means a new phenomenon.¹ However, such injury and death *as incidental outcomes of military attack* (hereinafter simply “incidental injury”) have grown more prevalent and visible with new military technology and changes in warfare. Some of this growth owes to the expansion of battlefields into “battlespaces”;² some of it to the large-scale involvement of civilians in technical disciplines that support military operations;³ and some of it to the escalating frequency of asymmetric conflicts, where the principle of distinction is less than rigorously

1. Data on civilian deaths is often absent or inaccurate, and is rarely broken up by cause. The highest civilian death toll of any single war is that of World War I (1914–1918): civilian deaths are estimated at 10 million, compared with an estimate for 8.5 million military deaths (and an estimate of 20 million injuries, both military and civilian). See Britannica Online Encyclopedia, World War I, <http://www.britannica.com/EBchecked/topic/648646/World-War-I> (last visited Dec. 21, 2008) (tabulating World War I deaths, losses, total casualties, etc.). Most civilian deaths were caused by famine and disease.

World War II data is largely irrelevant for present purposes, because the overwhelming majority of civilian deaths in that war were caused by genocide. The following are post-World War II examples.

Korea (1950–1953): Korean (North and South) civilian casualties are estimated between three and four million, while Korean Military casualty estimates range from 180,000 to 930,000. See Phil de Haan, *50 Years and Counting: The Impact of the Korean War on the People of the Peninsula*, CALVIN COLLEGE NEWS & NOTES, May 2002, <http://www.calvin.edu/news/2001-02/korea.htm> (last visited Dec. 21, 2008) (estimating Korean civilian casualties).

Vietnam (1963–1974): North and South Vietnamese civilian deaths are estimated at 4 million. News Release Regarding Vietnamese Government’s Official Casualty Count for the Vietnam War, AGENCE FRANCE PRESSE, April 4, 1995, available at <http://www.chss.montclair.edu/english/furr/casualty.html>. Vietnamese military casualties are estimated at 1.1 million. Britannica Online Encyclopedia, Vietnam War, <http://www.britannica.com/EBchecked/topic/628478/Vietnam-War> (last visited Dec. 21, 2008). U.S. and allied casualties are quoted at 300,000. See *id.* (citing South Vietnamese military deaths as between 200,000 and 250,000, and listing 58,200 American military dead).

Iraq (2003–present): Documented civilian casualties in Iraq number around 90,000. See Iraq Body Count, <http://www.iraqbodycount.org/> (last visited Dec. 21, 2008) (documenting the number of “civilian deaths from violence”). U.S. military and Iraqi security force losses are documented at about 13,000. Iraq Coalition Body Count, <http://icasualties.org> (last visited Dec. 21, 2008).

2. Michael Schmitt, *War, Technology and International Humanitarian Law*, PROGRAM ON HUMANITARIAN POLY & CONFLICT RES., HARV. U., OCCASIONAL PAPER SERIES, Summer 2005, at 30.

3. Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. INT’L HUMANITARIAN L. 3, 12 (2005).

observed, especially, but not exclusively, by the technologically inferior party.

In order to protect civilians from harm, the laws of armed conflict distinguish between combatants and civilians. The principle of distinction is expressed foremost in the absolute prohibition on intentional targeting of civilians expressed in the first Protocol Additional to the Geneva Conventions.⁴ Yet the laws of armed conflict acknowledge the futility of a general prohibition on causing injury to civilians, because the only way to comply with such a prohibition and ensure that civilians are not injured is to abstain from attack altogether.⁵ Parties would have a choice between compliance with the law by refraining from military action and violation of the law despite their best intentions. The former is unrealistic,⁶ and the latter is unfair. Consequently, civilians are not entirely immune to attack, and not every injury to a civilian constitutes a violation of international law. Instead, beyond the absolute prohibition on intentional targeting of civilians and a handful of other absolute prohibitions,⁷ the parties' conduct is governed by the obligation to minimize harm to civilians, without setting undue limitations on the pursuit of military goals.⁸

Article 57 of Additional Protocol I establishes the general obligation of parties to take constant care to spare the civilian population, including individual civilians and civilian objects.⁹ It also provides specific precautions that must be taken in this context: those who plan or decide upon an attack must "[d]o everything feasible" to verify that the objectives are legitimate military ones;¹⁰ "[t]ake all

4. 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(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The prohibition on targeting civilians is considered customary in the ICRC Study. JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 3 (2005) [hereinafter ICRC Study].

5. In 1980, Boyle argued that state responsibility does not necessarily imply an obligation of cessation and that it is flexible enough to encompass an arrangement based on a balance of interests. Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L.Q. 1, 13-14 (1990). However, in the absence of an institutional mechanism to reach such an arrangement, this possibility remains theoretical. Moreover, the ILC Draft Article 30(a) provides for cessation as the primary obligation of an internationally responsible state. ICRC Study, *supra* note 4, art. 30(a).

6. THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 67-68 (2006).

7. See, e.g., Additional Protocol I, *supra* note 4, art. 54(1) ("Starvation of civilians as a method of warfare is prohibited.").

8. There are other obligations, such as the prohibition on causing unnecessary pain and suffering. These are irrelevant in the present context.

9. *Id.* art. 57(1). This obligation and the specific precautions comprising it are considered customary in the ICRC Study. ICRC Study, *supra* note 4, at 51.

10. Additional Protocol I, *supra* note 4, art. 57(2)(a)(i).

feasible precautions in the choice of means and methods of attack” in order to minimize loss of, or injury to, civilian life;¹¹ give effective advance warning where circumstances permit;¹² and, among equivalent options, opt for the one that is least injurious to civilians while obtaining a similar military advantage.¹³ The terms “feasibility” and “reasonableness” cannot be understood in technical terms only. If they were, parties would be required to opt for inaction, which is always feasible and is the only way to truly avoid incidental injury. Accordingly, these terms must be interpreted as setting a normative standard of care. Injury to civilians must be minimized, taking into account all of the circumstances at the time of the attack, including those relevant to the success of military operations.¹⁴ In addition, a party must not carry out an attack which may be expected to cause incidental civilian loss that would be excessive in relation to the concrete and direct military advantage anticipated.¹⁵ The principle of proportionality serves as a base line, in that even when specific precautions have been taken, civilian injury must never outweigh the military advantage anticipated.¹⁶

The targeted party is also obligated to take precautions against the effects of attack.¹⁷ Article 58 of Additional Protocol I requires the targeted party to endeavor, to the maximum extent feasible, “to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”; to “avoid locating military objectives within or near densely populated areas”; and to “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”¹⁸

Articles 57 and 58 lay down a due diligence standard. They resemble rules of negligence in that international responsibility arises only from failure to comply with a determined standard of care, as reflected in the obligations to take feasible or reasonable precaution. If a party fails to comply with this standard and injury

11. *Id.* art. 57(2)(a)(ii), 57(4) (using the term “reasonable”).

12. *Id.* art. 57(2)(c).

13. *Id.* art. 57(3).

14. Claude Pilloud & Jean Pictet, *Commentary on Protocol I, Article 57—Precautions in Attack*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 677, 681–82 (Yves Sandoz et al. eds., Tony Langham et al. trans., Martinus Nijhoff 1987) [hereinafter COMMENTARY]. The Commentary suggests that the difference in use of “feasible” and “reasonable” is significant but does not explain in what way.

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

16. *Id.* art. 57(2)(a)(iii).

17. This obligation and the specific precautions comprising it are considered customary in the ICRC Study. ICRC Study, *supra* note 4, at 68.

18. Additional Protocol I, *supra* note 4, art. 58.

occurs, that party's conduct is regarded as negligent and the party is internationally responsible on the basis of fault. These rules differ from an ordinary negligence rule in that, under the laws of armed conflict, an expectation or even certain knowledge that an attack on a military object would result in injury or death does not automatically imply fault and does not render the attack wrongful, nor does it give rise to international responsibility for the attack.

When the attacking party complies with the precautionary requirements, primarily those of distinction and proportionality, the causation of injury to civilians is regarded as "unavoidable." The attack is not a breach of international law and the attacking party does not bear international responsibility for the resulting injury.¹⁹ Nor is there any other party that is internationally obligated to provide redress to the individual victim.²⁰ The victim is left to shoulder the loss. This result is morally unsatisfactory.²¹ Thus, there have been calls from nongovernmental organizations and academics²² for a change in policy that would entitle victims of military attacks to compensation, even if the losses sustained are incidental, i.e., unavoidable and proportionate outcomes of attacks on military objectives.

An obligation on parties to compensate all civilian victims of military attacks, even when the injury could not have been avoided

19. See U.N. Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2(b), U.N. Doc. A/56/10(SUPP) (2001) [hereinafter *ILC Draft Articles on State Responsibility*] (defining elements of an internationally wrongful act of a state).

20. The victim may have an Article 58 claim against the party to which it belongs for failure to take adequate precautions in defense. See generally Additional Protocol I, *supra* note 4, art. 58 (detailing requisite precautions against the effects of attacks).

21. See Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 99 (2006) (explaining the need for institutional norms that will lead decision makers, before engaging in combat, to consider the effects of their actions on enemy civilians); W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397-98 (1997) (discussing moral and legal justifications for collateral damage compensation).

22. Dieter Fleck, *Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 171, 180 (Wolff Heintschel von Heinegg & Volker Epping, eds., 2007); Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 551 (2003); Reisman, *supra* note 21, at 397-98; Karl F. Inderfurth, *Losing the 'Other War' in Afghanistan?*, INT'L HERALD TRIB., May 29, 2007, available at <http://www.iht.com/articles/2007/05/29/opinion/edinderfurth.php>; CIVIC—The Campaign for Innocent Victims in Conflict, <http://www.civicworldwide.org> (last visited Dec. 22, 2008). See Benvenisti, *supra* note 21, at 98-99 (mentioning different views and pointing out questions yet unanswered). See generally Campaign for Compensation, <http://www.campaign4compensation.org> (last visited Dec. 22, 2008) (comprising Amnesty International USA, CIVIC, EPIC (Education for Peace in Iraq Center), HRW (Human Rights Watch), NETWORK (A National Catholic Social Justice Lobby), and VFA (Veterans for America)).

by the exercise of due care, is a quasi-strict liability rule.²³ It resembles a strict liability rule in that it places the burden of loss on the injurer regardless of fault. It differs from an ordinary strict liability rule under international law in that the causation of injury does not constitute an internationally wrongful act.²⁴

An obligation to compensate all victims of military attacks, including those injured incidentally,²⁵ is morally laudable, but it is likely to disrupt the existing balance of powers and interests under the laws of armed conflict, and thus requires a more detailed examination. A preliminary issue, explored in Part II, is the conceptual basis for such an obligation. This informs the scope of arguments in support of and in opposition to the proposed obligation. Part III examines the effect of the proposed obligation on the conduct of parties to a conflict. For individual victims, compensation is no substitute for avoidance of incidental injury because monetary compensation can never fully reverse the consequences of personal physical injury. Therefore, if an obligation to compensate is expected to reduce incidental injury, it promises significant benefits to potential victims. If, on the other hand, it has an adverse effect on the protection of civilians, the benefit of an entitlement to compensation must be weighed against the increased risk of loss. A separate question, considered in Part IV, is how to ensure that the liability of the injuring party translates into an effective mechanism for securing compensation.

In the present context, the term “attacking party” refers to the instigator of a specific attack. Both parties to the conflict are invariably attacking parties. The term “military attack” is to be understood in terms of *ius in bello* rather than in terms of the overall engagement in military action under *ius ad bellum*.²⁶ This Article focuses on attacking parties, although in view of the obligation to

23. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 178 (7th ed. 2007).

24. Causation of injury is a condition for the existence of international responsibility. See NATHALIE L.J.T. HORBACH, *LIABILITY VERSUS RESPONSIBILITY UNDER INTERNATIONAL LAW: DEFENDING STRICT STATE RESPONSIBILITY FOR TRANSBOUNDARY DAMAGE* 3–80 (1996) (providing detailed analysis of the relationship between liability and responsibility under international law, specifically in the ILC work).

25. Liability for fault-based injuries already exists under both the laws of armed conflict and general principles of state responsibility. Additional Protocol I, *supra* note 4, art. 91; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 205 Consol. T.S. 277 [hereinafter Hague Convention IV]; cf. ICRC Study, *supra* note 4, at 530 (outlining state liability for international humanitarian law violations).

26. Cf. Additional Protocol I, *supra* note 4, art. 49 (defining “attacks” and scope of application). The relationship between *ius in bello* and *ius ad bellum* is considered in Part III.

take precautions in defense, an injuring state may also be the one acting in defense with respect to a specific attack.²⁷

Liability need not in principle be limited to states as opposed to nonstate actors. Although the greater part of the following discussion concerns “parties,” in certain contexts reference is made to states, either for convenience or because specific rules only apply to states.

Furthermore, this Article is largely limited to international armed conflict. Non-international armed conflicts raise specific issues, in particular those resulting from international human rights law. Although the applicability of these norms also arises with respect to international armed conflict, it is less prominent in this specific context. Despite the restriction of this discussion to international armed conflict, this Article addresses the difference between states and nonstate actors as parties to a conflict in Part III. One reason to do so is to cover, if only in a limited manner, a conflict with a nonstate actor that nonetheless transcends national borders.²⁸

II. FRAMING AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY

The moral underpinnings of an obligation to compensate incidentally injured (and other) civilian victims of a military attack are the wrongs caused to the victims. Compensation is a measure of redress for the violation of the victims’ rights to life and bodily integrity. The injuring party may not be at fault, but the absence of fault does not relieve it from the obligation to compensate the victim for the invasion of rights.²⁹ The legal underpinning of an obligation to compensate civilian victims may take various forms, discussed in the following sections.

A. *Incidental Injury as an Excused Breach*

Incidental injury may be regarded as a situation where a breach of international law occurs but the injuring party is exempted from

27. This choice stems from the fact that in the relationship between a targeted party and its civilians, human rights law has greater weight, although in view of Additional Protocol I Article 58, international law is not excluded. See *id.* art. 58 (referencing Article 49 of the Fourth Convention).

28. For example, consider the conflict between Israel and the Palestinian movements. In *Pub. Comm. Against Torture in Isr. v. Government of Israel*, the Supreme Court of Israel determined that the law of international armed conflict is the law applicable to the conflict between Israel and terrorist organizations because the conflict transcends Israel’s borders and is waged between Israel and a militarily organized movement that is powered like a state. HCJ 769/02 [2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm.

29. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 355–56 (1991–1992).

fault by a justification or excuse. The adoption of no-fault liability reflects a needs-oriented approach in this case, which proceeds from the needs of the victim rather than from the fault of the injurer.³⁰

The notion that the invasion of a right is an injury that gives rise to compensation—even in the absence of wrongfulness—is suggested in Article 27 of the ILC Draft Articles on State Responsibility.³¹ Article 27 provides: “The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to . . . the question of compensation for any material loss caused by the act in question.”³² The underlying principle of Article 27 is that there is no reason why the party harmed by an act should be required to suffer loss due to the actions of the injuring state, if the injured party did not contribute to, let alone cause, the situation.³³

When drafting this provision, the ILC was undecided as to the legal basis for compensation for injuries resulting from acts that are not wrongful.³⁴ Accordingly, it did not attempt to elaborate in detail the basis for compensation. Instead, the matter was covered by an appropriate “without prejudice” clause.³⁵ Lowe suggested that the special circumstances precluding wrongfulness should be regarded as “excuses” that preclude fault but do not nullify the primary obligation.³⁶ This would preserve a basis for entitling the injured state to compensation from the injuring state, despite the absence of international responsibility.³⁷ ILC Special Rapporteur Crawford confirmed that the mention of compensation in Article 27³⁸ suggested that at least some of the special circumstances enumerated in Chapter V of the ILC Draft Articles precluded only responsibility and

30. Cf. CA 507/79 Raundenaf v. Hakim, [1982] IsrSC 36(2) 757, 770. Compensation to a soldier, rather than a civilian, was at issue.

31. See ILC Draft Articles on State Responsibility, *supra* note 19, art. 27(b) (“The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to . . . the question of compensation for any material loss caused by the act in question.”).

32. *Id.*

33. James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT’L L. 435, 444 (1999).

34. Int’l L. Comm’n, *Report of the International Law Commission on the Work of Its Fifty-First Session*, U.N. Doc. A/54/10 (July 23, 1999), reprinted in [1999] 2 Y.B. Int’l L. Comm’n 1, ¶ 406, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2) [hereinafter ILC Report]; see Percy E. Corbett, *The Search for General Principles of Law*, 47 VA. L. REV. 811, 822–23 (1961) (discussing whether liability for unlawful harm is a general principle of law).

35. ILC Report, *supra* note 34, ¶ 421; ILC Draft Articles on State Responsibility, *supra* note 19, cmt. art. 27, ¶ 1.

36. See generally Vaughn Lowe, *Precluding Wrongfulness or Responsibility: A Plea for Excuses*, 10 EUR. J. INT’L L. 405 (1999).

37. *Id.* at 410. In this article, Lowe did not explicitly distinguish between excuses and justifications.

38. The language currently in Article 27 was then in Article 35. See *id.*

not wrongfulness.³⁹ In other words, Article 27(b) opens the way for an obligation to compensate for an apparent breach of international law if the absence of fault lies in an excusing circumstance that precludes responsibility but does not preclude wrongfulness. Article 27(b) only covers situations where the wrongfulness of an act is precluded by a circumstance enumerated in Chapter V of the ILC Draft Articles,⁴⁰ and when it is external to the definition of the primary obligation.⁴¹ Insofar as other circumstances give rise to an excuse or justification which precludes international responsibility, Article 27 can only apply by analogy. For an analogy from Article 27(b) to apply, causing incidental injury must be regarded as a breach of international law that is excused by overriding circumstances. The alleged breach would be of the right to life and bodily integrity. The excuse presumably would be the existence of military necessity during an armed conflict.

Application of the “breach and excuse” construction is inappropriate under the laws of armed conflict. First, the laws of armed conflict do not expressly guarantee a right to life for civilians.⁴² The duty to respect human life may only be inferred from the limitations on military attacks. Moreover, under the laws of armed conflict, military necessity is not a circumstance precluding wrongfulness but an integral part of the law.⁴³

Alternatively, the relevance of an analogy from Article 27(b) can be examined under human rights law. The right to life is guaranteed in international human rights instruments,⁴⁴ but even in a human

39. In the 1999 draft, the “without prejudice” clause applied only to preclusion of responsibility due to necessity and distress. Crawford criticized the imprecision of the distinction between excuses and justifications in the ILC Draft Articles on State Responsibility. Crawford, *supra* note 33, at 444.

40. Namely, consent, self-defense, countermeasures, *force majeure*, distress, and necessity. *ILC Draft Articles on State Responsibility*, *supra* note 19, ch. V, ¶ 1.

41. Crawford, *supra* note 33, at 445.

42. Common Article 3 of the Geneva Conventions prohibits “violence to life and person, in particular murder of all kinds.” Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/INTRO/375?OpenDocument>. The words “in particular” imply that violence to life and person other than murder, such as negligent killing and injuring, might also be prohibited, unless justified, expressly or implicitly, under rules on conduct during armed conflict.

43. Int’l L. Comm’n, *Report of the International Law Commission on the Work of Its Thirty-Second Session*, U.N. Doc. A/35/10 (July 1980), reprinted in [1980] 2 Y.B. Int’l L. Comm’n 1, ¶ 27, U.N. Doc. A/CN.4/SER/A/1980/Add.1 (Part 2); see David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT’L L. 88, 98 (2005) (discussing the treatment of this issue by the ICJ in the wall case).

44. The ICJ confirmed the applicability of international human rights law, specifically the right to life in times of armed conflict. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 239 (July 8). The applicability of international human rights law in occupied territories was confirmed by the ICJ. *Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005

rights context it may not be possible to constrain that right into a breach and excuse structure. International Covenant on Civil and Political Rights (ICCPR) Article 6 prohibits the arbitrary deprivation of life.⁴⁵ The test of arbitrary deprivation of life falls under the applicable *lex specialis*—namely, the laws of armed conflict.⁴⁶ This brings us back to the inapplicability of a breach and excuse structure to the laws of armed conflict: Because incidental death (i.e., one that is unavoidable and proportionate) is not considered arbitrary under this law, the ICCPR does not regard its causation as a violation of the right to life.⁴⁷

Another international human rights instrument that guarantees the right to life but does not clearly subject this right to the laws of armed conflict is the European Convention on Human Rights and Fundamental Freedoms (ECHR). ECHR Article 2 guarantees one's right not to be deprived of life unless this deprivation results from the use of force that is absolutely necessary in enumerated circumstances.⁴⁸ ECHR Article 15(2) allows derogation from Article 2 "in respect of deaths resulting from lawful acts of war."⁴⁹ Article 2 and 15(2) may, therefore, be read respectively as a prohibition and the excuse of its breach, to which Article 27(b) applies. Interestingly,

I.C.J. 1, 60 (Dec. 19); Legal Consequences in the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 1, 41–44 (July 9).

45. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

46. *Legality of Nuclear Weapons*, 1996 I.C.J. at 239–40.

47. ICCPR, *supra* note 45, art. 6 (defining the right to life).

48. One such circumstance is "in defence of any person from unlawful violence." Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, Europ. T.S. No. 44, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter ECHR]. Theoretically, this could cover a military attack designed to protect the civilians of a party victim of an unlawful use of force under either *jus ad bellum* or *jus in bello*. On the other hand, the European Court of Human Rights has held that "the force used must be strictly proportionate to the achievement of the aims set out in" Article 2(2). *McCann v. United Kingdom*, 17 Eur. Ct. H.R. 1, 39 (1995). The proportionality test suggests that the prohibition only concerns an intentional deprivation of life. For example, the European Court of Human Rights has ruled that recourse to potentially deadly force cannot be considered absolutely necessary when it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence. *Nachova v. Bulgaria*, Eur. Ct. H.R., 1, 3, 17 (2005). Given that the European Court of Human Rights has ruled out the use of force against certain individuals regardless of the fact that such use of force might literally fall within the meaning of Article 2, see generally UNIVERSITY CENTRE FOR INTERNATIONAL HUMANITARIAN LAW, EXPERT MEETING ON THE RIGHT TO LIFE IN ARMED CONFLICTS AND SITUATIONS OF OCCUPATION (2005), available at <http://www.adh-geneva.ch/events/expert-meetings.php> (examining the differences between how international humanitarian law and international human rights law govern the taking of life), it is doubtful whether Article 2(2) is at all relevant or even applicable to unintentional killing.

49. ECHR, *supra* note 48, art. 15(2).

the right to bodily integrity is not expressly provided for in any instrument.⁵⁰

Since the excuse of a breach does not annul the primary obligation but merely removes the wrongfulness of the breach, the existence of an armed conflict does not grant states blanket permission to cause incidental injury. It only serves an excuse *ex post facto*.⁵¹ An attacking state is not internationally responsible for causing incidental injury but arguably must compensate the victim nonetheless. Failure to compensate incidentally injured victims would not affect the lawfulness of the attack itself; it would only be a breach of the obligation to compensate. Thus, the substantive rules on causing incidental injury to civilians remain intact.

B. *Incidental Injury as an Injurious Consequence of an Act Not Prohibited by International Law*

An alternative conceptualization of the obligation to compensate victims of incidental injury is that the injuring act is simply permitted under international law. The source of an obligation to compensate for the injury must therefore exist outside the rules on state responsibility. Obligations to compensate for consequences of acts that are not in breach of an international obligation already exist in discrete areas of international law. Examples are the obligation to compensate for property duly taken for a public purpose⁵² and the obligation of an occupying power to pay for requisitions in kind and services from the inhabitants of an occupied territory for the needs of the army of occupation.⁵³

A systematic study of the notion of compensation for injurious consequences of acts not prohibited by international law was undertaken by the ILC in the late 1970s. This work on "liability," under ILC terminology, began as a general question of secondary rules but was later narrowed to primary rules concerning hazardous activities that cause transboundary harm to persons, property, or the

50. Exceptions exist where the violation of bodily integrity constitutes torture, inhuman or degrading punishment, or medical experimentation; however, these exceptions are irrelevant for present purposes. *See, e.g.*, ECHR, *supra* note 48, art. 3 (prohibiting torture and inhuman or degrading punishment).

51. This approach has the advantage of not absolving the party from responsibility for an injury that was caused *during* armed conflict but not *as a result of* it.

52. *ILC Draft Articles on State Responsibility, supra* note 19, general cmt. 4(c). There are other interpretations of this obligation, such as the separate opinion of Judge Brower in *Sedco (Second Interlocutory Award)*, that if no provision for compensation is made with the taking or one is made which clearly cannot produce the required compensation or is unreasonably insufficient, it would seem proper to deem the taking itself wrongful. *Sedco, Inc. v. Nat'l Iranian Oil Co.*, 10 IRAN-U.S. CL. TRIB. REP. 180, 204 n.34 (1986), *reprinted in* 25 I.L.M. 629, 648 n.34 (1986).

53. Hague Convention IV, *supra* note 25, art. 52.

environment.⁵⁴ The work of the ILC proceeded on the premise that the activities in question are essential for economic development and beneficial to society. For this reason, they are permitted despite being hazardous.⁵⁵ The 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities provide a due diligence standard of conduct⁵⁶ with respect to prevention and minimization of risk to significant transboundary harm,⁵⁷ building on existing customary international law. These Draft Articles are complemented by the 2006 ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities. The Draft Principles address situations where, despite compliance with the obligations of prevention and precaution, accidents occur that cause harm and serious loss in other states.⁵⁸ In order to ensure that an innocent victim should not be left to bear the loss or injury,⁵⁹ the Draft Principles place an obligation on states to provide prompt and adequate compensation for the innocent victims in the event that their activities give rise to transboundary damage. This obligation exists independently of any fault on the part of the injurer.⁶⁰ Importantly, since the activity in question is not prohibited per se, there is no obligation to cease it. Nor does failure to pay compensation render the activity illegal; it constitutes an independent breach of obligation.

The Draft Principles are of particular interest as a model for an obligation to compensate for incidental injury because quasi-strict liability builds, conceptually and historically, on a customary obligation of due diligence. The obligations under Additional Protocol

54. See Rep't of the Int'l L. Comm'n, 58th Sess., *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, princ. 2(a), U.N. Doc. A/61/10 (2006) [hereinafter *2006 Draft Principles*] (defining "damage" as "significant damage caused to persons, property, or the environment"); Rep't of the Int'l L. Comm'n, 53rd Sess., *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 2(b), U.N. Doc. A/56/10(SUPP) (2001) [hereinafter *2001 Draft Articles on Transboundary Harm*] (defining "harm" as "harm caused to persons, property, or the environment").

55. See *2006 Draft Principles*, *supra* note 54, general cmt. 7 ("[W]hile the activities contemplated for coverage are essential for economic development and beneficial to society, the regime must provide for prompt and adequate compensation for the innocent victims in the event that such activities give rise to transboundary damage."); *id.* princ. 4, cmt. 15 ("These activities may have been accepted only for their social utility and indispensability to economic growth."); *2001 Draft Articles on Transboundary Harm*, *supra* note 54, pmb., cmt. 1 (permitting States to "formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations" as long as they "[take] into account the interests of other States").

56. *2001 Draft Articles on Transboundary Harm*, *supra* note 54, art. 3, cmt. 7.

57. *Id.*

58. *2006 Draft Principles*, *supra* note 54, general cmt. 2.

59. *Id.* princ. 3, cmt. 2.

60. *Id.* princ. 4(2).

I to take precaution against injuries to civilians are the equivalent of the 2001 Draft Articles on Transboundary Harm. An obligation to pay compensation to civilian victims of attack, regardless of compliance with the obligation of due diligence, would complement the provisions of Additional Protocol I and customary law in the same manner that the 2006 Draft Principles complement the 2001 Draft Articles on Transboundary Harm.

This analogy is appropriate if the point of departure and purposes of the Draft Principles are similar to those of the proposed rule on liability for incidental injury to civilians. The purposes of liability for injurious consequences of hazardous industrial activities are defined broadly and include providing incentives to prevent transboundary damage from hazardous activities, preserving and promoting the viability of economic activities that are important to the welfare of states and peoples, and providing compensation in a manner that is predictable, equitable, expeditious, and cost-effective.⁶¹ These objectives also apply to compensation for incidental injury inflicted during armed conflict. However, the points of departure with respect to industrial activities and military attacks are different. Industrial activity is, on the whole, unregulated under international law. Although under *ius in bello* military attacks are neither permitted nor prohibited but are simply assumed, the use of force is regulated also by *ius ad bellum*, which has no equivalent applicable to industrial activity.⁶² Although *ius ad bellum* and *ius in bello* have traditionally been divorced from each other, this separation is not free of obstacles, as considered in Part III. A more general critique of the analogy is that placing the financial burden on the injurer for the consequences of hazardous industrial activities is heavily influenced by economic considerations, namely the attempt to optimize conduct through financial incentives. Part III examines the relevance of this rationale to the laws of armed conflict.

The analogy of environmentally ultrahazardous activities to the laws of armed conflict has other limitations. Even with respect to the former, the deterrent effect of liability is feeble.⁶³ This is despite the facts that such activities lend themselves much more easily to economic analysis than the laws of armed conflict, that strict liability is already available under the domestic environmental law of certain

61. *Id.* princ. 3, cmt. 10.

62. Alternatively, industrial activities are by default generally permitted under international law, unlike the use of force. *Cf.* 2001 Draft Articles on Transboundary Harm, *supra* note 54, pmb., cmt. 1 (recognizing the freedom of States to “formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations” provided they “[take] into account the interests of other States”).

63. Michael G. Faure & André Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 26 STAN. ENVTL. L.J. 123, 141 (2007).

states, and that strict liability has begun to permeate international treaties on environmental protection.⁶⁴ Many states are still reluctant to adopt the strict liability principle.

C. Summary

This Part explored conceptual bases for an obligation to compensate incidentally injured victims of military attacks. The point of departure was that causation of such injury should not be transformed into a breach of an international obligation, but that liability should nonetheless attach to the injuring party. This Part offered two bases for an obligation to compensate. One is that the causation of injury is a wrongful act where international responsibility is precluded by an excuse; the other is that it is an act not prohibited by international law. In both cases, the injurer is liable for the injury but not internationally responsible for it. Adoption of either basis requires both taking a stand on such other issues as whether international human rights law applies in situations of armed conflict and focusing more narrowly on the economic utility of the obligation for guiding parties' conduct.

III. THE EFFECT OF AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY ON THE CONDUCT OF PARTIES TO AN ARMED CONFLICT

A. *Economic Analysis and the Laws of Armed Conflict*

An obligation to compensate victims of incidental injury has the direct effect of shifting the cost of such injury from the victims to the injuring party. It may, therefore, also have an effect on the conduct of parties to armed conflict.⁶⁵ This Part examines and evaluates this effect. The point of departure for this evaluation is that, under the existing laws of armed conflict embodied in the precautionary requirements codified in Articles 57 and 58 of Additional Protocol I, parties should minimize civilian injury with respect to an anticipated military advantage.⁶⁶ The question is whether the proposed obligation enhances such minimization.

A shift in the cost of injury from one party to another may affect the conduct of parties if they are moved by economic considerations. It might be argued that states and other parties to armed conflict are not rational actors and that they are not moved by economic

64. See, e.g., *2006 Draft Principles*, *supra* note 54, principle 4(2) (stating that liability for transboundary damage should not require proof of fault).

65. Cf. POSNER, *supra* note 23, at 6 (regarding transfer payments that have a private cost and transactions that affect use of recourses and have a social cost).

66. See *supra* Part I.

considerations, and, thus, an economic analysis cannot apply to international law in general or to the social costs of the laws of armed conflict in particular. A separate but related argument is that many of the goods at stake in international relations, particularly in armed conflict—national security, human rights, and political standing—are relatively incommensurable, making an economic analysis impossible.

In response it is argued that although potential parties to an armed conflict (and states in general) do not always operate on a financial basis, they do make cost-benefit calculations. Concededly, the commodities in question are not always monetary. Yet, nonmonetary motives are not unique to these actors, and incommensurability issues arise even in thoroughly monetized exchange markets.⁶⁷ The matter is one of attaching the correct value to different commodities. An economic analysis may be more complicated and require adjustment for application to the laws of armed conflict, but that does not mean that it is impossible.⁶⁸ One adjustment that might be suggested concerns the fact that the choices among incommensurable goods are made in the political (and sometimes legal) system rather than in the financial market.⁶⁹

Another argument against the application of economic analysis to the laws of armed conflict is that states and other parties to armed conflict are motivated primarily or exclusively by concern for their own welfare or interests, and less or not at all by concern for global welfare or interests.⁷⁰ This is particularly likely in the area of armed conflict, where self-interest is sometimes perceived as necessarily precluding the interests of others. It is important to note, however, that actors at the domestic level also pursue their own welfare and interests rather than to the aggregate efficiency or optimal distribution of wealth. The aggregate welfare and optimal conduct are ensured by a legal dispute-settlement mechanism that establishes and enforces liability. If potential injurers unilaterally internalize the costs arising from their own actions, it is because they anticipate

67. Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394, 407 (1999); Jeffrey L. Dunoff, *Some Costs and Benefits of Economic Analysis of International Law*, 94 PROC. AM. SOC. INT'L LAW 185, 185-86 (2000); Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AM. LAW & ECON. REV. 72 (2007).

68. Cf. Alan O. Sykes, *The Economics of Public International Law* 6-7 (Univ. Chi. John M. Olin Law & Econ. Working Paper No. 216, 2004), available at http://ssrn.com/abstract_id=564383 (acknowledging that certain simplifying assumptions may be problematic but arguing that analogous assumptions are made in many economic models).

69. Dunoff & Trachtman, *supra* note 67, at 407.

70. Sykes, *supra* note 68, at 6.

enforcement.⁷¹ International law, particularly the law of armed conflict, differs from domestic tort law in that it lacks a binding mechanism of legal determination and enforcement. This is another element that calls for adjustment in assessing the utility of a strict liability rule.

An argument of a different order is that even if the laws of armed conflict *can* be analyzed under an economic model, they *should not* be. An economic analysis is consequentialist and assumes no absolute rights or wrongs.⁷² Because a cost-benefit analysis of liability for incidental injury implies that life and physical integrity are financially negotiable, it may be irreconcilable with the humanitarian character attributed to the laws of armed conflict, which posit certain moral imperatives. Specifically, a liability regime premised on the legality of causing injury gives a seal of approval to injuring civilians during military conflict.

While the objection to a consequentialist approach to law is generally defensible, at least if the approach claims to exclude all other analyses, it is paradoxically weak with regard to liability for incidental injury. The law as it stands today already suggests that life and bodily integrity are not absolutely protected and may be balanced against other interests: injury is permitted if it is proportionate to the military advantage anticipated, and precautions should be taken only if they are feasible and reasonable in the circumstances. Thus, the legitimacy of incidental injury is already established. The imposition of strict liability is not intended to alter the substantive laws of armed conflict. The question is whether, by reallocating the costs of incidental injury from the victim to the injurer, the proposed regime might reduce the risk to civilians and thus diminish the perceived moral imperfection of the law.⁷³

B. *An Incentive to Reduce Activity Levels*

Tort liability induces potential injurers to take precaution against injury. But even a rule of strict liability, which places the burden of all injuries on the injurer, does not purport to induce an injurer to avoid the activity altogether merely because it might cause injury and give rise to liability.⁷⁴ It only promotes an efficient avoidance of injury, namely when the cost of injury is higher than the anticipated benefit. If adjudication of tort cases were based on full

71. Or, the cost is internalized because this internalization is itself valuable to them.

72. See Dunoff, *supra* note 67, at 186 (criticizing consequentialism).

73. The assumption is that the victim's state does not provide compensation. See *infra* Part IV.

74. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1056-57 (1972).

and perfect information and were administratively costless, negligence and strict liability would produce identical results in terms of the parties' conduct.⁷⁵ In both cases, injurers only invest in precautions if they are less costly than the anticipated damages.⁷⁶ However, the parties are rarely perfectly informed, and adjudication is not costless. This limits the ability to monitor accurately whether the conduct of a party is optimal—which, under the laws of armed conflict, means minimizing civilian injury with respect to an anticipated military advantage. If the standard for liability is one of negligence, which requires proof of fault—i.e., suboptimal conduct—the injuring party can evade liability because of these limitations. Strict liability mitigates the chances of evasion.⁷⁷

An accurate evaluation of a party's conduct requires the monitoring of two elements. One is the standard of care applied in the specific instance in which the activity is carried out. In military attacks, this refers to, *inter alia*, the weapons used, the timing of attack, and the possibility of advance warning. The other element is the level of activity—namely, the frequency or intensity with which an activity is undertaken. This refers to whether an attack on a specific site is launched in the first place, regardless of whether it is carried out in compliance with the precautionary requirements. Monitoring the level of activity is particularly important when the standard of care cannot be changed, or when a change is regarded as prohibitively costly (e.g., if it requires the development of new weapons or the sacrifice of the lives of the state's military forces).⁷⁸

Domestic courts rarely try to identify the optimal level of activity. They do not inquire whether the benefit of the particular activity was equal to or greater than its costs, including losses incurred as a result of the activity, or whether an alternative was available that was equally beneficial but less risky to civilians. Instead, they limit their inquiry to the care taken in the specific instance of activity once it was undertaken. In consequence, under a negligence rule, an injurer can escape liability by conforming to the legal standard of care in a specific instance, regardless of whether engaging in the activity in the first place was optimal. This is a serious shortcoming of a negligence rule.⁷⁹ In contrast, a strict liability rule, which places the burden of all injuries on the injurer, incentivizes the injurer to set *every* variable affecting the probability

75. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 325 (4th ed. 2004). See generally POSNER, *supra* note 23, at 178–82.

76. Calabresi & Hirschhoff, *supra* note 74, at 1057.

77. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 65–66 (1987).

78. A change may also be unjustifiable. From a legal perspective, the point is the inability to monitor the standard of care, regardless of the reason for this inability.

79. POSNER, *supra* note 23, at 178.

of injury at its optimal level, including both the standard of care and the activity level.⁸⁰

Article 57(3) of Additional Protocol I specifically addresses the problem of activity level in attacks. It provides that “[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”⁸¹ In other words, when determining whether the conduct of a party to a conflict was negligent or not, that party’s activity level—the choice to launch the attack as opposed to how it was carried out—may legitimately be scrutinized. But Article 57(3) does not, indeed cannot, overcome the practical difficulty in reaching such a determination. Thus, despite the existence of Article 57(3), a rule of strict liability that incentivizes the attacking party to unilaterally internalize the costs of its activity level attenuates the distortion caused by the inadequacy of the legal process to monitor the activity level. It thus enhances optimal conduct as defined above and eliminates the need for a judicial determination whether the activity level was in excess of the optimal.

The inability of a judicial body to monitor the level of activity is actually one aspect of a general problem of information. After all, given enough time and resources, a court could determine whether a certain level of activity was optimal or not. It is not required to do so because the costs involved in obtaining relevant information and processing it are prohibitive. A strict liability rule serves as a blanket substitute for such expenditure. The information challenge with respect to armed conflict is particularly great, because even the standard of care adopted by the parties can escape judicial scrutiny. Leaving aside the costs of obtaining the relevant information,⁸² the determination of the proportionality between the injury to civilians and the anticipated military benefit is particularly difficult because it

80. COOTER & ULEN, *supra* note 75, at 332; A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 51–52 (3rd ed. 2003); POSNER, *supra* note 23, at 178. The difficulty in monitoring the activity level might also allow an accident victim to escape responsibility for contributory fault. In the case of military attacks, however, this is a moot issue. The victim, whether an individual or the state, can take greater or less precaution but has little control over the extent or frequency of military attacks. A targeted party cannot realistically be required to reduce the number of its military objectives as a means of reducing the risk of incidental injury. Even if there were such a requirement, this would not necessarily reduce military targeting. Thus, the activity level of the targeted party, let alone of its civilians, is hardly something that can be changed and need not be monitored. See *infra* Part III.E on conflicts with non-state actors.

81. Additional Protocol I, *supra* note 4, art. 57(3).

82. Considerations of minimizing litigation costs generally support reliance on a strict liability rule, if the relative costs are measured per case.

is subjective.⁸³ It depends on culture and values,⁸⁴ on changing military and political objectives,⁸⁵ and even on a party's perception of its combat situation in comparison with the adversary.⁸⁶ The discretion of a party can rarely be critiqued externally on such matters,⁸⁷ which is why military operations are ordinarily regarded as nonjusticiable in domestic courts.⁸⁸ Because it is seldom possible to determine whether a military party complied with the optimal standard of care and whether appropriate precautions had been taken, a negligence rule may effectively result in the victim's inability to recover for its injuries. A rule of strict liability that places the cost of injury on the injuring party mitigates the inadequacy of the judicial determination.⁸⁹ It ensures the correct attachment of liability in cases where there was fault, but at the price of attaching the liability to the injurer also in cases where there was no fault. One example of this phenomenon is NATO's military campaign in Serbia in 1999. The debate over whether NATO forces utilized appropriate precautions or carried out their attacks negligently—e.g., by using air strikes rather than ground forces—may continue indefinitely.⁹⁰ If the

83. Cf. William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 102–06 (1982) (discussing what may be considered “proportional” and “excessive” when comparing civilian losses with military advantages); Lionel K. McPherson, *Excessive Force in War: A “Golden Rule” Test*, 7 THEORETICAL INQUIRIES L. 81, 91 (2006).

84. For example, do “feasible” measures to avoid civilian losses include risking the lives of combatants? Benvenisti, *supra* note 21, at 82.

85. For an overview of questions, see Dale Stephens & Michael W. Lewis, *The Law of Armed Conflict—A Contemporary Critique*, 6 MELB. J. INT'L L. 55, 69–77 (2005).

86. Cf. Schmitt, *supra* note 2, at 51 (discussing how technological advantages can enter into a party's proportionality determinations).

87. Torsten Stein, *Collateral Damage, Proportionality and Individual International Criminal Responsibility*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 157, 160 (discussing the application of the proportionality principle in an international criminal setting).

88. See, e.g., *Shaw Savill v. Commonwealth* (1940) 66 C.L.R. 344 (Austl.) (holding that allegations of military negligence were not justiciable by domestic courts if the acts were committed in the conduct of war). *But see* H CJ 4764/04 *Physicians for Human Rights v. IDF Gaza Strip Military Commander* [2004] IsrSC 58(5) 385 (holding that although judicial review does not examine the wisdom of the decision to engage in war, it may examine the legality of that activity); *Bici v. Ministry of Defence* [2004] E.W.H.C. 786 (Q.B.), ¶ 112–13 (Eng.) (holding that the Army is liable for negligence “even where the victims are from the very community which has benefited so much from the Army's assistance”).

89. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 200–02 (1981). This is part of Posner's explanation for the prevalence of strict liability in the tort law of primitive societies, which he identifies as scientifically ignorant and judicially lay.

90. See, e.g., Paul Robinson, *Ready to Kill but Not To Die*, 54 INT'L J. 671, 671 (1999) (analyzing the morality of NATO's strategy in Kosovo). The claims of the Former Republic of Yugoslavia (Serbia and Montenegro) against NATO members (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States of America) were dismissed on the ground that the ICJ had no jurisdiction. See International Court of Justice, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=yus&case=114&k=25> (last visited Dec. 22, 2008) (listing

standard were that of strict liability, NATO states' liability would be largely self-evident.

But a simple strict liability rule also has its limitations. It induces only the injurer to internalize the cost of injury. The victim is compensated regardless of its actions and therefore has no incentive to take precautions. When the victim is in a position to reduce the chances of harm, as envisaged in Article 58,⁹¹ this disincentive is a significant drawback of a strict liability rule. The nonreciprocity of the laws of armed conflict⁹² exacerbates the problem. The targeted party actually has an incentive to create obstacles for the attacking party by failing to take precautions, such as distancing its civilians from military objects.⁹³ To counter this disincentive, a defense of contributory fault must be added to the strict liability rule.⁹⁴ Then the liability of the injuring party is limited to the extent that the targeted party fails to take efficient precautions, and both sides have incentives to optimize their conduct.⁹⁵ Strict liability for incidental injury differs in this respect from liability for transboundary harm caused by hazardous activities, which is premised on the unilateral nature of the injury.⁹⁶

Returning to whether a strict liability rule can resolve judicial inadequacies, it is clear that this is not the case when a defense of contributory fault is available, because this defense reintroduces the need to determine fault—in this case, the fault of the victim. This might result in a slight shift of the argument over negligence, but not in its disappearance. For example, there are claims that, in its military campaign in Lebanon in the summer of 2006, Israel failed to take appropriate precautions for the protection of Lebanese

links to information about these cases). On the link between *jus ad bellum* and *jus in bello* responsibility, see *infra* Part III.C.

91. Additional Protocol I, *supra* note 4, art. 58.

92. *Id.* art. 51(8).

93. Such conduct, when carried out intentionally, is a violation of the laws of war and outside the scope of this inquiry. *Id.* art. 51(7).

94. For convenience, the term “strict liability” will subsequently signify strict liability with a defense of contributory fault. In certain domestic jurisdictions, a defense of contributory fault may negate the injurer's liability altogether. The present discussion assumes that liability can also be partially limited, depending on the relative fault of each party.

95. POLINSKY, *supra* note 80, at 49. A defense of contributory fault is also available under a rule of negligence. Under domestic Anglo-American tort law, contributory fault cannot be a complete defense because, if the victim is fully responsible for the injury, this implies no causation between the act of the “injurer” and the injury and thus no liability for the “injurer.” The role of a defense of contributory fault, particularly in the context of military attacks, requires separate, detailed analysis.

96. See 2006 Draft Principles, *supra* note 54, princ. 4, cmt. 13 (discussing the “polluter-pays principle”).

civilians.⁹⁷ A strict liability rule would have required Israel to pay compensation to the victims regardless of the sufficiency of precautions. However, Israel claims that the high rate of civilian casualties was caused by the failure of Hizbollah fighters to distinguish themselves from the civilian population.⁹⁸ Questions of contributory fault immediately emerge, reintroducing the indefinite debate on negligence, this time with respect to the targeted party.

Finally, the advantages of a strict liability rule as regards the inadequacies of a judicial claims mechanism are also significant when such a mechanism is altogether absent. The rule allows a relatively simple determination of liability, subject to the complications raised by a defense of contributory fault, when no court is available for making such a determination.⁹⁹

C. *A Disincentive to Take Action and the Ius ad Bellum/Ius in Bello Distinction*

The preceding discussion concerned the role of a strict liability rule in monitoring excessive activity (i.e., the number or frequency of military attacks), even if that activity is carried out in accordance with the optimal standard of care (i.e., through implementation of appropriate precaution). The converse problem, namely, a suboptimal activity level, must also be considered.

Any liability rule that obligates an injuring party to compensate victims has the potential of deterring that party from taking any action that generates unwanted costs. In fact, deterrence is one of the objectives of an obligation to compensate. Problems may arise if the social cost of reducing the activity level is greater than the harm avoided through that reduction. This raises a general question of tort law—namely, whether a potential injurer can be required to raise its level of activity and at the same time take greater precaution.¹⁰⁰ The laws of armed conflict add additional elements to the question. Military attacks can be examined at two levels. One is as a *ius in bello* issue governed by Article 57. In this limited context, it is

97. See, e.g., AMNESTY INTERNATIONAL, ISRAEL/LEBANON OUT OF ALL PROPORTION—CIVILIANS BEAR THE BRUNT OF THE WAR 1 (2006), available at <http://www.amnesty.org/en/library/info/MDE02/033/2006> (“Amnesty International found that Israeli forces had committed indiscriminate and disproportionate attacks, pursuing a strategy which appeared intended to punish the people of Lebanon.”).

98. ISRAELI MINISTRY OF FOREIGN AFFAIRS, PRESERVING HUMANITARIAN PRINCIPLES WHILE COMBATING TERRORISM: ISRAEL'S STRUGGLE WITH HIZBULLAH IN THE LEBANON WAR 6-7 (2007), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Preserving%20Humanitarian%20Principles%20While%20Combating%20Terrorism%20-%20April%202007>.

99. There remains the need for enforcement. See *infra* Part IV.

100. One might also consider whether the potential injurer could compensate the victims of its failure to take that precaution. Cf. DAVID GILO & EHUD GUTTEL, LIABILITY FOR INSUFFICIENT RISKS (2008).

arguable that the fewer attacks parties carry out in pursuance of a specific military advantage, the better.¹⁰¹ However, military attacks can also be examined as part of a larger scheme of military engagement under *ius ad bellum*, where minimization of attacks through inaction is not necessarily the optimal course of conduct.

In this context, three situations must be distinguished. The first is when the injuring party is an aggressor. If potential liability for avoidable or incidental injuries deters it from engaging in the use of force, this is highly welcome. The second situation is when the potentially injuring party is acting in self-defense. In this case, it is unlikely that the liability for injury to enemy civilians would deter it from engaging in military action. It is immaterial whether liability is strict or fault-based. Furthermore, in economic terms, the stakes for the party acting in self-defense are so high that they unquestionably outweigh the cost of avoiding incidental injury to enemy civilians by total inaction.¹⁰² The potential consequences include both the state's political survival and the lives of its own civilians. No party is likely to sacrifice its own civilians for the benefit of the adversary's civilians.¹⁰³ By analogy, the cost of incidental injury can be said to be proportionate to the political advantage anticipated.

The third situation is when the injuring party is acting in collective self-defense, under Chapter VII authorization,¹⁰⁴ or for humanitarian purposes.¹⁰⁵ Here too, there is a requirement of proportionality. The content of the proportionality requirement with respect to action under Chapter VII authorization presumably differs in accordance with the circumstances of that action. Proportionality is required between the danger to civilians which is to be thwarted

101. Arguably a higher level of activity, in compliance with the determined standard of care, could be required in order to shorten a war. However, under existing law, the expected military benefit, civilian loss, and the proportionality between them are all measured with respect to individual attacks and not to the overall conflict. See, e.g., Additional Protocol I, *supra* note 4, art. 57(3).

102. This calculation maximizes national benefit. In a calculation of global benefit, the importance of defeating an aggressor permits a greater number of civilian casualties (so long as individual attacks comply with the requirements of Additional Protocol I, *supra* note 4, art. 57).

103. Benvenisti points out that parties are under an obligation both to ensure the rights of their own nationals and to respect enemy nationals. Benvenisti, *supra* note 21, at 87. Thus, although civilians are entitled to human dignity and to the right to life, regardless of their nationality, as a matter of *jus in bello*, the duty to respect enemy civilians is subject to the legitimately dominant goal of each party to protect its own civilians. *Id.* at 89. This theory is equally true with respect to aggressor parties and intervening parties, except that the risk to one's civilians is far less obvious. At any rate, the argument here is positivist, rather than normative.

104. U.N. Charter art. 7.

105. For present purposes, the assumption is that military intervention for humanitarian purposes is permitted outside Chapter VII authorization.

and the force used.¹⁰⁶ The scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question. The means must be commensurate with the ends and in line with the magnitude of the original provocation.¹⁰⁷ With respect to humanitarian intervention, the original provocation must be a large scale loss of life or other serious human rights violation, such as ethnic cleansing.¹⁰⁸

In this third situation, unlike in a situation of individual self-defense, recourse to force is elective. States, the only actors to which self-defense, Chapter VII action, and humanitarian intervention are applicable, have the luxury of choosing whether to intervene militarily. They will naturally balance their own costs against their own benefits without maximizing global welfare. Had there been a general obligation¹⁰⁹ to engage in military action in these situations,¹¹⁰ potential intervener states would have calculated the cost of intervention—risk to their forces and possibly civilians, costs of using weaponry, etc.—against the cost of failing to do so, including the responsibility for the loss of civilian life as a result of the failure to intervene.¹¹¹ Such an obligation could have induced states to intervene.¹¹² However, international law does not *obligate* states to intervene. They are free to ignore the cost of their own non-intervention.¹¹³ The risk of liability, particularly if it cannot be avoided even by adhering to an optimal standard of care, may deter good Samaritan states from taking action. This indicates that a strict liability rule discourages conduct that is optimal under *ius ad bellum*.

Since the exceptional permission to use force implicitly assumes that, overall, such use is beneficial to the international community, an exception might be appropriate to prevent liability for incidental injury from deterring states from such use of force. In other words,

106. See Robin Cook, Sec'y of State for Foreign & Commonwealth Aff., Address before the A.B.A. (July 19, 2000), in [2000] 71 BRIT. Y.B. INT'L L. 646, 647.

107. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 37 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter THE RESPONSIBILITY TO PROTECT] (requiring the use of force to be proportional with the possibility of achieving a humanitarian purpose).

108. *Id.* at 32–33.

109. That is, as opposed to a potential bilateral treaty obligation.

110. With respect to the humanitarian intervention, there is at most a responsibility to protect (R2P). THE RESPONSIBILITY TO PROTECT, *supra* note 107, at 11–18.

111. Although the right to intervene in international law is only vaguely defined, it is based on the need to prevent or halt a large-scale catastrophe. Cook, *supra* note 106, at 647. A cost–benefit calculation of the need to intervene would thus assume a large number of lives potentially saved. *Id.*

112. Again, this assumes a mechanism for enforcing states' liability. See *infra* Part IV.

113. The immediate cost would be the loss of life in another state. Inaction may also have nonmonetary costs, such as reputation.

the obligation itself could be limited to military operations carried out in violation of *ius ad bellum*.

Such a link was made ex post facto with respect to Iraq's liability for consequences of its invasion of Kuwait in 1990–1991.¹¹⁴ Security Council Resolution 687 reaffirmed that Iraq was “liable under international law for any direct loss, damage . . . or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.”¹¹⁵ Liability thus attached to Iraq for losses caused by its military action, including injuries to civilians, regardless of whether that action was in compliance or violation of *ius in bello*.¹¹⁶ Compensation was obtained from Iraq through the United Nations Compensation Commission (UNCC), an ad hoc institution established under Security Council Resolution 687.¹¹⁷

Hypothetically, Iraq's liability could be regarded as strict with respect to the injurious consequences of acts not in violation of *ius in bello*, in application against a state that had violated *ius ad bellum*. In practice, the Security Council imposed liability in direct consequence of Iraq's international responsibility for the violation of *ius ad bellum*. In this respect, it is not liability despite the absence of wrongfulness but liability based on an expansive definition of wrongfulness.

The liability imposed on Iraq is unique, as is the UNCC mechanism for extracting the monies. It followed the first time that the Security Council had called for measures under Article 42 of the UN Charter in forty years;¹¹⁸ it came at a singular moment of instability of global political polarity; and it was based on a rare convergence of cross-cutting political interests. This is, therefore, an unlikely precedent for an obligation of strict liability for injuries to civilians.

The link between *ius ad bellum* and *ius in bello* has important drawbacks, which, in the specific case of Iraq, were of little practical significance. First, linking compensation to the legality of military

114. There are other examples of reparations exacted from aggressor states after the termination of a conflict, for example, from Germany under the 1919 Treaty of Versailles and following World War II, and from Japan under the Peace Agreement of 1951. However, given the absence of a clear general prohibition on the use of force until the termination of a conflict, the linkage of *jus ad bellum* and *jus in bello* in the cases of Germany and Japan is not instructive for present purposes.

115. S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (Apr. 3, 1991).

116. John R. Crook, *The United Nations Compensation Commission: A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144, 146–48 (1993). For a discussion of this mechanism as the extension of responsibility from the violation of *jus ad bellum* to all its consequences, including the consequences of acts that may have been lawful under *jus in bello*. See Yaël Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201 (2008).

117. S.C. Res. 687, *supra* note 115, ¶ 18.

118. U.N. Charter art. 42.

action under *ius ad bellum* undermines the basic tenet of *ius in bello*—namely, to protect all civilians regardless of the justification for each party's involvement in the conflict. The distinction between *ius ad bellum* and *ius in bello* is premised on the assumption that even aggressor parties can conduct their warfare humanely.¹¹⁹ Conversely, one must take into account the possibility that a party resorting to force lawfully may nonetheless conduct its warfare inhumanely.¹²⁰ If strict liability enhances adherence to lawful warfare, then it is no less pertinent to a lawful intervener than to an illegal aggressor.

An exemption of a party from strict liability also undermines the purpose for which the rule of strict liability was suggested in the first place, i.e., prompt and adequate redress to victims of attack. If the entitlement to compensation is subject to normative considerations such as whether *ius ad bellum* was violated or not, the prospects of individuals receiving any compensation grow remote. The indefinite debate over fault would only shift from the specific attack to the overall engagement in military action. In this respect too, the case of Iraq is unique because the identification of the aggressor party was unanimous (with the exception of Iraq, of course). In the absence of a general binding mechanism for determination of responsibility under *ius ad bellum*, an entitlement to compensation that depends on such a determination may be illusory.

One way to exempt the lawful intervener from liability without doing so at the expense of civilians is to establish a right for the intervener to claim its losses from the aggressor through separate proceedings.¹²¹ However, the potential benefit of such a cause of action should not be overestimated. If a party's decision to engage in military action is in practice influenced by the risk of liability for incidental injury, it is unlikely to change on the basis of an entitlement to sue the aggressor. Such an entitlement may also be illusory, given the absence of a binding dispute settlement mechanism for deciding such a claim, and extralegal constraints on bringing a claim, such as the aggressor's exiting the armed conflict victorious.

Because compensation for incidental injury was claimed only from Iraq and not from the victorious coalition parties, the question

119. Antoine Bouvier, *Assessing the Relationship Between Jus ad Bellum and Jus in Bello: An "Orthodox" View*, Address Before the Panel on the Relationship Between Jus ad Bellum and Jus in Bello: Past, Present and Future (Mar. 30, 1989), 100 AM. SOC'Y INT'L L. PROC. 109, 109–11 (2006).

120. For example, the United States' involvement in World War II was permissible for self-defense, but its bombing of Nagasaki and Hiroshima was not clearly lawful.

121. Such a claim could cover much more than the cost of compensation paid to incidentally-injured civilians. It could encompass all losses incurred as the result of a conflict for which the claimant party was not responsible.

arises whether the UNCC mechanism incorporated a recouping element, as suggested here, whereby claims of injury resulting from action by the coalition forces were compensated by Iraq as the party responsible for the violation of *ius ad bellum*. The answer must be negative. First, Iraq was only held liable for “direct” loss, excluding loss caused by other parties to the conflict.¹²² Second, compensation was only offered to Kuwaiti and third-party nationals, not to Iraqis.¹²³ Thus, to the extent that Iraqis were injured by coalition forces, they remained without remedy at the international level. Rather than incorporating a recouping mechanism, the establishment of the UNCC reflects a complete exemption of the coalition parties from liability.

To conclude, for the same reason that the use of force is not absolutely prohibited in international law, it is arguable that the financial burden embodied in the proposed rule is not beneficial with respect to potential lawful intervention. The choice appears to be between the lesser of two evils: If we are more disturbed by excessive injury to civilians in conflicts that do take place, then a rule of strict liability is preferable; if we are more disturbed by the loss of civilian life caused by the failure of states to take military action, then maintenance of the existing fault-based liability rule is preferable.

D. *The Distinction Between Legal and Illegal Attacks*

The discussion up to the present point has assumed that the cost of injury is sufficiently high to have a deterrent effect on engagement in military action under *ius ad bellum* or on launching specific attacks under *ius in bello*. One possible objection to an obligation to compensate for incidental injury may be that the cost of injury is so low that it would have the opposite effect.¹²⁴ Strict liability for injury, covering also incidental injury, might remove the parties’ incentive to act legally and obviate the distinction between legal attacks (accompanied by appropriate precaution) and illegal ones (where precautions are inappropriate or absent). The entitlement to compensation might erode the distinction between wrongful injuries and non-wrongful ones, with parties contending that they can make right what they have done through compensation, buying their way out of adherence to the principle of distinction. This would not only affect the choice of tactics in individual instances but would undermine the laws of armed conflict altogether.

122. S.C. Res. 687, *supra* note 115, ¶ 16.

123. *Id.*

124. See *infra* Part IV (discussing why the cost of injury might have to be regarded as a given before it occurs, rather than later in deciding the appropriate level of compensation to redress an injury or to deter future injuries).

The principal answer to this concern is that, fortunately, parties to a conflict are motivated not only by financial considerations. Indeed, if the decision whether to uphold the principle of distinction was dependent on financial accountability alone, no state would have upheld it even to date because, barring a few exceptions, states have not been held financially accountable for armed conflict since World War II.¹²⁵ Thus, the incentive to violate the law is countered by nonfinancial forms of enforcement.

If an obligation to compensate incidentally injured victims of military attacks is adopted and a party consequently forgoes precautions altogether (or, for that matter, miscalculates the cost-benefit ratio), it will be not only liable for all injuries—including unavoidable, incidental ones—but also internationally responsible for violating the laws of armed conflict, with whatever consequences such responsibility entails.¹²⁶

Failure to protect civilians adequately may also entail individual criminal responsibility, such as when a party not only ignores the requirement to take precaution but intentionally targets civilians. The criminal character of the injury can also be given weight in the context of compensation owed when the international responsibility of states is invoked, in the form of punitive damages.¹²⁷

Finally, if parties to armed conflicts make (or can be induced to make) cost-benefit calculations, there is no reason to assume that only direct monetary expenditures are included in that calculation. Illegal targeting of civilians (particularly if it is criminally sanctioned) has other consequences that the parties take into consideration, such as their international reputation¹²⁸ and internal public opinion. Illegal conduct can draw criticism, condemnation, retaliation, and sanctions. These consequences can be factored into the cost of injury,¹²⁹ in which case the cost of causing illegal injury is

125. The ICJ has held Uganda liable for violations of international law against Congo, including *jus in bello*. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 102 (Dec. 19). Eritrea and Ethiopia have been held liable to each other for violations of international law, including *jus in bello*, by the Eritrea-Ethiopia Claims Commission. W. Front, Aerial Bombardment and Related Claims (Eri. v. Eth.), Eri. Eth. Claims Comm'n (Perm. Ct. Arb. 2005), available at <http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf>; W. and E. Fronts (Eth. v. Eri.), Eri. Eth. Claims Comm'n (Perm. Ct. Arb. 2005), available at [http://www.pca-cpa.org/upload/files/FINAL%20ET%20FRONT%20CLAIMS\(1\).pdf](http://www.pca-cpa.org/upload/files/FINAL%20ET%20FRONT%20CLAIMS(1).pdf).

126. This responsibility extends to all injuries, even those that were unavoidable.

127. Reisman, *supra* note 22, at 398.

128. Cf. Andrew T. Guzman, *Reputation and International Law* (U. Cal. Berkeley Pub. L. Working Paper No. 1112064, 2008), available at <http://ssrn.com/abstract=1112064>.

129. In domestic law, they rarely are, probably because they are difficult to quantify. In international law, they differ little from other costs that are difficult to quantify.

significantly higher than the cost of causing incidental injury. In such a scenario, the alleged disincentive to distinguish between the two does not arise.

E. Conflicts with Non-State Actors

A growing share of armed conflicts around the world are asymmetric.¹³⁰ The asymmetry may consist of a disparity in technological power, which often translates into a disparity in compliance with the laws of armed conflict. It may also consist of differences in legal status, when the conflict is between a state and a non-state actor. The extreme violation of the laws of armed conflict, namely the deliberate and systematic targeting of civilians, is usually characteristic of non-state actors,¹³¹ but the two asymmetries are not identical. A non-state actor may conduct its warfare in compliance with the laws of armed conflict, while a state actor may violate the same laws.

Since existing mechanisms currently limit liability to states,¹³² the question arises whether expansion of liability exacerbates the asymmetry between states and non-state actors. It is important to distinguish in this context between two aspects of this alleged imbalance. One is the obligation to pay compensation when incidental injury is caused. The other is the effect of the asymmetric liability on the conduct of the parties.

There is already an asymmetry between a state, which can be held liable for injury to civilian members of the non-state actor, and the non-state actor, which cannot be held liable for injury to civilians of the other party.¹³³ As long as in there are no claims against either party in practice, this asymmetry remains theoretical. If a rule of

130. BRAD ROBERTS, INST. FOR DEF. ANALYSES, DEFENSE THREAT REDUCTION AGENCY: ASYMMETRIC CONFLICT 2010 (2000).

131. John McNee, Permanent Representative of Canada to the United Nations, Statement to the Security Council on Protection of Civilians in Armed Conflict (June 22, 2007), available at http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/security_council-conseil_securite/9890.aspx?lang=eng.

132. That is, unless the non-state actor falls within the purview of Additional Protocol I, *supra* note 4, art. 96, para. 3, but no such non-state actor exists at the time of writing. The actions of a non-state actor might also entail state responsibility if that non-state actor subsequently establishes itself as the government of an existing or new state. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001), corrected in U.N. Doc. A/56/49(Vol. I)/Corr.4, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

133. Asymmetry assumes that one party is a state and the other is not. If both are non-states, then symmetry reigns again.

strict liability results in claims actually being brought against parties,¹³⁴ the asymmetry would become operative and visible.

Another aspect of the asymmetry of liability is its impact on the conduct of parties to a conflict. With respect to specific attacks, the question now is whether the conduct of the state party is affected by the non-state party's exemption from liability and vice versa. Insofar as conduct in attack is concerned, the answer with respect to the state actor appears to be negative. For example, there is no reason to assume that Israel's attacks on Hizbollah during the war in Lebanon in 2006 were in any way affected by the knowledge that Hizbollah would not be held internationally liable for injuries caused to Israeli civilians. As for the non-state actor, the answer to this question may depend on various circumstances. For example, one might ask whether Hizbollah's attacks on Israel were guided by the knowledge that Israel could be held liable for wrongful injuries to Lebanese civilians and, hypothetically, if the obligation to compensate for incidental injury were adopted, for non-wrongful injuries. Generally stated, a non-state actor may find it expedient to provoke the state party into a military engagement that entails financial liability in order to achieve political gains, even while exposing its own civilians to physical harm. This is particularly true if the non-state party does not fear that similar measures would be adopted toward itself. The launching by a party of provocative attacks¹³⁵ is probably too distant from the direct attacks against the same party to be regarded as conduct contributing to the damage caused by each of those direct attacks individually. The party resorting to such measures thus has little to lose in terms of international liability.

However, the defense of contributory fault may have significant application to a party's precautions in self-defense. Such a defense may already exist under prevailing law, which reflects a standard of negligence. But since no international claims for civilian injury are brought at present, they do not reach the point where this defense can be raised. If a strict liability rule is adopted and claims actually follow, the defense of contributory fault will take on greater significance. Any party that does not take appropriate defensive precautions will then deprive its own civilians of compensation.¹³⁶ Where the party's military authorities are in any way accountable to their constituency, the risk of such deprivation being revealed publicly might induce them to take precaution whereas they otherwise would not have.

134. A rule of strict liability encourages claims because they are easier to litigate. See LANDES & POSNER *supra* note 77, at 65.

135. Under *jus in bello*, let alone under *jus ad bellum*.

136. If the civilians are not members of the non-state actor, then it is the conduct of the civilians rather than that of the non-state actor's that must be examined.

The precautionary requirement in Article 58 of Additional Protocol I applies to the defensive precautions of any party to a conflict, making the above argument apposite to both state and non-state actors. But to the extent that a strict liability rule makes claims practicable, the defense of contributory fault would have a greater effect on non-state actors. States have no remedy against non-state actors, so they would remain unaffected. In contrast, a non-state actor which so far has gained politically from a failure to take precautionary requirements stands to lose if it maintains its course of conduct. For example, during the 2006 war in Lebanon, Lebanese civilians that could have been spared had they remained in shelters were instead injured or killed.¹³⁷ This was not a case of deliberate use of civilians as human shields or of deliberate targeting—simply put, neither the Lebanese Government nor Hizbollah had built civilian shelters.¹³⁸ Had Israel's strict liability been invoked in order to obtain compensation, Israel could have credibly argued that the failure to construct shelters constituted contributory fault. Lebanese civilians would then have been deprived of some compensation because of their own authorities' conduct. Domestic discontent might have ensued and affected Hizbollah's public standing. Leaving aside whether or not anticipation of such discontent would have moved the specific authorities involved to take greater precautions in defense from attack, this situation demonstrates how, under the proposed rule, a defense of contributory fault becomes pertinent and raises the possibility of another influence on parties' conduct—domestic public opinion.

In conclusion, the imposition of strict liability will not have the same effect on state and non-state parties. However, it will not put a state actor at a disadvantage in comparison with the non-state actor. Therefore, a strict liability rule does not exacerbate the asymmetry of conflicts. Moreover, there is a chance that it will induce parties, particularly non-state actors, to take defensive precautions to minimize harm to civilians.

137. Cf. Anna Badkhen, *Civilian Death Toll Raises Questions*, S.F. CHRON., July 20, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/20/CIVILIANS.TMP> (demonstrating inevitability of Lebanese civilian casualties in the Israeli-Hezbollah conflict).

138. Cf. Thomas Wagner & Kathy Gannon, *Israel Strikes Resume After Brief Lull*, S.F. CHRON., July 31, 2006, available at <http://www.sfgate.com/cgi-bin/article/article?f=/n/a/2006/07/31/international/i055130D90.DTL> (explaining refugee status of Lebanese civilians trying to avoid injury from the Israeli-Hezbollah conflict). See COMMENTARY, *supra* note 14, at 694, for mention of shelters as the principal measure of protection for civilians.

F. Summary

The effect on armed conflict of a strict liability rule for injury to civilians is not to eliminate all incidental injury. Whatever the liability rule, rational injurers will take precautions only if they cost less than the anticipated compensation to injured civilians. Information deficits distort the calculation of these costs so that under a negligence rule the injurer has an incentive to externalize the cost of avoidable injury with the prospect of evading responsibility. Theoretically, a strict liability rule with a defense of contributory fault counters this incentive. It encourages the potential injurer to take appropriate precautions in military attacks so as to minimize injuries in the first place. It may also have other effects, going beyond the conduct of specific attacks. This Part considered two possibilities: first, that if the cost of compensation is high, a strict liability rule may deter states from engaging in beneficial military action; second, if the cost is low, it may erode the distinction between legal and illegal attacks. Finally, this Part examined the operation of a strict liability rule in conflicts between states and non-state actors. None of the arguments supports the adoption or rejection of the proposed obligation. It is now useful to examine other aspects of the proposed obligation, including the actual costs of compensation and enforcement.

IV. AN OBLIGATION TO COMPENSATE FOR INCIDENTAL INJURY AS A MEANS OF RECOVERY OF LOSSES

A. *The Bearable Cheapness of Life and Limb*

The previous Part examined the effect of an obligation to compensate for incidental injury on the conduct of parties to a conflict on the basis of two contradictory assumptions: one, that compensation reflecting the cost of injury is significantly higher than the cost of preventing the injury, and two, that compensation reflecting the cost of injury is significantly lower than the cost of prevention.¹³⁹ The cost of prevention through precautionary measures differs according to circumstances. It depends on the type of precautionary measure, agency, and the internalization of costs.¹⁴⁰

139. Posner and Sykes address this problem with respect to violations of the laws of armed conflict. Posner & Sykes, *supra* note 67, at 21.

140. As an example, the development of more precise weapons or risking the lives of many of the attacking party's combatants (e.g., when substituting a ground attack for an air strike), compared with a lower level of activity. The development of more focused weapons that minimize incidental injury with respect to a given target

For present purposes, it can be taken as a constant because it is not subject to a normative definition. The present Subpart focuses on the other element in the equation—the cost of compensation.

Ideally, the degree of compensation should flow from the goals it serves, such as deterrence and redress. This can occur when the rate of compensation is determined by a body external to the parties involved, such as a court. In international law, the parties directly determine the terms of their own obligations; compensation is then dictated by other factors. An obligation to compensate incidentally injured civilians will limit the parties' freedom of action in military attacks but will still generate expenditures. States have, therefore, no reason to agree on a high compensation scale. They might be motivated to adhere to a rule of liability and comply with it in exchange for the moral gain that compliance with a morally laudable scheme generates, but they can achieve this by agreeing on a compensation scale that is negligible compared with the overall costs of armed conflict.

There is little precedent of compensation in the absence of fault on which to predict a scale to which states might realistically agree. In isolated cases, states have offered *ex gratia* compensation for mistakenly targeting civilians because of errors in identification.¹⁴¹ There are even fewer cases of compensation offered for incidental injury. The conflicts in Afghanistan since 2001 and in Iraq since 2003 offer some insight into this practice.

U.S. military regulations allow judge advocates to offer *ex gratia solatia* (condolence) payments to victims of incidents that cause bodily injury, death, or loss of property.¹⁴² This option is sometimes used to compensate individuals injured in connection with combat action when a combat exclusion precludes a tort claim.¹⁴³ U.S. regulations allow such payments in countries where payment in money or in kind to a victim or to a victim's family is customary as an expression of sympathy or condolence, particularly within Asia and the Middle East.¹⁴⁴ The individual or unit involved in the damage has no legal obligation to pay solatia. Solatia payments are

may also be a side effect of the development of more accurate weapons, which are more likely to hit the chosen target. Schmitt, *supra* note 2, at 23.

141. See Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 AM. J. INT'L L. 319, 319–24 (1989); Harold G. Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325, 325–32 (1989). *But see* Andreas F. Lowenfeld, *Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 336, 336–41 (1989).

142. 10 U.S.C. § 2736 (2004).

143. Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, 2004 ARMY LAW. 39, 43 (2004).

144. Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOTIATION J. 219, 224–25 (2007).

immediate and generally nominal.¹⁴⁵ On this basis, the U.S. offered solatia payments in Vietnam in the 1960s¹⁴⁶ and in Afghanistan and Iraq since 2004.¹⁴⁷ By 2006, U.S. armed forces had paid out some \$30 million in condolence and solatia payments to Iraqi and Afghan civilians.¹⁴⁸ In Iraq, maximum individual solatia payments are \$2,500 for a death, \$1,000 for a serious injury, and \$500 for property loss or damage.¹⁴⁹

A similar scheme exists in Canada. In 2005, Canada signed an agreement with the Afghan government, waiving any liability for damage it caused in Afghanistan.¹⁵⁰ However, the Canadian Federal Treasury Board Policy on Claims and Ex Gratia Payments allows *ex gratia* payments to be offered “to anyone in the public interest for loss or expenditure incurred for which there is no legal liability on the part of the Crown. An *ex gratia* payment is an exceptional vehicle used only when there is no statutory, regulatory or policy vehicle to make the payment.”¹⁵¹ In 2006, Canada offered a number of *ex gratia* payments for incidental injury caused to civilians in Afghanistan, in amounts of up to \$9,000 per person.¹⁵² A few small *ex gratia* allowances have also been offered in Iraq by the UK¹⁵³ and by the

145. DEP'T OF THE ARMY, LEGAL SERVICES, CLAIMS PROCEDURES, PAMPHLET 27-162 \$10-10 (2008), available at http://www.army.mil/usapa/epubs/pdf/p27_162.pdf; Joseph, *supra* note 144, at 224.

146. John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages* 10 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 08-181, 2008), available at <http://ssrn.com/abstract=1096587>.

147. In November 2004, a U.S. Department of Defense General Counsel memorandum stated that *solatia* is a custom in Iraq and Afghanistan. U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCHOOL, OPERATIONAL LAW HANDBOOK 149 (2007), available at <http://www.fas.org/irp/doddir/army/law2007.pdf> [hereinafter OPERATIONAL LAW HANDBOOK].

148. Witt, *supra* note 146, at 6–7. See Jonathan Tracy, *Condolence Payments*, CIVIC, July 2006, http://www.civicworldwide.org/index.php?option=com_content&task=view&id=27&Itemid=77, for a discussion of US condolence payments in Iraq and Afghanistan.

149. OPERATIONAL LAW HANDBOOK, *supra* note 147, at 270.

150. Tom Blackwell, *Ottawa on the Hook for Harm to Afghans*, NAT'L POST, Apr. 23, 2008, available at <http://www.nationalpost.com/news/world/uselection/timeline/story.html?id=466785>.

151. Treasury Board of Canadian Secretariat: Policy on Claims and Ex Gratia, <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12197§ion=text#3> (last visited Dec. 22, 2008).

152. Blackwell, *supra* note 150. Not all payments are for incidental injury resulting from combat action. *Id.* Reported payments for clearly incidental combat-related injuries range from \$1,120 and \$1,981 for an “Afghan hit by ricochet from Canadian shot” to \$2,000 for the “death of [an] Afghan civilian during ‘rules of engagement’ escalation” to almost \$8,000 “for an incident in May, 2006, when a Canadian vehicle carrying an unnamed Afghan was hit by a rocket-propelled grenade.” *Id.* This report was based on information disclosed under the Canadian Access to Information Act. *Id.*

153. 416 PARL. DEB., H.C. (6th ser.) (2004) 140WH (statement of Mr. Adam Ingram, Minister of State, Ministry of Defense).

NATO-led International Security Assistance Force (ISAF) in Afghanistan.¹⁵⁴ Australia's *Financial Management and Accountability Act 1997* authorizes "act of grace" payments in circumstances in which the Commonwealth considers it has a moral, rather than legal, obligation to provide redress in relation to losses directly caused by its acts or omissions.¹⁵⁵ Payments of over US\$50,000 per person¹⁵⁶ have been made in Iraq and Afghanistan under this Act, although reports refer only to mistaken identification of victims rather than incidental injury.

Resort to *ex gratia* payments, sometimes to circumvent the inability to award legal compensation because of the combat exclusion, demonstrates that the injuring party perceives the benefit resulting from payment as greater than its immediate cost. However, this cannot be regarded as an application of the strict liability proposal made here. First, *ex gratia* payments are ordinarily limited in size, so that the immediate cost is very low and does not cover the loss. Second, the payment is not intended to allow *restitutio ad integrum* but to substitute an admission of guilt and to reflect good will. Indeed, the target audience of *ex gratia* payments is hardly the direct victim, but rather the Afghani or Iraqi public in general. The purpose of these *ex gratia* payments is to "win the hearts and minds," or to ensure the goodwill of local populations, thus allowing the injuring state to maintain positive relations with a host nation in whose territory it operates.¹⁵⁷ The U.S. military authorization to make the payment typically justifies the payment in that "[b]y making this condolence payment, MNF [(multinational force)] ensures the family and community recognize the MNFs' sympathy for the unfortunate occurrence. Support will positively influence both the community and local Iraqi leaders."¹⁵⁸ *Ex gratia* payments are limited to a discrete type of conflict, even if those constitute the principal conflicts in which the U.S. and its allies have been involved since World War II. These are conflicts where the injuring Western powers have perceived their opponents not as a monolithic enemy but as a mixture of potential allies and enemy insurgents. The objectives of the Western powers have been broader than merely a military counterinsurgency victory, and include nation- and state-building and

154. Ron Synovitz, *Afghanistan: NATO Begins Fund for Civilian War Victims*, RADIO FREE EUROPE RADIO LIBERTY, Jan. 26, 2007, <http://www.rferl.org/content/Article/1074305.html>.

155. *Financial Management and Accountability Act, 1997*, § 33(1) (Austl.).

156. Tom Hyland, *How We Pay Iraq When Diggers Kill*, AGE, July 2, 2006, <http://www.theage.com.au/news/national/how-we-pay-iraq-when-diggerskill/2006/07/01/1151174441322.html?page=fullpage>.

157. OPERATIONAL LAW HANDBOOK, *supra* note 147, at 149.

158. *E.g.*, Memorandum from Headquarters, 256th Brigade Combat Team, Department of the Army to the Chief of Staff, 3d Infantry Division (June 3, 2005), available at <http://www.aclu.org/natsec/foia/log.html>.

reconstruction. These powers also maintain a visible presence among the civilian population.¹⁵⁹ Given these unique characteristics, and particularly the purpose of payment, it would be wrong to draw conclusions from the practice in Vietnam, Afghanistan, and Iraq that the Western powers would be willing to pay compensation for incidental injuries caused to “proper” enemy civilians beyond the context of an occupation. If anything, this practice demonstrates that even when payment is voluntary and entirely at the discretion of the states, they do not exhibit great benevolence.

To conclude, the political price for adopting a rule which obligates states to pay compensation may be a formally endorsed low valuation of human life, and consequently the absence of any deterring effect. Overall, strict liability for civilian injury might be feasible only because it requires little change in practice, and even offers a cloak of legitimacy at only a marginal cost. The low valuation may also affect claims for wrongful acts. Although the scale need not be identical for incidental injury and for fault-based injury, some relationship between the two can be assumed. Because ensuring appropriate compensation and minimizing injury push in opposite directions in this case, it is again a choice between two evils: one possibility is to maintain existing law, in which case civilians are unlikely to receive compensation even for wrongful conduct, and the other is to adopt a strict liability rule to ensure redress for victims of both wrongful and faultless conduct, but at a lower scale.

B. *Claim Mechanisms*

Liability alone is “no threat to the judgment-proof.”¹⁶⁰ Thus, a proposal for a new obligation on states raises the problem of enforcement. There are many rules in international law that are not enforceable by any existing dispute-settlement institution and are nonetheless effective. However, to the extent that the rule of strict liability aims to enhance compliance with an already-existing obligation to minimize injury, it adds little to existing law if it is not enforced. Similarly, an abstract entitlement to compensation without the possibility of enforcement is of little assistance to victims of armed conflict.

A further question is whether the right to compensation should belong to the individual or the targeted state.¹⁶¹ The issue lies at the

159. Joseph, *supra* note 144, at 222–23.

160. Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 445, 460 (David Kairys ed., 1998).

161. Cf. Rainer Hofmann, Andrea Friedrich & Friedrich Rosenfeld, Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), ILA Committee on Reparation for Victims of Armed Conflict, art. 4 (Sept. 2007) (on file with the author).

intersection of the laws of armed conflict, which are generally applicable between states, and international human rights law, which focuses on individuals. A choice between the possible mechanisms depends on various factors, including the exact scope of the obligation, e.g., whether liability is linked to violation of *ius ad bellum*. Accordingly, the following is only a general outline of possible mechanisms for both types of claims.

1. Institutions for Individual Claims

Domestic courts seem to be the natural forum for tort claims. However, procedural obstacles are obvious. First, jurisdiction would be limited to the courts of the injuring state, the targeted state, and third states whose nationals were injured.¹⁶² In the latter two cases, state immunity will block the claim.¹⁶³ As for the courts of the injuring state, claimants are unlikely to have access to them.¹⁶⁴ There are, however, exceptions to this general rule. For example, Palestinian residents of the West Bank and Gaza Strip have been able, from the outset of the Israeli occupation, to bring claims against Israel in Israeli courts. Although the policy of the Israeli executive and judiciary of allowing such claims—without bars of jurisdiction, justiciability, or standing—is related to the status of the territories as occupied,¹⁶⁵ this practice also extended to other “enemy civilians,”¹⁶⁶ such as residents of Lebanon.¹⁶⁷ Moreover, for a short period of time, Israeli law envisaged the possibility of granting compensation to Palestinian victims of incidental injury. In 2005, Israel’s law on state liability for civil torts was amended, expanding the already existing combat exclusion clause¹⁶⁸ to cover injuries caused by Israel’s security

162. Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction Over the Military Pilots Implicated in the 1998 Italy Gondola Accident*, 65 J. AIR L. & COM. 605, 609 (2000).

163. HAZEL FOX, *THE LAW OF STATE IMMUNITY* 11 (2002).

164. The present discussion assumes that, to the extent that domestic law regards combat-related claims as nonjusticiable, this bar will be removed. Otherwise, there is no cause of action in a domestic court of the injuring party.

165. On the history and politics of this policy, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* 19–25 (2002).

166. This term is used loosely as there is no definition of an “enemy” under Israeli law.

167. Some Lebanese claims concerned Israel’s conduct as an occupying power in Lebanon, e.g., HCJ 102/82 Zemel v. Minister of Defense [1983] IsrSC 37(3) 365. However, there were claims related to combat activity but not to occupation, and even then questions of jurisdiction and standing were not raised, e.g., HCJ 574/82 El Nawar v. The Minister of Defense [1985] IsrSC 39(3) 449 (a claim by a Lebanese civilian for taking of property during Israel’s 1982 war in Lebanon). Most other claims concerned Israeli actions in Lebanon and in the West Bank and Gaza Strip as occupied territories.

168. Civil Torts (State Liability), art. 5, 1952 (Isr.).

forces in the West Bank under almost any circumstance.¹⁶⁹ To soften the consequences of that expansion, the amendment also established a committee authorized to grant *ex gratia* compensation to persons in conflict zones whose claims were otherwise excluded.¹⁷⁰ This would have permitted *ex gratia* compensation for any injury, including incidental injury caused by military operations.¹⁷¹ In the end, however, the exclusion of claims was struck down by the Israeli Supreme Court as unconstitutional, and with it the establishment of the *ex gratia* committee.¹⁷²

Another mechanism for individual claims—international tribunals—is also limited. The European Court of Human Rights and the Inter-American Commission and Court of Human Rights have limited mandates, circumscribed by their constitutive documents.¹⁷³ Whether the laws of armed conflict can be brought within the scope of these mandates is a controversial issue.¹⁷⁴ The International Criminal Court's Rome Statute creates a compensation fund for

169. *Id.* art. 5C(a). This followed Israel's disengagement from the Gaza Strip.

170. Even outside the context of "combat immunity." *Id.* art. 5C(b).

171. A restrictive reading of the clause suggests that the *ex gratia* compensation would have been limited to injury caused through negligent conduct. Assaf Jacob, *Immunity Under Fire: State Immunity for Damage Caused by Combat Action*, 33 MISHPATIM 107, 180 n.214 (2003) (Isr.). This interpretation is implicitly supported by the Supreme Court's ruling. See HCJ 8276/05 Adalah v. Minister of Defence [2006] (Isr.), translated by HaMoked, Center for the Defence of the Individual, available at http://www.hamoked.org.il/items/318_eng.pdf. After rejecting the excessive expansion of combat immunity as disproportionate and therefore unconstitutional, the Court noted that the possibility of *ex gratia* compensation did not mitigate the disproportionality. *Id.* ¶¶ 146, 164. Since it was in response to an illegitimate denial of a right to claim, the compensation would not have been *ex gratia* but required by law. *Id.* ¶ 90. The Court appears to have assumed that the *ex gratia* compensation would have been available to people with otherwise valid fault-based claims that were rejected because of the immunity clause. *Id.* ¶ 33.

172. See *Adalah*, HCJ 8276/05, ¶¶ 160–164.

173. These constitutive documents for the European Court of Human Rights include the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Europ. T.S. No. 5, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>. The constitutive documents for the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights include the American Convention on Human Rights, art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; the Charter of the Organization of American States, art. 106, Apr. 30, 1948, 119 U.N.T.S. 3; and the Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

174. Emiliano J Buis, From La Tablada to Guantanamo Bay: The Challenge of New Conflict Situations in the Experience of the Inter-American System of Human Rights Protection, presented at Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations (Jerusalem, June 1–3, 2008) (draft paper, on file with the author).

victims, but entitlement depends on individual responsibility under the Statute,¹⁷⁵ which requires not only fault but also intent.

Another mechanism may be an international victim compensation fund based on compulsory state contributions.¹⁷⁶ It is difficult to imagine, however, that states will agree to establish such a fund. Those that regard themselves as potentially targeted parties, as well as states that consider themselves unlikely to be involved in conflict, can donate the monies directly to their own nationals or to other states when the need arises and at their own discretion. States that regard themselves as potential injurers have no reason to contribute to such a fund and thereby subsidize other potential injurers. If they intend to compensate the victims of their attacks, they can do so directly when the occasion arises. Such a fund would not include non-state actors that are not identifiable in advance of the conflict and are unlikely to be granted the privilege of participating. Contributions would, therefore, be lacking. Moreover, like any insurance mechanism, a victim compensation fund provides a disincentive to take precautions. Liability then has less deterrent effect on injuring states. In short, a universal compensation fund seems impractical.

Any individual claim mechanism runs the risks of inefficiency and inaccessibility, which would enable injuring states to evade liability. However, the UNCC, which offers relief to large numbers of individual claimants through comparatively simple and expeditious administrative procedures,¹⁷⁷ has proven that this is not inevitable.

2. State Claims

Tort litigation has significant drawbacks as a means for providing coverage of loss. For one, it is a costly method.¹⁷⁸ In addition, it has been argued that tort law is an inappropriate tool for dealing with damage caused by military activity.¹⁷⁹ For example, military activity is routinely hazardous, making the presumption of ultrahazardous activity inapplicable. Other evidentiary rules of tort law are also problematic. A different line of argument is that tort law envisages a dispute between two individuals, while military activity

175. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, art. 79, UN doc. A/CONF. 183/9 (July 17, 1998).

176. Under this proposal, voluntary contributions need not go through an international institution.

177. See John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144, 145 (1993).

178. Specifically, with respect to negligence, see POSNER, *supra* note 23, at 181.

179. Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraid Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 517–18 (2006).

typically generates mass claims. The difficulty of adjudicating a case involving policy and budgetary considerations of a state has already been pointed out. Finally, the basic tenet of tort law—namely, “special risk”¹⁸⁰—is not intended to cover a risk that is common to the entire state community or to large parts of it, as well as to residents of other parties to the conflict. In view of all these problems, the question arises whether a mechanism based on tort liability of the injuring party is truly the most efficient way of compensating victims.¹⁸¹

The traditional form of dispute settlement under international law is between states.¹⁸² The right to compensation attaches to the targeted state, which adopts the claims of its nationals and presents a claim to the injuring state.¹⁸³ Any compensation that the targeted state receives belongs to the state itself, and it enjoys discretion regarding whether and how to distribute the proceeds among injured individuals.

The conspicuous advantage of an inter-state claim as compared with individual claims, whether in the courts of the injuring state or in that of the targeted state, is efficiency. The apparent shortcoming of state claims is that they do not guarantee that the injured individuals will receive compensation. Granted, the targeted state generally has an interest in rehabilitating its population.¹⁸⁴ However, whether it does so through collective facilities or on an individual basis is left to the state to determine according to its needs and priorities. There might be instances when the interests of the state do not correspond to those of the victim population, even indirectly.¹⁸⁵ Two possible examples are when the victims hail from an ethnic community that is marginalized by state authorities, and when the governing authorities are for whatever reason insufficiently accountable to the population.¹⁸⁶ Alternatively, the targeted state

180. See GRAHAM STEPHENSON, SOURCEBOOK ON TORT LAW 54 (2d ed. 2000).

181. Jacob, *supra* note 171, at 138–40.

182. See Jessica Bodack, Note, *International Law for the Masses*, 15 DUKE J. COMP. & INT’L L. 363, 363–66 (2005).

183. For example, “[t]he Eritrea-Ethiopia Claims Commission was established and operates pursuant to Article 5 of the Agreement signed in Algiers on December 12, 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.” Permanent Court of Arbitration: Eritrea-Ethiopia Claims Commission, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Dec. 22, 2008).

184. States may only adopt the claims of their nationals, whereas victims may or may not be residents of the targeted state.

185. This is the underlying premise of human rights law.

186. An example from another field is the claim that pension monies transferred by Israel to the Palestinian Authority following the signing of the Interim Accord in 1995 reached the private accounts of Palestinian leaders rather than the civil servants to whom they belong and for whom they were intended. RACHEL EHRENFELD, WHERE DOES THE MONEY GO?: A STUDY OF THE PALESTINIAN AUTHORITY 7 (2002), available at <http://www.jewishvirtuallibrary.org/jsource/Peace/ehrenfeld.html>.

might decide not to present a claim or to waive its right altogether, as part of a peace agreement, for example. This may be politically, economically, or otherwise justifiable, but the individual victim nonetheless remains empty-handed. Furthermore, the injuring state might in certain circumstances expect an eventual waiver of claims, so that the obligation will have little effect on its conduct.

3. A Combined Mechanism

Perhaps an optimal mechanism to ensure that the individual victim is compensated without the drawbacks of reliance on individual claims against the injuring state is domestic social insurance or statutory entitlement combined with an international claim for reimbursement. Under such a scheme, the burden of providing compensation for victims of military attacks, including incidentally injured victims, will be placed in the first instance on the targeted state. That state would be obligated to compensate the individual victim for his or her losses under a domestic social insurance or statutory benefits scheme. The state would then have a right to recoup its losses from the injuring state through an international claim.

Economically, first-party liability through domestic benefits is ordinarily more efficient than third-party liability.¹⁸⁷ Only where first-party insurance is unavailable or prohibitively costly, which is rare, is liability insurance better justified.¹⁸⁸

Social insurance and statutory schemes are not mandated by the laws of armed conflict.¹⁸⁹ The impetus for instituting such insurance correlates to the extent to which a state considers itself a victim of military attacks. Israel has had extensive legislation providing benefits to victims of hostilities since its inception.¹⁹⁰ In recent years, various states that had not previously had social security schemes for victims of hostilities have enacted such arrangements.¹⁹¹ Notably, such legislation was often spurred primarily by terrorist attacks,¹⁹²

187. For example, the cost of information gathering is likely to be smaller and the need to internalize costs greater, than for the injuring state.

188. Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 663, 693 (2006).

189. An obligation to provide benefits to victims of armed conflict may be based on human rights obligations, to the extent that the injury results in a person's inability to provide for him- or herself, requires special assistance, etc.

190. Law on Benefits to Victims in Periphery Area, 1956 (Isr.); The Benefits for Victims of Hostilities Law, 1970 (Isr.).

191. BERNHARD A. KOCH, EUROPEAN COMMITTEE ON LEGAL CO-OPERATION (CDCJ), REPORT ON INDEMNIFYING VICTIMS OF TERRORISM 19, 18–23 (2006), available at [http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/CJ-S-VICT/CDCJ-BU%20\(2006\)%2019%20e%20-%20ECTIL%20Report.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/CJ-S-VICT/CDCJ-BU%20(2006)%2019%20e%20-%20ECTIL%20Report.pdf).

192. See Grey, *supra* note 188, at 664.

suggesting that it addresses specific difficulties that do not arise in an ordinary inter-state conflict, most obviously the absence of a defendant entity. In addition, these situations are not clearly governed by public international law,¹⁹³ and are thus of limited relevance in the present context.

An international legal obligation on states to provide domestic benefits to their own citizens or residents for injury caused by the enemy during armed conflict will not result in uniform domestic legislation. Such arrangements are dictated by domestic policy and budgetary considerations that vary from state to state. For this reason, international law neither can nor should govern the administration of benefits. It can at most create the obligation to provide a benefit scheme with certain indispensable elements.

The possibility that a targeted state would decide not to claim its losses also exists under the combined mechanism. The advantage of the combined mechanism is that the targeted state may legitimately retain its freedom of action, but not at the expense of the individual victim. However, reliance on domestic benefits also has its weaknesses. First, domestic benefits disbursed by the targeted state provide little incentive for the injuring party to minimize injuries. In addition, domestic benefits are preferable to tort liability only if they are available in practice. There may be various reasons why a targeted party would not offer benefits to its civilians. One possibility is that the targeted party is a failed or failing state. It might not even be a state.¹⁹⁴ For many reasons, a functioning state also might not provide benefits. It is not clear that such failure is a breach of international law. If the obligation is limited to essential elements, it may not be able to justify its failure to act by financial inability. In any case, such an obligation would be difficult to enforce. If a claim by an individual against a foreign state is difficult to realize, a claim by an individual against his or her own state is even more so. An unrealized right to benefits leaves the injured individual empty-handed.¹⁹⁵

193. They are governed rather by domestic and international criminal law and, at best the law of non-international armed conflict. A case in point is the U.S. legislation following the September 11, 2001 terrorist attacks, setting up the September 11 Victim Compensation Fund. See Air Transportation Safety and System Stabilization Act, title IV, Pub. L. No. 107-42, 115 Stat. 230 (2001). However, the main goal of the fund was to protect the airlines from civil suits, not to substitute for the perpetrator's liability. *Cf. id.* § 408.

194. Since this article is limited to international armed conflict, this line of argument will not be pursued further, although it is arguable that under unique circumstances, an international armed conflict might extend to non-state parties. *Cf. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Government of Israel* [2005], ¶¶ 29–40 (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm.

195. In domestic law, one can imagine a more complex system under which an individual victim may choose, subject to limitations, between a statutory benefit from

4. Political Enforcement

Even in the absence of judicial dispute-settlement mechanisms, enforcement is possible in the international arena. Parties to a conflict may be judgment-proof, but not sanction-proof. The political will required for any sanction is, of course, no small matter. In addition, the difference in operation between political and judicial institutions must be taken into account. If enforcement through political institutions purports to reflect legal standards, the legal standards must be easy to apply. Since a rule of strict liability is simple and renders liability practically self-evident, states have a legal basis on which to establish a political demand that a state pay compensation. This simplicity may nonetheless be frustrated by the defense of contributory fault, as discussed in Part III.

One example of a political enforcement mechanism is the United Nations Compensation Commission. However, its value as a model for other conflicts is limited, not only because of the political circumstances surrounding its establishment, but also because it relied on the ability of the international community to extract compensation from Iraq.¹⁹⁶ The same result is not guaranteed for other potentially liable states.

5. Conclusion

Each of the potential enforcement mechanisms examined has its advantages and weaknesses. The choice between them depends primarily on who are identified as the legal victim and claimant and on the scope of the entitlement to compensation.

V. SUMMARY

This Article explores the idea that states should be held strictly liable for incidental injury that they cause in the course of military attacks, without being held internationally responsible for the injury. This approach takes into account the sad reality that, currently, the law does little to restrain states' targeting policies and leaves innocent civilians bearing the costs of their loss. The primary purpose of strict liability is to provide prompt and appropriate compensation to victims by divorcing international liability from international responsibility. The main issue addressed here is the

the state and a tort claim against the injurer. An international law equivalent is not impossible, though difficult to envision at the current stage of development of individual rights.

196. Status of Processing and Payment of [UNCC] Claims, <http://www.uncc.ch/status.htm> (last visited Dec. 22, 2008).

effect that such a scheme might have on the conduct of parties to a conflict. Strict liability is not proposed in order to prohibit all injuries to civilians, and this Article does not pretend that complete avoidance of injury to civilians is a realistic goal. Strict liability can, at most, reduce avoidable injuries to a minimum and provide redress to those injured.

A theoretical economic analysis suggests that a strict liability regime may encourage states to change their military strategies, both by investing greater resources in avoiding injury and by reducing their level of military activity. The relevance of economic analysis and its practical implications are nonetheless controversial. The utility of the proposal depends largely on the relative weight of economic considerations in states' policies.

States sometimes pay compensation to civilian victims of military attack despite believing that they are not obligated to do so. They do so for political reasons and do not see such compensation as a reflection on the legality of their own military conduct that led to the injury. Thus, it is not inconceivable that states would agree to pay compensation for incidental injury to civilians, but such a scheme may have an adverse effect on the goals of adequate compensation and avoidance of injuries.

Additional arguments may be put forward against an obligation to compensate all victims of military attacks. For example, when combatants or civilians directly involved in hostilities as described in Article 51(3) of Additional Protocol I fail to distinguish themselves from noncombatant civilians,¹⁹⁷ injuring parties would be more resistant to compensating the injured, naturally wishing to avoid compensating *de facto* combatants¹⁹⁸ of the other party, who would clearly be outside the scope of international entitlement to compensation, even under the proposed rule. One answer to this argument is that this problem is no different from other false claims in civil proceedings.¹⁹⁹ If the onus is on the claimant to prove eligibility, proof of civilian status is no exception.

A more general response, also by way of conclusion, is that it is probably difficult to establish the instrumental utility of an obligation to compensate incidentally injured victims of armed conflict, in addition to pre-existing state responsibility for fault-based injuries. This Article responds to some concerns in this regard but recognizes that there are no watertight solutions. The proposed obligation might prove less than economically efficient, yet this alone does not mean

197. See Additional Protocol I, *supra* note 4, art. 51(3). This is a characteristic problem when the conflict is with a non-state actor, but need not be unique to it.

198. The use of these words is not an attempt to create a new category of individuals under the laws of armed conflict, nor is it an attempt to rename an existing category.

199. Cf. Jacob, *supra* note 171, at 185 n.229.

that it is not worthy of consideration, because it reflects, first and foremost, a moral commitment to victims that can be evaluated irrespective of its economic implications. If the commitment is found morally justified, it may be the basis for a new obligation. At the same time, the proposed obligation's potentially adverse consequences on states' conduct must not be ignored. Instead, they should be met by fine-tuning the obligation and its implementing mechanisms so as to minimize its deficiencies. Although a tall order, this might not be impossible. In the long run, liability may combine with expanding restrictions on *ius in bello*—e.g., restrictions on the use of certain weapons—and linkages between *ius ad bellum* and *ius in bello* to modify current perceptions of the legality of conduct in armed conflict. The present inquiry may advance the development of international law by shedding new light on familiar problems.
