

## Implementing War Torts

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*Under international law, no entity is accountable for lawful acts in war that cause harm, and accountability mechanisms for unlawful acts (like war crimes) rarely create a right to compensation for individual victims. Accordingly, states now regularly create bespoke institutions, like the proposed International Claims Commission for Ukraine, to resolve mass claims associated with international crises. While helpful for specific and politically popular populations, these one-off institutions have limited jurisdiction and thus limited effect. Creating an international “war torts” regime—which would establish a route to compensation for civilians harmed in armed conflict—would better address this accountability gap for all wartime victims.*

*This Article is the first attempt to map out the questions and considerations that must be navigated to construct a war torts regime. With the overarching aim of increasing the likelihood of victim compensation, it considers (1) the respective benefits of international tribunals, claims commissions, victims’ funds, hybrid systems, and domestic courts as institutional homes; (2) appropriate claimants and defendants; and (3) the elements of a war torts claim, including the necessary level and type of harm, the preferable liability and causation standards, possible substantive and procedural affirmative defenses, and potential remedies.*

*Domestic law has long recognized that justice often requires a tort remedy; it is past time for international law to do so as well. By describing how to begin implementing a new war torts regime to complement the law of state responsibility and international criminal law, this Article provides a blueprint for building a comprehensive accountability legal regime for all civilian harms in armed conflict.*

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## INTRODUCTION

In May 2022, President Zelensky announced Ukraine's intention "to ensure that Russia compensates in one way or another for everything it has destroyed in Ukraine. Every burned house. Every ruined school, ruined hospital. Each blown up house of culture and infrastructure facility. Every destroyed enterprise. Every shut down business, every hryvnia lost by people, enterprises, communities and the state."<sup>1</sup> He called upon states to "create a mechanism through which each and every one who has suffered from Russia's actions will be able to receive compensation for all losses."<sup>2</sup>

Zelensky's call is one for basic justice, but he must regularly repeat it because there is currently no institution able to provide compensation to "each and every" harmed Ukrainian civilian. However, in the wake of Russia's illegal war and its devastating civilian toll, states have shown interest in and taken steps towards creating a bespoke "International Claims Commission for Ukraine" to address the harms Zelensky enumerated.<sup>3</sup> This is a good and important development, but it is inherently limited. While custom institutions may be well-tailored to particular situations, most civilian victims are not politically popular enough to obtain and sustain the widespread state interest and investment necessary for creating a bespoke claims commission.<sup>4</sup> Instead, a permanent institution designed to

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1. Volodymyr Zelenskyy, President, Ukr., We Urge the Partner States to Recognize that Russia Must Be Held Financially Responsible for the Crimes It Committed – Address by the President of Ukraine (May 20, 2022, 10:25 PM), <https://www.president.gov.ua/en/news/proponuyemod-erzhavam-partneram-viznati-sho-rosiya-povinna-p-75221>.

2. *Id.*

3. *E.g.*, Chiara Giorgetti, Markiyani Kliuchkovsky & Patrick Persall, *Launching an International Claims Commission for Ukraine*, JUST SEC. (May 20, 2022), <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/>; *see also* Chiara Giorgetti, Markiyani Kliuchkovsky, Patrick Pearsall & Jeremy K. Sharpe, *Historic UNGA Resolution Calls for Ukraine Reparations*, JUST SEC. (Nov. 16, 2022), <https://www.justsecurity.org/84146/historic-unga-resolution-calls-for-ukraine-reparations/> (discussing the resolution to create a registry of Ukrainian damages).

4. *E.g.*, Lorraine Ali, *In Ukraine Reporting, Western Press Reveals Grim Bias Toward People Like Us*, L.A. TIMES (Mar. 2, 2022), <https://www.latimes.com/entertainment-arts/tv/story/2022-03-02/ukraine-russia-war-racism-media-middle-east> (noting the discrepancies in American and European reporting on the Ukrainian conflict and coverage of armed conflicts in the Middle East, Africa, South Asia, and Latin America and concluding that the "limits of empathy in wartime are still too often measured by race"); *see also* Patryk I. Labuda, *On Eastern Europe, Whataboutism' and West(s)plaining': Some Thoughts on International Lawyers' Responses to Ukraine*, EJI.L. TALK! (Apr. 12, 2022), <https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westspaining-some-thoughts-on-international-lawyers-responses-to-ukraine/> (implying that many Western states have self-interested reasons to support Ukraine and undermine Russia, which might explain their greater interest in this conflict).

compensate *all* civilians harmed in *all* armed conflicts is needed.<sup>5</sup>

In prior work,<sup>6</sup> I joined a growing chorus of military advisors,<sup>7</sup> civilian advocates,<sup>8</sup> political scientists,<sup>9</sup> and legal scholars<sup>10</sup> working to address the

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5. A permanent institution would not preclude the development of future, tailored ones; rather, it would ensure that there is something for those populations who would not otherwise have a route to redress. See *infra* Part III.D.7 (noting that a *res judicata* defense could prevent claimants from bringing identical claims in multiple venues).

6. Rebecca Crootof, *War Torts*, 97 N.Y.U. L. REV. 1063 (2022) [hereinafter Crootof, *War Torts*].

7. E.g., Memorandum from James H. Anderson, Performing the Duties of the U.S. Deputy Under Secretary of Defense (Policy), Office of the Undersecretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatant Commands & General Counsel of the Department of Defense, Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (Jan. 31, 2020), <https://media.defense.gov/2020/Feb/20/2002252367/-1/-1/1/DEVELOPMENT-OF-A-DOD-INSTRUCTION-ON-MINIMIZING-AND-RESPONDING-TO-CIVILIAN-HARM-IN-MILITARY-OPERATIONS.PDF>; LARRY LEWIS, REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS 8 (2013); CHRISTOPHER D. KOLENDA, RACHEL REID, CHRIS ROGERS & MARTE RETZIUS, THE STRATEGIC COSTS OF CIVILIAN HARM: APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS 32–33 (Open Soc’y Found. 2016).

8. E.g., CTR. FOR CIVILIANS IN CONFLICT & COLUM. L. SCH. HUM. RTS. INST., IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 41 (Feb. 13, 2020); Scott T. Paul, *The Duty to Make Amends to Victims of Armed Conflict*, 22 TUL. J. INT’L & COMP. L. 87 (2013).

9. E.g., NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA’S POST-9/11 WARS 305–85 (2013) (arguing for vesting moral responsibility for civilian harm in armed conflict with institutions, rather than individuals).

10. E.g., Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXFORD J. LEGAL STUD. 808, 809 (2019) [hereinafter *Belligerent Wrongs*]; Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT’L L. 375 (2019) [hereinafter *Collateral Damages*] (comparing U.S. and Israeli compensation programs and providing guidelines for future state compensatory mechanisms in asymmetric conflicts); Marta Bo, *Autonomous Weapons and the Responsibility Gap in Light of the Mens Rea of the War Crime of Attacking Civilians in the ICC Statute*, 19 J. INT’L CRIM. JUST. 275, 285–93 (2021) (arguing for an expansive interpretation of the Rome Statute’s *mens rea* requirement to ensure criminal liability for indiscriminate attacks); 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) (arguing that “[r]eparation should not be limited to violations of international humanitarian law, but include adequate redress for victims of collateral damage”); Tetyana (Tanya) Krupiy, *Regulating a Game Changer: Using a Distributed Approach to Develop an Accountability Framework for Lethal Autonomous Weapon Systems*, 50 GEO. J. INT’L L. 45 (2018) (arguing for expanding criminal liability based on the exercise of authority, rather than intent); W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. L. REV. 1, 4 (2013) [hereinafter Reisman, *Compensating*] (arguing that harmed civilians are entitled to direct remedies); W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT’L L. 381, 398 (1997) (same); Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT’L L. 181 (2009) (evaluating whether state liability for civilian harms can be read into the law of state responsibility); Marcus Schulzke & Amanda Cortney Carroll, *Corrective Justice for the Civilian Victims of War: Compensation and the Right to Life*, 21 J. INT. RELS. & DEV. 372 (2018) (arguing that the right not to be arbitrarily deprived of life entails a second-order duty to compensate civilians who have been killed); Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT’L L.

accountability gap at the heart of the law of armed conflict.<sup>11</sup> Namely, despite the myriad sources of civilian harm,<sup>12</sup> there is rarely a route to an individualized remedy for the property, bodies, or lives which are destroyed in war. Under international law, no entity is liable for lawful acts that cause harm—regardless of how many or how horrifically civilians are hurt. To the extent there are international accountability mechanisms, they are limited to unlawful acts: Individuals who willfully target civilians or otherwise commit serious violations of international humanitarian law may be prosecuted for war crimes,<sup>13</sup> and states that commit internationally wrongful acts must make reparations under the law of state responsibility.<sup>14</sup> But neither of these legal regimes ensure that the victims will be compensated for their injuries.<sup>15</sup>

I proposed creating an international “war torts” regime that would require states to pay for all acts—including intended injuries, collateral damage, and accidents—which cause civilian harms.<sup>16</sup> This new legal regime would exist alongside international criminal law and the law of state responsibility; in doing so, it would help define the boundaries and relevance of each.<sup>17</sup> Harmful acts could be more clearly categorized: “[A]s in domestic law, an act might be a war crime, a war tort, both, or neither.”<sup>18</sup> And, just as tort and criminal law serve overlapping but distinct aims in domestic legal

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121, 137 (2017); *id.* at 169 n.312 (citing other scholars writing on how to improve the civilian amends process).

11. Rebecca Crootof, *AI and the Actual IHL Accountability Gap*, in THE ETHICS OF AUTOMATED WARFARE AND ARTIFICIAL INTELLIGENCE (Ctr. for Int’l Governance Innovation 2022), <https://www.cigionline.org/articles/ai-and-the-actual-ihl-accountability-gap/>.

12. Crootof, *War Torts*, *supra* note 6, at 1073–78 (discussing intentional attacks on civilians, anticipated civilian injury incidental to other attacks, and accidental civilian harm).

13. *Id.* at 1080–86. Further, due to various pleading restrictions and immunities, individual combatants generally cannot be held liable in domestic law. *Id.* at 1086–89.

14. *Id.* at 1089–1101 (detailing potential arguments for state responsibility for accidental civilian harm and their limited applicability). Like individual combatants, states generally cannot be sued for acts in armed conflict in domestic courts due to various international and domestic law immunities. *Id.* at 1096–98. While some states voluntarily provide amends to harmed civilians (sometimes termed *ex gratia*, *solatia*, or condolence payments), these discretionary and irregular payments are hardly an accountability mechanism. *Id.* at 1098–1101.

15. War crimes are usually punished with incarceration, not fines; meanwhile, reparations owed under the law of state responsibility are paid to the victim state, not individual victims.

16. Crootof, *War Torts*, *supra* note 6. A war torts regime would not be a comprehensive transitional justice program—rather, it would be but one component, focused solely on increasing the likelihood of civilian compensation, without minimizing the need for other, nonmonetary responses—like acknowledgement, apology, and guarantees of non-repetition. *See infra* Part III.E.

17. Crootof, *War Torts*, *supra* note 6, at 1085, 1128 (noting that, in the absence of tort remedies, “many look to criminal law to achieve aims it was never meant to accomplish” and that a war torts regime might reignite awareness of the relevance of the law of state responsibility to violations of international humanitarian law).

18. *Id.* at 1128.

regimes, war torts, war crimes, and the law of state responsibility could coexist and complement each other, collectively establishing a more comprehensive international accountability system.

While ambitious, this proposal is simultaneously intuitive: States should be accountable for the harms they cause to innocent civilians. It is also grounded on established doctrinal foundations, including international humanitarian law's obligation to minimize needless civilian suffering<sup>19</sup> and the broader legal principle that an entity who causes harm should pay compensation.<sup>20</sup> After sketching out some of the fundamental characteristics of a war torts regime,<sup>21</sup> I outlined the benefits that would attend its creation. First and foremost, establishing a war torts regime would increase the likelihood that victims of wartime violence would receive compensation; it would also facilitate the collection of more data on the sources and scope of civilian harm in armed conflict, which in turn might indirectly foster safer military policies and procedures.<sup>22</sup> A war torts regime would also encourage productive legal evolution, both within international humanitarian law and in other international legal regimes.<sup>23</sup> Finally, I engaged with critiques, including why tort law is not ill-suited to addressing the types and scope of harms in war,<sup>24</sup> why I doubt the threat of war torts liability would over-deter states from engaging in armed conflicts,<sup>25</sup> why the risk of "pricing" civilian harms is preferable to a status quo which ignores them,<sup>26</sup> why any war torts regime will need to contend with thorny design decisions that risk entrenching extant uneven state power relations,<sup>27</sup> and why states would ever be interested in creating a regime that would impose

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19. *Id.* at 1101–07.

20. *Id.* at 1107–09.

21. *Id.* at 1109–20.

22. *Id.* at 1120–24.

23. *Id.* at 1124–30.

24. *Id.* at 1130–32 (arguing that we can usefully draw on domestic tort law concepts to develop war torts and showcasing institutions that have provided individualized compensation to innumerable victims, both outside of and in the armed conflict context).

25. *Id.* at 1132–34 (concluding that states are unlikely to create a war torts regime which acts as a significant deterrent to engaging in military operations); *see also infra* Part III.D.2 (discussing the possibility of state immunity for actions authorized by the Security Council).

26. Crootof, *War Torts*, *supra* note 6, at 1134–36 (noting that, while not harming civilians in the first place would obviously be ideal, to the extent states are going to continue to wage war, compensating the attendant civilian harms is preferable to not doing so).

27. *Id.* at 1136–37 (discussing the disparities inherent to institutional and procedural design decisions); *see also infra* Part I.B.2 (discussing the differing impacts of different institutional design choices); Part III.B (discussing the differing impacts of differing liability standards); Part III.E (discussing the differing impacts of differing damages calculations).

costs for previously costless activities.<sup>28</sup>

But while I made doctrinal arguments for war torts and normative claims about the diverse benefits that would accompany establishing this new legal regime, I did not address how to go about creating it. My proposal acknowledged and postponed engaging with the myriad messy implementation questions: What institutional structure would be preferable? Who should be able to bring a claim? Against whom? What kind and amount of harm must be shown? What standard of liability should be employed? How should causation be evaluated? What affirmative defenses are permissible? What remedies should be available?

This Article tackles these and other complicated questions affecting whether and when harmed individuals will be able to receive compensation. Part I outlines a host of institutional design issues, including a war torts institution's appropriate responsibilities, possible structures, and relationship with domestic institutions; in doing so, it weighs the respective benefits of adversarial tribunals and indemnification systems (such as claims commissions and victims' funds) as institutional models. Part II discusses which entities would be appropriate claimants and defendants, with a focus on the tradeoffs involved in permitting states and third-party representatives to bring suit on behalf of individuals. Part III draws on international law and U.S. tort law concepts<sup>29</sup> to identify the elements of a "war torts" claim, including the necessary level and type of harm, the preferable liability standard, the utility of narrow and expansive causation standards, possible substantive and procedural affirmative defenses, and potential remedies. The Conclusion addresses the looming background question: Why would states ever establish a war torts regime in the first place?

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28. Crootof, *War Torts*, *supra* note 6, at 1137–40 (discussing the utility of articulating the concept of "war torts" and arguing that it might provide a solution to the debate around accountability for autonomous weapon systems); *see also infra* Conclusion (discussing how Russia's unlawful war in Ukraine and subsequent state interest in accountability mechanisms for wartime harms make the idea of establishing a war torts institution less impossible than it seemed just last year).

29. *Cf.* Gabriella Blum & John C. P. Goldberg, *The Unable or Unwilling Doctrine: A View from Private Law*, 63 HARV. INT'L L.J. 63, 108 (2022) ("[T]here are good reasons to look to private law to illuminate possible choices for the interpretation and application of international law relating to responsibility and liability."). Many of my arguments necessarily draw from U.S. tort law, as that is my area of expertise. I welcome future works that identify distinctions between American and other tort law regimes and explore the implications of those distinctions in developing a war torts regime.

*Caveats*

Before proceeding, I pause to acknowledge three facts, each of which counsels against making specific recommendations.

First, answering institutional design questions often requires reconciling difficult political tradeoffs. For example, the more robust the war torts regime, the more likely that it will accomplish the aims of providing compensation to victims, collecting information about civilian harm, promoting safer military practices, and fostering useful legal evolution—but the more robust the regime, the less likely it is to be established, as states willing to pay lip service to civilian compensation may not be willing to commit to paying large costs. Meanwhile, the more that a war torts institution is modeled on an adversarial tribunal, the more it will be able to provide victims with all of the benefits associated with having a “day in court” and holding an entity which caused harm accountable, though it may be more difficult for victims to bring or prove claims. The more it looks like a claims commission or victims’ fund, the faster it will be able to provide individual payments, though it may sacrifice tailored awards, some amount of information generation, and the deterrent effects of naming and shaming particular defendants. The more a war torts regime is developed in domestic law, the sooner it can be created; the more it is developed at the international level, the more it will be free from domestic constraints.

Second, many of these questions are interrelated, such that answering a question about one may implicitly resolve another. For example, the selection of an institutional form raises some secondary questions and forecloses others. If the war torts institution is structured as an international tribunal where claims are brought against individual state defendants, there is no need to develop a table of harms. Conversely, if it is structured as an indemnification system, there is no need to consider various liability or causation standards. Similarly, setting a high bar for one element of a claim—say, the amount or kind of harm experienced—might affect how high the bar is set for another element—say, the proximate cause standard. While it is possible to conceive of a regime that allows claims for all kinds of harms and has an expansive proximate cause analysis, it seems more likely that making one expansive will encourage a narrower assessment of the other.

Third, questions of institutional design are unending: Answering one

simply raises three more, of increased detail and complexity.<sup>30</sup> In exploring the relative benefits of tribunals and alternative indemnification systems, must I explore every question of structural design? Whole books have been written on these topics!<sup>31</sup> And so, while I will often wave at certain considerations—such as my observation that there should be some means of appealing a tribunal’s decision or contesting a commission’s finding—or acknowledge likely second-order implications—for example, that the creation of a war torts regime suggests the creation of war torts insurance—a full excavation of all questions and consequences is beyond the scope of this work.

In light of these various political tensions, interdependent issues, and fractal questions, I am generally hesitant to make specific recommendations about which option among various possibilities would be preferable. There are a few sections where I take a clear stance—such as in arguing that individuals should not be defendants<sup>32</sup> or that most war torts claims should be evaluated under a strict liability standard<sup>33</sup>—and undoubtedly my biases side in under the cover of my word choices. Mostly, however, I aim to provide a relatively neutral collection of options to be considered when building an international war torts regime.

### I. INSTITUTIONAL DESIGN<sup>34</sup>

It would be incredibly difficult to incorporate a war torts regime within existing institutions. At the international level, most institutions would not even be able to consider war torts claims. The International Court of Justice’s jurisdictional reach is universal but limited: It can hear inter-state disputes when states accept its jurisdiction as generally compulsory or agree to have it decide a specific issue,<sup>35</sup> but only 73 of the 193 UN member states are currently subject to the Court’s compulsory jurisdiction—a list that does not include four permanent members of the UN Security Council—and

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30. Cf. Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986).

31. See, e.g., LEA BRILMAYER, CHIARA GIORGETTI & LORRAINE CHARLTON, INTERNATIONAL CLAIMS COMMISSIONS: RIGHTING WRONGS AFTER CONFLICT (2017) (providing a comprehensive review of the mechanics, benefits, and challenges of claims commissions).

32. See *infra* Part II.B.

33. See *infra* Part III.C.

34. This section expands on arguments I introduced in Crotofof, *War Torts*, *supra* note 6, at 1116–18.

35. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

there would be little incentive for a potential defendant state to agree to litigate a particular war torts claim.<sup>36</sup> Similarly, regional tribunals—like the European Court of Human Rights, the Inter-American Court of Human Rights, or the African Court of Human Rights—are unlikely forums for war torts claims. Only rarely will they have jurisdiction over all relevant parties, and whether international humanitarian law questions are within their mandate is already controversial.<sup>37</sup> Other international tribunals and non-fault systems—like the International Criminal Court, ad hoc tribunals, and various claims commissions—have circumscribed jurisdiction, which would require a treaty amendment to enable war torts liability. Meanwhile, domestic courts' ability to evaluate war torts claims will be stymied by domestic and international state immunity defenses.<sup>38</sup>

Given the limitations of existing institutions and given that modifying them would entail grafting on structures to achieve aims that the original entities were never meant or designed to accomplish, this Part starts from scratch and considers questions relevant to constructing a new institution.<sup>39</sup> This includes identifying the responsibilities a war torts institution would need to fulfill and weighing the respective benefits of the two main potential formats—an adversarial tribunal and an indemnification system.<sup>40</sup> It concludes by discussing how, in addition or as an alternative to developing an international institution, states could create domestic mechanisms or tweak domestic law defenses to enable harmed civilians to file claims for compensation.

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36. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <https://www.icj-cij.org/en/declarations> (last updated Apr. 15, 2016).

37. Ronen, *supra* note 10, at 218.

38. Crootof, *War Torts*, *supra* note 6, at 1096–98 (noting that civilian victims “who attempt to bring suit against a foreign or territorial state almost invariably have their claims quashed,” either because they lack standing, their claims are barred by a peace settlement, dismissed as contrary to the foreign policy interests of the host state, or thwarted by the defense of sovereign immunity).

39. There is, of course, much to be learned from existing institutions; a consideration of which have succeeded at what endeavors will be invaluable in constructing a new one. *See, e.g.*, Anne Dutton & Fionnuala Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate*, 19 CHI. J. INT'L L. 490 (2019) (evaluating the strengths and effectiveness of the ICC Trust Fund for Victims). Similarly, a broad body of amends experience and scholarship should also inform the creation of a war torts institution. *See, e.g.*, Wexler & Robbennolt, *supra* note 10, at 124 (discussing what factors should inform the design of amends practices for lawful and unlawful acts in armed conflict).

40. *See also* Reisman, *Compensating*, *supra* note 10, at 17 (suggesting that the project of evaluating claims could be delegated to a respected non-governmental organization, like the International Committee of the Red Cross).

### *A. Responsibilities*

At a bare minimum, a war torts institution would need structures for receiving and processing claims, the capacity to make determinative findings of fact and law, and the means to determine damage assessments and distribute or enforce damages awards. In the process of making findings of fact and law, the institution will both develop war torts law and refine our understandings of the law of armed conflict, the law of state responsibility, and international criminal law.

#### *1. Findings of Fact*

Regardless of how a war torts institution is structured,<sup>41</sup> it will need to be able to make determinative findings of fact to identify legitimate claims.<sup>42</sup> For example, if an individual's ability to bring a claim depends on their status—whether they are a civilian, a civilian who directly participated in hostilities, a private military company, or a combatant<sup>43</sup>—or on the amount or kind of harm they have suffered,<sup>44</sup> the institution will need to be able to evaluate whether the requirements for all elements of a claim are met.

A war torts institution's ability to assess information and reach independent factual conclusions could have a host of positive externalities. For example, there are stark discrepancies in military and NGO reporting on civilian harms, due to different categorization choices, different access to data, and different investigative practices.<sup>45</sup> Militaries usually rely on pre-strike internal sources and remote post-strike damage assessments to determine the amount of civilian harm, while non-governmental organizations tend to engage in on-the-ground witness interviews and

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41. See *infra* Part I.B (discussing the relative benefits of adversarial tribunals and indemnification systems); see also Bachar, *Collateral Damages*, *supra* note 10, at 387 (noting the import of this capability and concluding that a tribunal would be better able to engage in objective and contextual fact-finding than a non-fault, administrative compensation program).

42. A war torts institution might rely solely on the facts asserted by claimants and defendants; it might also have its own independent fact-finding capabilities, possibly modeled on current UN Commissions of Inquiry. While some have critiqued these Commissions for inappropriately reaching conclusions regarding criminal liability, e.g., Michael Nesbitt, *Re-Purposing UN Commissions of Inquiry*, 13 J. INT'L L. & INT'L RELS. 83, 99–103, 115–18 (2017), they are better suited to the fact-finding necessary for understanding the context of a war torts claim, see *id.* at 103–04 (observing that Commissions are better at fact-finding that entails “detail[ing] what happened and how it might be prevented in the future”).

43. See *infra* Part II.A.

44. See *infra* Part III.B.

45. Crootof, *War Torts*, *supra* note 6, at 1120–22.

reporting. When evaluating an individual claim in a tribunal setting, it would be possible to compare military and witness narratives, allowing “each source [to corroborate or refute] information from others until the most accurate conclusion possible under the circumstances is found.”<sup>46</sup> This fact-finding process would have varied benefits. For victims, the opportunity to learn about the causes of their harms may be as important as receiving monetary compensation.<sup>47</sup> Meanwhile, states would be incentivized to improve their record-keeping, both to detail their compliance with legal obligations and to contest claims.<sup>48</sup> Stepping back, a clearinghouse for articulating, investigating, and evaluating claims would result in far better data on the sources, kinds, and extent of civilian harms in armed conflict, which would be invaluable to militaries, civilian advocates, and others working to better understand and minimize them.<sup>49</sup>

## 2. *Findings of Law*

A war torts institution will need to resolve many of the legal questions raised in this Article, as well as many that are outside of its scope.<sup>50</sup> Some will be relevant regardless of the structure; for example, any institution will need to identify who can bring a claim<sup>51</sup> and what kind and amount of harm they must demonstrate.<sup>52</sup> Other questions—like whether non-state armed groups can be defendants,<sup>53</sup> what liability standards should be employed,<sup>54</sup> or when punitive damages are appropriate<sup>55</sup>—will only be relevant if the institution is structured as a tribunal. Accordingly, as a general rule, tribunals are more likely to contribute to legal developments as they wrestle with the

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46. Luke Hartig, *What Counts as Sufficient Transparency on Civilian Casualties in Somalia*, JUST SEC. (Apr. 20, 2020), <https://www.justsecurity.org/69771/what-counts-as-sufficient-transparency-on-civilian-casualties-in-somalia/>.

47. Wexler & Robbenolt, *supra* note 10, at 155–57 (discussing civilians’ desire for information about why they were harmed).

48. *Cf.* Bachar, *Collateral Damages*, *supra* note 10, at 410 (noting that, after a wave of lawsuits grounded in actions taken during the First Intifada, Israeli military “record keeping became much more rigorous”).

49. Crotoof, *War Torts*, *supra* note 6, at 1120–22.

50. Even if some of these questions are addressed explicitly in an implementing document, an institution will still need to interpret those requirements in unanticipated or unaddressed edge cases.

51. *See infra* Part II.A.

52. *See infra* Part III.A.

53. *See infra* Part II.B.

54. *See infra* Part III.B.

55. *See infra* Part III.E.

specific facts of particular scenarios.<sup>56</sup>

One significant legal issue will be what evidentiary standards should apply to war torts claims. War torts investigations will be plagued by information gaps and asymmetries, due to the difficulty of obtaining direct evidence from war zones and information about internal state practices (especially when the latter implicates national security issues).<sup>57</sup> On the claimant's side, evidentiary challenges may make it impossible to substantiate or defend a valid claim; on the defendant's side, similar challenges may make it impossible to identify or challenge false ones.<sup>58</sup>

In an adversarial setting, some evidentiary issues may be addressed by shifting burdens of proof. In general, the party alleging a fact in an international tribunal has the burden of proving it,<sup>59</sup> and circumstantial evidence is usually permitted, though often critically examined.<sup>60</sup> When a claim depends on evidence in the sole possession of the opposing party, the International Court of Justice has sometimes held that the burden of proof shifts to the party with access to information to disprove the claim.<sup>61</sup> Drawing on the Ethiopia-Eritrea Claims Commission's practices in fact-finding, for example, the Court altered the burden of proof in its *Armed Activities Reparations Judgement* for different situations: "For all reparations claims involving Ugandan occupation of Ituri, Uganda had the burden to prove that any injury suffered by the DRC was *not* caused by its failure to discharge the legal duties of an Occupying Power. For [other] claims...the

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56. That being said, tribunals may sometimes pronounce judgements without elucidation. See Desierto, *infra* note 62 (observing that, in the *Armed Activities Reparations Judgement*, the Court determined reparation amounts "[w]ithout explanation or reasoning whatsoever").

57. Cf. Bachar, *Collateral Damages*, *supra* note 10, at 400 (noting that civilian claims against Israel for the acts of its security forces often ended in settlement, due to evidentiary issues faced by both sides); *id.* at 410–11 (noting that Israeli lawyers defending the state have a host of evidentiary challenges, including difficultly verifying the medical records provided by plaintiffs, problems securing combatant's testimony, and the inability to investigate the scene of the incident safely).

58. *Id.* at 411.

59. Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 162 (Apr. 20).

60. See Michael P. Scharf & Margaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences*, 13 CHI. J. INT'L L. 123, 147 (2012) (analyzing jurisprudence from the International Court of Justice, the Permanent Court of Arbitration, the Eritrea-Ethiopia Claims Commission, and the NAFTA Claims Tribunal).

61. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, ¶ 15 (June 19); see also Gangaram-Panday v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 16, ¶ 49 (Jan. 21, 1994); see also Central Front (Eri. v. Eth.), 26 R.I.A.A. 115, 117 (Eri.-Eth. Claims Comm'n 2004) (reading negative inferences of fact against a state for failing to produce evidence).

DRC assumed the burden of proof.”<sup>62</sup> Similarly, a war torts tribunal might require the defendant to disprove an element of a claim when the information required to prove or disprove the element is controlled by the defendant.

More often, however, rather than shifting the burden of proof, the International Court of Justice has used nonproduction of evidence “as a license to resort liberally to circumstantial evidence where direct evidence would otherwise be preferred.”<sup>63</sup> In its 1949 *Corfu Channel* decision, for example, the Court determined that, in cases where key evidence was in the possession of the accused state, the accusing state would enjoy “a more liberal recourse to inferences of fact and circumstantial evidence,” provided there was no room for reasonable doubt.<sup>64</sup> In 2007, the Court revisited this evidentiary problem in the *Bosnian Genocide* case, where it relied on circumstantial evidence to reach a legal conclusion regarding Serbia’s failure to prevent atrocities, but disregarded such evidence with regard to the claim that Serbia intended to commit genocide.<sup>65</sup> As a general rule, the Court “will permit liberal reliance on circumstantial evidence so long as two conditions are met: (1) The direct evidence is under the exclusive control of the opposing party; and (2) the circumstantial evidence does not contradict any available direct evidence or accepted facts.”<sup>66</sup> Again, a war torts tribunal might similarly grant more weight to circumstantial evidence in specific situations or for establishing particular elements of a claim.

In an indemnification system, evidentiary issues will be lessened—insofar as there will be no need to prove certain elements of a claim, like causation—but not eliminated. Claimants will still need to provide proof of their harms, the linkages to an armed conflict, and whatever else may be required to state a claim.

A war torts institution will also need to resolve a number of legal

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62. Diane Desierto, *The International Court of Justice’s 2022 Reparations Judgment in DRC v. Uganda: ‘Global Sums’ as the New Device for Human Rights-Based Inter-State Disputes*, EJIL: TALK! (Feb. 14, 2022), <https://www.ejiltalk.org/the-international-court-of-justices-2022-reparations-judgment-in-drc-v-uganda-a-new-methodology-for-human-rights-in-inter-state-disputes/#:~:text=The%20DRC%20named%20the%20sum,%5B2022%20Reparations%20Judgment%2C%20p> (citing *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, *Reparations*, Judgment, 2022 I.C.J. 38, ¶¶ 118-19 (Feb. 9)).

63. Scharf & Day, *supra* note 60, at 128.

64. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 18 (Apr. 9).

65. *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26). This may be because Serbia submitted direct evidence that it did not meet the intent requirement for the crime of genocide. Scharf & Day, *supra* note 60, at 141.

66. Scharf & Day, *supra* note 60, at 131.

questions beyond the scope of this Article. These include ones which will implicate current international humanitarian law debates more generally<sup>67</sup> as well as ones particular to a war torts regime. For example, what is the appropriate scope of war torts liability? Should *ad bellum* and *post bellum* actions constitute grounds for war torts claims? Should war torts liability apply to skirmishes, to occupations, or to harmful “below-the-threshold” peacetime actions? Should a state’s war tort liability be subject to treaty modification?

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As a war torts institution operates and addresses the substantive and procedural questions raised in this Section, it will contribute to legal development of international humanitarian law.<sup>68</sup> For example, if a war torts institution’s jurisdiction depends on the existence of an armed conflict, its jurisdictional decisions will be relevant to broader questions of when armed conflicts begin and end.<sup>69</sup> If a would-be claimant’s standing depends on their status as a civilian, a civilian directly participating in hostilities, or as a combatant, the institution’s standing decisions will inform interpretations of these currently-disputed categories.<sup>70</sup>

Those attempting to resolve these questions should do so with an awareness of potential second and third and nth order effects. If war torts liability depends on the existence of an armed conflict, for example, states may be incentivized to raise the threshold for what amount of engagement transforms a skirmish into an armed conflict—which in turn would alter

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67. Crootof, *War Torts*, *supra* note 6, at 1141 (noting that “there are questions which are relevant to shaping a war torts regime, but which intersect with other evolving and unresolved issues in international humanitarian law,” including “when an armed conflict formally begins or ends, what obligations states owe when withdrawing from armed conflict, state responsibility for military acts which cause civilian harms outside of an armed conflict, and the appropriate scope of international organizations’ accountability” as well as questions about the role of non-state armed groups, such as “when ‘unwilling and unable’ states should be held accountable for not preventing the acts of otherwise unaffiliated non-state actors and whether organized armed groups should enjoy the privileges and be subject to the obligations the law of armed conflict imposes on states”) (citations omitted).

68. Crootof, *War Torts*, *supra* note 6, at 1124–30.

69. *Cf.* DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, *INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT* (2017).

70. *Cf.* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 5 (2010) (critiquing the International Committee of the Red Cross’ proposed definition for “direct participation in hostilities”).

which legal regimes apply to the engagement.<sup>71</sup>

### *B. Structure*

An international war torts institution might be structured as an adversarial tribunal, as some sort of indemnification system, or as some combination of the two. This Section teases out the respective strengths of the two alternatives before discussing the ways in which a hybrid regime might marry the best of both.

#### *1. Adversarial Tribunal*

If designed as an adversarial tribunal, an international war torts institution might take inspiration from a host of extant international courts,<sup>72</sup> varied ad hoc and hybrid courts,<sup>73</sup> regional courts,<sup>74</sup> and domestic courts. It might be created within the United Nations, like the International Court of Justice, or as an independent entity, like the International Criminal Court. It might have universal or limited jurisdiction<sup>75</sup>; it might have appointed or rotating judges; it might have trial and appellate bodies; it may anticipate that unsuccessful defendants will pay judgements or it may create a supplemental victims' fund when defendants are judgement proof<sup>76</sup>; and

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71. See, e.g., Oona A. Hathaway, Rebecca Crootoof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis & Julia Spiegel, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012) (discussing when international human rights law and international humanitarian law apply to specific scenarios).

72. These include the International Court of Justice, the International Criminal Court, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration, and the World Trade Organization Dispute Settlement Body and Appellate Body.

73. These include the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Residual Special Court for Sierra Leone, and the Extraordinary Chambers of the Court of Cambodia.

74. These include the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights.

75. The International Court of Justice has universal jurisdiction. ICJ Statute, *supra* note 35, art. 36, ¶¶ 1, 6. In contrast, ad hoc criminal tribunals tend to have extremely circumscribed jurisdictions. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, May 25, 1993, [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf); Statute of the International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, [https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131\\_Statute\\_en\\_fr\\_0.pdf](https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf).

76. The International Court of Justice anticipates that unsuccessful defendants will make appropriate reparations. See, e.g., *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Reparations, Judgment, 2022 I.C.J. 38, ¶¶ 118-19 (Feb. 9). The International Criminal Court has an associated Victims' Fund with the discretion to pay damages awards on behalf of judgement-

it may or may not have a supervisory unit to monitor state compliance with judgements.<sup>77</sup> While a full exploration of the various tribunal structures is outside of the scope of this Article, a few generalizations are possible.<sup>78</sup>

From a claimant's perspective, a tribunal might be preferable for multiple reasons. It allows claimants to have their "day in court,"<sup>79</sup> on equal standing with the entity seen as the source of their harm.<sup>80</sup> The claimant has the opportunity to tell their version of events and have the other side listen and respond,<sup>81</sup> both of which can help restore a sense of agency and power.<sup>82</sup> The information-generating nature of an adversarial suit produces more data about what happened,<sup>83</sup> and "the litigation process can combine the facts and the law to produce narratives and explanations of past events, frameworks for addressing hurtful events that are ongoing, and opportunities for healing."<sup>84</sup> If the claimant does prevail, they will have the benefit of a public acknowledgement of the defendant's responsibility for their harms,<sup>85</sup> and they may receive a damages award, tailored to their

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proof defendants. Rome Statute of the International Criminal Court art. 79, July 17, 1998, 2187 U.N.T.S. 90; *see also* David P. Stewart, *The International Criminal Court*, in *INTERNATIONAL LITIGATION IN PRACTICE* 191, 224 (Chiara Giorgetti ed., 2012).

77. The International Court of Justice has no such unit; the Inter-American Court of Human Rights created one in 2015. Desierto, *supra* note 62.

78. *See also* Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman & Geir Ulfstein, *Legitimacy and International Courts – A Framework*, in *LEGITIMACY AND INTERNATIONAL COURTS* 1 (2018) (discussing factors which affect an international court's legitimacy).

79. Bachar, *Collateral Damages*, *supra* note 10, at 384 (noting that having one's day in court is a component of procedural justice).

80. *Id.* (noting that equal standing is a featured element in civil recourse theory); *id.* at 388 (noting that tort suits can "invert[] the victim/perpetrator status").

81. *Id.* at 384 (noting that prioritizing the claimant's voice and requiring that the defendant attend and respond are means of recognizing the claimant's dignity and autonomy).

82. *Id.* at 388 & nn.54–57 (citing, among others, Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 *VAND. L. REV.* 2305, 2318 (2004) and Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 1, 2 (2002)). Additionally, "being accorded fair procedures before a neutral and respectful decision-maker may provide a surrogate for apology and repentance from responsible parties." Bachar, *Collateral Damages*, *supra* note 10, at 390.

83. *See* Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 *DEPAUL L. REV.* 345 (2022).

84. Bachar, *Collateral Damages*, *supra* note 10, at 383 (describing Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 *EMORY L.J.* 1657, 1683–84 (2016)); *see also id.* at 388–89 & nn.58–61.

85. *Cf. id.* at 409 (noting that plaintiffs bringing suit against Israel for the acts of Israeli security forces were often motivated by a desire for an acknowledgment of wrongdoing than compensation). Additionally, Bachar notes that successful tort litigation "can generate a form of collective memory, particularly in the face of counternarratives that would deny violations or portray victims as blameworthy." *Id.* at 390.

individualized monetary harms and symbolic of their loss.<sup>86</sup>

A tribunal might also be preferable for the broader international community. Although tort law is classically conceptualized as private law, it often has public effects.<sup>87</sup> Many of the private benefits associated with a tribunal—like greater information about what occurred in particular instances and internal state policies—would also be collective benefits.<sup>88</sup> The more information we have on the sources and kinds of civilian harms in armed conflict, the more states will be able to enact policies to minimize the likelihood of those harms.<sup>89</sup> And the more that is known about state policies—either discovered during a suit or published preemptively—the easier it will be to identify emerging or changing customary international humanitarian law.

A tribunal would also create more direct incentives for individual states to take greater care to minimize civilian harm, insofar as they would be identified as defendants and responsible for damages awards.<sup>90</sup> The existence of a tribunal would also foster indirect incentives to create, standardize, and comply with civilian harm investigation and mitigation best practices, in order to avoid suits, to be able to provide evidence of due care, and to better dispute attributions of certain harms.<sup>91</sup>

But there are, of course, also a number of drawbacks associated with a

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86. *Id.* at 390; Wexler & Robbennolt, *supra* note 10, at 170–71 (discussing the importance of individualized compensatory payments).

87. *See, e.g.*, Douglas A. Kysar, *The Public Face of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REGUL. 48 (2018) (discussing the benefits of tort law's public law effects); Gilat Juli Bachar, *A Duty to Disclose Social Injustices*, 55 ARIZ. ST. L.J. (forthcoming 2023) (observing that, “[w]hile tort law has traditionally focused on relationships between individuals, its capacity to impact the public sphere, including in effecting social change and catalyzing regulatory action, has now been well-documented”) (citations omitted). *See also* Bachar, *Collateral Damages*, *supra* note 10, at 384–85.

88. *See* Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgement*, 96 MICH. L. REV. 2031, 2101 (1998) (noting that civil suits can have collective psychological benefits, insofar as they “permit a more thorough airing of victims’ stories”).

89. Crootof, *War Torts*, *supra* note 6, at 1120–24 (arguing that a war torts regime will provide more information about civilian harms, which in turn will indirectly foster civilian harm mitigation and reduction); *see also* Bachar, *Collateral Damages*, *supra* note 10, at 410 (noting that, after a wave of lawsuits grounded in actions taken during the First Intifada, “the military introduced more careful rules of engagement and supervision of soldiers’ conduct”).

90. *Cf.* Bachar, *Collateral Damages*, *supra* note 10, at 385 (“Imposing liability on the state through an individual lawsuit may incentivize the state to change its practices to avoid paying tax revenues as damages to individuals.”).

91. *See id.* at 397 (noting that, for institutional defendants, “discovery and evidentiary requirements may push for greater accountability . . . and encourage change of practices on the part of units that are repeatedly implicated”).

tribunal process. First and foremost, claimants are not guaranteed a win.<sup>92</sup> To prevail, a claimant must satisfy standing requirements, contend with a defendant's counter-narrative, and meet liability and causation standards that may not exist in other institutional structures. The process can be slow and expensive,<sup>93</sup> which may be especially difficult for those who may need compensatory funds more immediately.<sup>94</sup> Once a suit begins, the value of a "day in court" may not be what claimants expect. As Beth Van Schaack has noted when discussing tort suits in human rights cases, although claimants may be able to tell *a* story, they may not be able to tell *their* story, insofar as the important legal facts rarely directly correspond to the important emotional facts.<sup>95</sup> And, to the extent out-of-court settlements are permitted, they may promote private benefits while undermining many of the collective, public benefits associated with tort suits, such as information production, directed "naming and shaming," and legal evolution.<sup>96</sup> This is doubly true for confidential settlements.<sup>97</sup>

As a practical matter, precisely because it will foster more particularized assignments of responsibility to individual states, military powerhouses (and their allies and beneficiaries) may be less willing to create, fund, or comply with the dictates of a tribunal. Further, to the extent the jurisdiction of a tribunal is based on state consent, it will likely be piecemeal, as states most likely to be defendants are least likely to participate.<sup>98</sup>

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92. See *id.* at 393 & n.83 (noting that claimants may suffer anxiety due to fears about losing the case or announcement of a negative verdict) (citing Van Schaack, *supra* note 82, at 2321 for examples).

93. The International Criminal Court, for example, has been roundly critiqued for its high costs and slow proceedings. Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 8–9 (2014).

94. Bachar, *Collateral Damages*, *supra* note 10, at 391.

95. Van Schaack, *supra* note 82, at 2320.

96. Bachar, *Collateral Damages*, *supra* note 10, at 393 & n.87 (discussing drawbacks associated with settlement).

97. *Id.* at 400 (noting that, due in part to Israel's desire to avoid public embarrassment, it settled nearly all claims associated with its forces' misconduct subject to a confidentiality requirement); *id.* at 419 (noting that, while confidentiality compromises accountability and risks disadvantaging less powerful parties, it may also "allow authorities to admit guilt and acknowledge wrongdoing in private in appropriate cases, which may be more important to some victims than public accountability").

98. Again, the International Criminal Court serves as a cautionary model, as many of the more militarily active states have not agreed to its jurisdiction. See *The State Parties to the Rome Statute*, INT'L CRIM. CT. (Oct. 11, 2022, 12:35 PM), <https://asp.icc-cpi.int/states-parties>; see also Terrence L. Chapman & Stephen Chaudoin, *Ratification Patterns and the International Criminal Court*, 57 INT'L STUD. Q. 400, 403 (2013).

## 2. *Indemnification Systems*

Alternatively, a war torts regime might be developed as a claims commission, victims' fund, or other administrative indemnification system, which distribute monies to claimants who satisfy predetermined requirements. Institutional funds can be subsidized by states, other entities who benefitted from the harm-causing acts, as well as voluntary donors.

There are a host of domestic and international law precedents for indemnification mechanisms. At the international level, states regularly create institutions to settle specific types of post-conflict claims.<sup>99</sup> These include the UN Compensation Commission, a quasi-judicial body which evaluated claims for losses and damages resulting from Iraq's illegal invasion and occupation of Kuwait;<sup>100</sup> the Iran-United States Claims Tribunal, which has jurisdiction over certain types of property claims of U.S. nationals against Iran, Iranian nationals against the United States, and the two states against each other;<sup>101</sup> and the Eritrea-Ethiopia Claims Commission, which created a route to a remedy for violations of international humanitarian law in the conflict between those states.<sup>102</sup> Similarly, the Rome Statute establishing the International Criminal Court also created a Trust Fund for Victims to provide reparations to individual and community victims of international crimes.<sup>103</sup>

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99. *E.g.*, Emanuela-Chiara Gillard, *Reparations for Violation of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 540 (2003) (noting that numerous mixed claims commissions and quasi-judicial bodies have been created to review claims of victims and award compensation); Giorgetti et al., *Launching*, *supra* note 3 ("More than 400 international claims commissions have been created in modern times, starting with those established in the 1794 Jay Treaty between the United States and Great Britain.").

100. *Who We Were*, U.N. COMP. COMM'N, <https://uncc.ch/who-we-were> (last visited Mar. 23, 2023). Holding Iraq liable for all harms associated with its war, regardless of their *in bello* lawfulness, is often justified on the grounds that Iraq's aggression (an *ad bellum* violation) rendered it liable for all resulting damages. *See* Gillard, *supra* note 99, at 550–51 (noting the unique nature of this institution's funding).

101. *Introduction*, IRAN-U.S. CLAIMS TRIBUNAL, <https://iusct.com/introduction> (last visited Apr. 4, 2023); *see also* Fleck, *supra* note 10, at 194.

102. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement), Eth.-Eri., art. 5, Dec. 12, 2000, 40 I.L.M. 260.

103. Rome Statute, *supra* note 76, arts. 68(3), 75, 79. This is not exactly an indemnification system; it only operates after the ICC has found an individual guilty of a war crime, obligated to pay damages to victims, and unable to meet that obligation. Thus far, that has only occurred in two cases. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, ¶¶ 306–07, 330 (Mar. 24, 2017) (awarding a symbolic \$250 to each individual victim); Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Reparations Order, ¶¶ 33, 52–54, 55 (Aug. 17, 2017) (awarding

States have also experimented extensively with domestic variations on this theme.<sup>104</sup> For example, the United States has a number of different systems which complement or supplement traditional tort law claims. The Radiation Exposure Compensation Program provides lump sum compensation to individuals who contracted specified diseases associated with the U.S. atmospheric nuclear weapons development tests.<sup>105</sup> The National Vaccine Injury Compensation Program recompenses individuals who suffer negative effects from a vaccine.<sup>106</sup> The federally-funded September 11th Victim Compensation Fund takes a hybrid approach.<sup>107</sup> Individuals harmed (or personal representatives of individuals killed) due to the 9/11 aircraft crashes or subsequent debris removal efforts have the option of pursuing traditional tort suits or filing a claim with the Victims Compensation Fund.<sup>108</sup> Finally, workers' compensation regimes provide

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compensatory reparations to “those whose livelihoods exclusively depended upon the Protected Buildings and . . . those whose ancestors' burial sites were damaged in the attack”). In a third case, the ICC considered but decided against awarding individual reparations and instead awarded collective remedies. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 270–74 (Aug. 7, 2012), *aff'd*, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012 (Mar. 3, 2015). In the limited situations where the Trust Fund has provided monies to victims, it has done so in an insurance-like manner. See TRUST FUND FOR VICTIMS, TFV MANAGEMENT BRIEF Q3/2021 11 (2021), [https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20Q3\\_2021\\_ENG.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20Q3_2021_ENG.pdf). The program is funded primarily through voluntary contributions; it also receives income from fines or forfeitures if so ordered by the ICC, resources collected through awards for reparations if ordered by the ICC, and resources allocated by the Assembly of States Parties. UNITED KINGDOM NAT'L AUDIT OFFICE, INTERNATIONAL CRIMINAL COURT – TRUST FUND FOR VICTIMS 21 (2005), <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Financial%20Statements%202004.pdf>.

104. Fleck, *supra* note 10, at 193–97 (discussing national and intranational examples).

105. *Radiation Exposure Compensation Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/civil/common/reca> (last accessed Jun. 24, 2022). This program was established after failure to warn suits against the United States were dismissed in appellate courts. *Id.* Claimants do not have to establish that the tests caused their disease; instead, they must establish that they are a member of a specified population (including Uranium Miners, Millers, Ore Transporters, Onsite Participants at test sites, and individuals who lived downwind of the Nevada Test Site), that they have a diagnosis of one of the listed compensable diseases, and that they received that diagnosis after working or residing in a listed location for a specific period of time. *Id.*

106. *Vaccine Injury Compensation Program*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/civil/vicp> (last updated Jan. 25, 2023). Individuals retain the right to file a tort suit, but few elect to do so. *Id.*

107. Christopher J. Robinette, *Harmonizing Wrongs and Compensation*, 80 MD. L. REV. 343, 370 (2021).

108. *About the Victim Compensation Fund*, SEPT. 11TH VICTIM COMP. FUND, <https://www.vcf.gov/about> (last accessed Jun. 24, 2022). The Fund estimates how much the family of a victim would receive based on the victim's expected earnings. If the family accepts the Fund's determination, the

additional models for administrative alternatives to traditional tort litigation. Employees are not permitted to bring tort suits for negligence claims that arise due to work-related activities; in exchange, it is easier for harmed employees to receive compensation from dedicated funds, insofar as they need not prove all of the elements of a negligence tort.<sup>109</sup>

Based on these and other precedential institutions, scholars have proposed establishing indemnification systems to remedy cross-border harms,<sup>110</sup> and states are currently exploring creating an International Claims Commission for Ukraine.<sup>111</sup> As of yet, however, there is no international indemnification system with the authority, jurisdiction, or funding to receive claims for all wartime civilian harms.

When contrasted with a tribunal, indemnification systems have a number of comparative advantages. Perhaps most importantly, they are

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matter is settled; if not, they may appeal in a non-adversarial, informal hearing. Any settlement acceptance included a non-negotiable clause relinquishing the right to sue the airlines. As with the Vaccine Program, most eligible claimants forewent a torts suit for the administrative award; as of the 2022 Annual Report, the Fund had awarded nearly \$10.9 billion to 49,000 impacted individuals. SEPT. 11TH VICTIM COMP. FUND, 2022 ANNUAL REPORT 5 (2022), <https://www.vcf.gov/report/annual/vcf-2022-annual-report>.

109. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R44580, WORKER'S COMPENSATION: OVERVIEW AND ISSUES 2–4 (2020). However, workers' compensation regimes have been heavily critiqued: The administrative process may be just as burdensome as a traditional trial, Gregory B. Cairns, Mark Saliman, Kenneth Platt & David Seserman, *Sticking Points – Part 2: A Survey of Remedies for Vaccination Injuries*, 50 COLO. LAW. 32, 35 (2021), and the settlement tables aren't regularly updated to keep pace with changing costs of living and comparable jury damages awards, see JOHN C.P. GOLDBERG, LESLIE C. KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW 884 (Wolters Kluwer ed., 5th ed. 2021). Additionally, because workers' compensation regimes are regulated state-by-state, the same injury may result in wildly different awards. *The Critical Need to Reform Workers' Compensation*, AM. PUB. HEALTH ASS'N (Nov. 7, 2017), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/the-critical-need-to-reform-workers-compensation> (noting that, in 2017, the national average for losing an index finger was \$11,343, but in Oregon it was \$79,759 and in Massachusetts it was \$2,065). Finally, it is worth noting that the “grand bargain” is itself a cost for claimants who would prefer the benefits associated with a traditional tort suit. These include the ability to receive compensatory and punitive damages and not bear the spread costs of the regime in the form of reduced wages, see SZYMENDERA, *supra* at 8–9, 17–18, as well as the ability of spouses to bring consortium claims, Michael Green & David M. Layman, *Consortium and Workers' Compensation: The Demolition of Consortium*, 80 LA. L. REV. 777, 791–93 (2020) (observing that, “[t]oday, no state permits a spouse to pursue a consortium claim against the injured spouse's employer,” and discussing the varying rationales for why this claim is blocked by Workers Compensation statutes).

110. See, e.g., Rosemary Lyster, *A Fossil Fuel-Funded Climate Disaster Response Fund Under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, 4 TRANSNAT'L ENV'T L. 125, 140–41, 146–47 (2015) (proposing a “Climate Disaster Response Fund”); see also Brigham Daniels, Michalyn Steele & Lisa Grow Sun, *Just Environmentalism*, 37 YALE L. & POLY REV. 1 (2018) (discussing the need to compensate those harmed by policy decisions intended to protect the environment).

111. Giorgetti et al., *Launching*, *supra* note 3.

relatively efficient: Standardizing the claims process, eliminating the need to evaluate complicated and competing stories, removing the need to make certain factual and legal determinations,<sup>112</sup> and having settlement tables all allow for a speedier distribution of funds to victims.<sup>113</sup> This efficiency is of particular importance given the possible number of war torts claimants in need of immediate relief. Indemnification systems are relatively cheap, both as a system and for individual claimants.<sup>114</sup> They eliminate costly procedural requirements, as claimants need not marshal the resources to prevail over an opponent in proving an element of a claim and claimants need not prove other elements (such as duty, breach, or causation) at all.<sup>115</sup>

Indemnification systems are also arguably fairer, insofar as they reduce practical barriers for differently-situated individuals bringing a claim and reduce variability in damages awards.<sup>116</sup> They also ensure that all eligible victims will receive compensation, even if the responsible state is judgement-proof or refuses to participate in the process.<sup>117</sup>

While indemnification systems will generate less information than an adversarial process about particular cases,<sup>118</sup> they will amass more information about the kinds and scope of civilian harms than is currently accessible.

Precisely because an indemnification system would not engage in attributing harm to individual states or require the payment of funds directly from state coffers, states are likely to find them more politically appealing.

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112. As there are no defendants, there is no need for certain types of factual and legal findings (such as whether a particular defendant is an appropriate target of a suit or the appropriate standard of liability); simultaneously, other standing requirements can be lowered. The UN Compensation Commission, for example, provided lump sum payments to claimants without evaluating whether the losses were associated with international humanitarian law violations. U.N. COMP. COMM'N, *supra* note 100; Gillard, *supra* note 99, at 550–51.

113. *See, e.g.*, Bachar, *Collateral Damages*, *supra* note 10, at 395 (noting that a no-fault model “gives precedence to efficiency and economy over values such as participation, accountability, and transparency”).

114. *Id.*

115. *See id.*

116. *Id.* (noting that indemnification systems “promot[e] horizontal equality and eliminat[e] windfall awards”).

117. This is only true to the extent the structure is funded by a sufficiently diverse group of states. In smaller compensation structures, the refusal of one or two states to participate can negate the entire endeavor. For example, the Eritrea-Ethiopia Claims Commission awarded damages to both Ethiopia and Eritrea, with the direction to use the awards to provide relief to injured civilians (as well as to some named Eritrean civilians). Ethiopia’s Damages Claims, 26 R.I.A.A. 633, 769–70 (Eri.-Eth. Claims Comm’n 2009); Final Award: Eritrea’s Damages Claims, 26 R.I.A.A. 507, 629–30 (Eri.-Eth. Claims Comm’n 2009). However, neither state ever paid any compensation to the other. Wexler & Robbennolt, *supra* note 10, at 133.

118. Bachar, *Collateral Damages*, *supra* note 10, at 395.

Not only would states be able to avoid the embarrassment and risk of moral judgement that might accompany being found to be a “war tortfeasor,” they would also be able to make payments to a general fund without raising concerns about “paying enemies.”<sup>119</sup> Further, to the extent states might be concerned that some entities might use litigation to expose or highlight civilian harms for political purposes, it would be more difficult to do so in an indemnification system.<sup>120</sup>

But indemnification systems often achieve the benefits associated with relatively speedy and cheap processes at the expense of making tailored damages awards; instead, such institutions tend to use settlement tables that proscribe certain damage payments for certain types of harms. While promoting the fairness of treating like cases alike, this approach risks sacrificing the fairness of acknowledging that different claimants are differently situated. The cost of a car, prosthesis, or rehabilitative care will differ state to state; accordingly, standardized payments may result in some victims being “over” or “under” compensated relative to others. This issue might be somewhat addressed with settlement tables with granular levels of detail or numbers benchmarked to local prices. Still, settlement tables will be subject to political wrangling over which details to consider<sup>121</sup> and, absent dedicated budget lines and obligations regularly update the table or its datasets, may remain perpetually behind the times.<sup>122</sup> Indemnification systems may also sacrifice some of the benefits associated with individuals having their “day in court,”<sup>123</sup> the information-generating nature of an adversarial process,<sup>124</sup> and attribution of responsibility to the appropriate

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119. Both the United States and Israel have limited their civilian compensation programs to avoid this political problem. Foreign Claims Act, 32 C.F.R. § 536.138 (2017) (noting that claims are not payable if they are “presented by a national . . . of a country at war or engaged in armed conflict with the United States”); Haim Abraham, *Tort Liability, Combatant Activities, and the Question of Over-Deterrence*, 47 L. & SOC. INQUIRY 885, 907 (2022) [hereinafter *Combatant Activities*] (noting that Israeli politicians’ interest in expanding the combatant activities exception—which would prevent more of those harmed by Israeli forces from successfully suing for compensation—was grounded mainly on a dislike of paying perceived enemies).

120. See Bachar, *Collateral Damages*, *supra* note 10, at 396 (noting that non-profits sometimes use tort litigation instrumentally to highlight defendants’ blameworthy actions).

121. Cf. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 562–72 (2014) (discussing different methods for valuing foreign lives).

122. This critique is commonly levied against U.S. workers’ compensation settlement tables. See GOLDBERG ET AL., *supra* note 109.

123. But see Bachar, *Collateral Damages*, *supra* note 10, at 395 & n.98 (noting that the U.S. 9/11 Commission provided a means for some claimants to have their “day in court” as part of the appeals process).

124. While indemnification systems will still allow for the collection of information on claimants’

defendant.<sup>125</sup>

The relative lack of direct accountability means that the deterrent effects associated with being named as a defendant or the payment of awards will dissipate.<sup>126</sup> However, this is only a drawback to the extent one believes that naming defendants or paying damages awards will have a deterrent effect. Given the impossibility of preventing civilian harms in armed conflict, it seems likely that any state engaging in conflict may be subject to tort suits; presumably, their frequency will lessen the moral condemnation that accompanies being named a defendant. And, as I argued in prior work, I think it unlikely that states will establish a compensatory regime that will significantly constrain their military freedom.<sup>127</sup> Instead, I think most of the deterrent effects will be indirect, traceable to increased information about the sources and kinds of civilian harm.<sup>128</sup>

Finally, a major practical challenge in establishing a claims commission will be determining how to fund it.<sup>129</sup> If funded by individual states, should contributions be voluntary or required? If required, should amounts be determined based on states' gross domestic product? Their military budget? The amount they engage in armed conflicts? Should payments be made at regular intervals by all states, or at the commencement of a state's engagement in an armed conflict? Alternatively, the institution could be housed within a larger organization, like the United Nations, where these complicated funding questions could be subsumed within a larger budgetary structure. Additionally, private companies and non-governmental organizations could raise and contribute money.<sup>130</sup> Should international law

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kinds and magnitudes of harms, the lack of a discovery process will result in less information than what might be generated in an adversarial tribunal.

125. *Cf.* Bachar, *Collateral Damages*, *supra* note 10, at 411 (noting, as drawbacks of an indemnification system, that there is no "opportunity for victims to articulate their stories, experience empowerment, or solicit information").

126. Ronen, *supra* note 10, at 219 ("[L]ike any insurance mechanism, a victim compensation fund provides a disincentive to take precautions.").

127. Crootof, *War Torts*, *supra* note 6, at 1104–05.

128. *Id.* at 1120–30.

129. Ronen, *supra* note 10, at 219 (concluding that states are unlikely to fund claims commission for civilians harmed in armed conflicts); *cf.* Gillard, *supra* note 99, at 550–51 (concluding that the combination of factors that resulted in the successful UN Compensation Commission are "unlikely to recur").

130. *Cf.* Gillard, *supra* note 99, at 543 (noting that German corporations voluntarily contributed monies to funds established to compensate victims of international humanitarian law violations during World War II).

evolve to hold private entities responsible for war crimes,<sup>131</sup> they might even be required to pay fines into the fund.

### 3. Hybrid Structures

Institutions need not be wholly this or that: There are various ways to mix-and-match characteristics to leverage the respective benefits of different structures.

For example, it might be possible to have an international institution with both a tribunal and indemnification system. This dual-structure could allow for some types of claims (say, ones alleging violations of international humanitarian law) to be addressed in a tribunal setting, while others are processed in a more administrative setting.<sup>132</sup> Alternatively, this structure might be designed to empower claimants to choose their track based on their priorities.<sup>133</sup> A claimant might elect to pursue a speedier, relatively guaranteed resolution through an indemnification process<sup>134</sup> or to file a suit in order to hold a defendant accountable, gain more clarity on what actually happened, or in the hopes of receiving a more personalized award.<sup>135</sup>

Alternatively, a hybrid institution might attempt to combine the best of a tribunal and indemnification approaches in one structure. A primarily adversarial process might have lowered evidentiary requirements and a fund to ensure victims of judgement-proof defendants are compensated; a primarily indemnification system might allow for bespoke damages

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131. Cf. Rebecca J. Hamilton, *Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities*, 63 B.C. L. REV. 1349 (2022) (discussing means of holding platforms accountable for facilitating international crimes, including war crimes).

132. See Crootof, *War Torts*, *supra* note 6, at 1115 (proposing and rejecting this structure as needlessly complex).

133. Robinette, *supra* note 107, at 347 (arguing that forcing plaintiffs interested in pursuing vindication to use the same system as plaintiffs interested in pursuing compensation is “harmful to both types of plaintiffs”); see also Bachar, *Collateral Damages*, *supra* note 10, at 381, 418 (concluding that a tort-like system with an opt-out administrative option would be the ideal structure for a domestic asymmetric conflict civilian compensation program); Wexler & Robbennolt, *supra* note 10, at 176 (noting that different victims look for different things in seeking accountability for the injuries they have suffered in armed conflict).

134. Cf. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC. REV. 645, 666–69 (2008) (finding that victims eligible for the U.S. 9/11 compensation fund who chose an administrative route did so due to an immediate need for funds, concern that litigation would take too long, skepticism about litigation as a means of achieving their desired goals, and difficulties in obtaining legal representation).

135. Cf. *id.* at 661–62 (finding that victims eligible for the U.S. 9/11 compensation fund who chose an administrative route did so due to an interest in punishing responsible parties, wanting to learn more, and a desire to promote change; none mentioned the potential for obtaining a higher payout than the administrative process as a motivating factor).

awards.<sup>136</sup>

#### 4. *Common Traits and Baseline Requirements*

While different structures are distinctive, it is worth noting that all institutional structures share a number of characteristics. Adversarial tribunals, indemnification systems, and hybrids can all provide claimants with an official recognition of their losses, and all can provide a route to compensation.

Meanwhile, all claimants—particularly individual claimants—will face a host of emotional and practical challenges to filing claims. These may include, but are hardly limited to, not knowing of the option, a sense of powerlessness, lack of access to counsel, financial constraints, difficulties marshalling evidence, concerns about negative repercussions, pessimism about the outcome, emotional exhaustion, and fear of retraumatization.<sup>137</sup> And, depending on how the institution is structured, procedural requirements might preserve a theoretical route to a remedy while raising insurmountable obstacles to claimants' success.<sup>138</sup> Accordingly, structural design decisions should be made with awareness of the practical barriers to bringing claims and with the aim of minimizing unnecessary procedural barriers.<sup>139</sup>

Any international war torts institution should have (1) neutral adjudicators;<sup>140</sup> (2) some sort of settlement table to standardize non-

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136. The U.S. Vaccine Program, for example, establishes a streamlined system for compensating vaccine-caused injuries while retaining the ability to tailor awards to claimants' medical and rehabilitative expenses, pain and suffering, lost earnings, and reasonable attorney's fees and costs. U.S. DEPT OF JUST., *supra* note 106. Since the program's inception, almost 9,500 individuals have been paid a total of over \$4.5 billion. *Id.*

137. The risk of retraumatization is likely greater in a litigious context, where the defending party is likely to contest the claimant's narrative. Bachar, *Collateral Damages*, *supra* note 10, at 392.

138. *Cf.* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 130–92 (Cambridge Univ. Press 2017) (exploring how the U.S. Supreme Court has retrenched civil litigation by reinterpreting procedural rules to bar litigants seeking to enforce regulatory policy); *see also* Gilat J. Bachar, *Access Denied—Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience*, 92 CHI.-KENT L. REV. 841 (2018) [hereinafter *Access Denied*] (describing how increased procedural barriers decreased the number of successful Palestinian suits against Israel for the acts of their security forces). Thanks to Luke Norris for this point.

139. *See infra* text accompanying notes 175–79 (noting that there is no need to create procedural barriers to bringing claims absent evidence that the practical barriers are insufficient).

140. *Cf.* Damien Charlotin, *A Data Analysis of the Iran-US Claims Tribunal's Jurisprudence: Lessons for International Dispute-Settlement Today*, 1 ITA REV. 1, 7 (2019) (noting that the Iran-U.S. Claims Tribunal

quantifiable awards (though this may offer non-binding guidance, rather than mandatory award amounts); and (3) an appeals process. If structured primarily as an adversarial tribunal, it should ideally have some sort of fund to make payments on behalf of judgement-proof defendants;<sup>141</sup> if structured primarily as an indemnification system, it should ideally have some opportunity for victim participation and voice.

### C. Domestic Options

While creating a new international institution designed to achieve the aims of a war torts regime is the ideal, it may not be politically feasible any time soon. Given this, a more immediate approach would be for individual states to establish national victims' funds or modify their own domestic law to create war torts liability.

While limited to specific and particularly egregious situations, a few states have already demonstrated a willingness to create victims' funds. Germany and Austria set aside monies and established claims review systems to compensate former Nazi slave laborers and others harmed by the Nazis,<sup>142</sup> and both the United States and Canada have programs to compensate individuals of Japanese ancestry who were interned, deported, or lost property during the Second World War.<sup>143</sup> Additionally, a few states also voluntarily make *ex gratia* payments to civilians harmed in specific armed conflicts.<sup>144</sup>

Additionally or alternatively, any state could create domestic war torts liability by granting domestic and foreign individuals standing to bring suit against itself and foreign states, while waiving territorial and foreign state immunities and procedural barriers (like the sovereign immunity, combatant

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has been critiqued for its adjudicators' perceived biases, as exemplified by the fact that, from 1981-2000, no Iranian arbitrator had ever voted to (1) issue awards to the United States or a U.S. national or (2) deny claims brought by an Iranian claimant).

141. *Judgment-Proof*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a judgment-proof individual as one who is "unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment, or claims the benefit of statutorily exempt property").

142. Fleck, *supra* note 10, at 193-94.

143. *Id.* at 194.

144. Crotoft, *War Torts*, *supra* note 6, at 1098-1101 (citing sources regarding American, Australian, British, Canadian, Danish, and Polish payments); *see also* AMSTERDAM INT'L L. CLINIC, MONETARY PAYMENTS FOR CIVILIAN HARM IN INTERNATIONAL AND NATIONAL PRACTICE 12 (2013), [https://civiliansinconflict.org/wp-content/uploads/2020/12/2013\\_civic\\_report\\_on\\_monetary\\_payments.pdf](https://civiliansinconflict.org/wp-content/uploads/2020/12/2013_civic_report_on_monetary_payments.pdf).

activities immunity, the state secrets privilege, or political question doctrines).<sup>145</sup> While there is little evidence that states generally would be willing to water down their protection from suits, states which have been invaded, served as battlegrounds for foreign engagements, or received large numbers of refugees might find it beneficial to take the lead in crafting domestic war torts liability, as doing so would provide a legal justification for restitution demands.<sup>146</sup> Indeed, any state with an interest in influencing the scope and requirements for international war torts liability would have a reason to be an early mover, as the public production of domestic policies in new areas tend to shape the international regulatory conversation.<sup>147</sup> And, should a sufficient number of states eliminate sovereign immunity for war torts claims, it may cease to be a defense for all. In 2012, the International Court of Justice evaluated whether states enjoyed a customary right to immunity in torts for their actions in armed conflicts.<sup>148</sup> The Court's finding that there was such a right was grounded on state practice;<sup>149</sup> if states change

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145. States are willing to waive their own immunity and foreign state immunities when doing so serves other policy interests. *See, e.g.*, U.S. Foreign Sovereign Immunity Act, 28 U.S.C. § 1605 (2016); Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016); *see also In re Terrorist Attacks on September 11, 2001*, No. 15-3426, 2017 WL 8776686, at \*1 (2d Cir. Feb. 7, 2017) (vacating the district court's foreign-sovereign-immunity-based dismissal of a suit against Saudi Arabia for bodily, property, and economic damage associated with the 9/11 attacks due to the passage of JASTA). States also may have domestic law legitimizing the taking of enemy property for compensatory payments. *See, e.g.*, 50 U.S.C. § 1702(a)(1)(C) (2001) (providing that, if the United States is attacked, the President may confiscate property associated with the foreign state, group, or individuals who aided in the attack).

Whether states would be able to freeze or use foreign funds to pay any domestic judgements will likely be a context-specific evaluation, depending on the terms of the treaties between the respective state parties. *See, e.g.*, *Certain Iranian Assets (Islamic Republic of Iran v. U.S.)*, Judgment, 2019 I.C.J. 7 (Feb. 13) (evaluating whether the U.S. can legally use nearly \$2 billion in frozen Iranian assets seized from the Iranian national bank to compensate victims of an Iranian-linked 1983 suicide bombing that killed more than 300 people, including U.S. military members).

146. *See, e.g.*, Bohdan Karnaukh, *Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with Regard to Tort Claims Brought by the Victims of the Russia-Ukraine War*, 15 ACCESS TO JUST. E. EUR. 165, 166–67 (2022) (discussing the Ukrainian Supreme Court's decision to no longer apply its constitutional rule regarding the jurisdictional immunity of a foreign state to the Russian Federation in tort claims for harms associated with the 2022 conflict).

147. For example, the U.S. publication of its internal policy on autonomous weapon systems shaped the subsequent international conversation.

148. *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99, ¶¶ 68–79 (Feb. 3).

149. *Id.* ¶ 77; *But see* Elena Chachko, *Iran Sues the U.S. in the ICJ – Preliminary Thoughts*, LAWFARE (Jun. 18, 2016), <https://www.lawfareblog.com/iran-sues-us-icj-%E2%80%93-preliminary-thoughts> (arguing that the 2012 *Jurisdictional Immunities of the State* case demonstrated the ICJ's unwillingness to accept new exceptions to immunity, especially as the ICJ held that “[s]tate immunity from post-judgment enforcement proceedings (or ‘measures of constraint’) is even broader than jurisdictional

their practices, the Court's assessment may no longer hold.

Of course, the current absence of universal domestic war torts liability suggests that it is unlikely to develop spontaneously. Even if it does, there are risks to relying overmuch on domestic law. For example, the political costs to permitting suits by “enemies” in domestic courts might prompt some states to limit who can file claims, cap awards, and otherwise restrict war torts suits. The Israeli experience is instructive. From the late 1990s through the early 2000s, Israeli politicians and government attorneys worked to expand the combatant activities immunity—largely because the state was facing thousands of tort claims filed by perceived foes and losing some of them.<sup>150</sup> Israeli lawyers seemed to feel as though they were continuing an ongoing fight and regularly used military phrases—like “joining forces,” “platoon,” and “war of attrition”—in discussing their legal “battles.”<sup>151</sup> One stated, “in cases against the state, especially on sensitive subjects like the Intifada, you feel the state's loss. . . . It is not just a sense of personal success that drives you, it is a sense of justice towards the state.”<sup>152</sup> Eventually, Israel legislatively expanded the scope of the combatant activities exception, increased the procedural barriers to filing claims, and made it difficult for Palestinian plaintiffs and witnesses to testify.<sup>153</sup>

That being said, it is worth noting that international regimes can also work in tandem with domestic ones, and even encourage the development of relevant domestic law. The Geneva Conventions obligate states to investigate and prosecute war crimes;<sup>154</sup> the Rome Statute encourages state

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immunity”). This prediction proved accurate. Elena Chachko, *Certain Iranian Assets: The International Court of Justice Splits the Difference Between the United States and Iran*, LAWFARE (Feb. 14, 2019), <https://www.lawfareblog.com/certain-iranian-assets-international-court-justice-splits-difference-between-united-states-and-iran> (“The ICJ agreed with the U.S. that the court does not have jurisdiction to hear claims based on the international law of state immunity . . .”).

150. Abraham, *Combatant Activities*, *supra* note 119, at 903–05.

151. Bachar, *Access Denied*, *supra* note 138, at 865; *see also* Abraham, *Combatant Activities*, *supra* note 119, at 909 (“It seems that government attorneys view themselves as acting in a way that complements, and perhaps is even a part of, the military's belligerent activities.”).

152. Abraham, *Combatant Activities*, *supra* note 119, at 910.

153. Bachar, *Access Denied*, *supra* note 138; Abraham, *Combatant Activities*, *supra* note 119, at 912–13.

154. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

war crimes prosecutions by deferring jurisdiction to domestic courts.<sup>155</sup> Similarly, a war torts institution could require states to develop processes for investigating and evaluating war torts claims and defer jurisdiction to those able to do so effectively.<sup>156</sup>

## II. PARTIES

There are strong arguments for recognizing states, harmed individuals, and third-party representatives as claimants. Whether combatants—including a state’s traditional military forces, private military groups, and civilians directly participating in hostilities—should be able to bring claims is a far more fraught question. Meanwhile, to the extent war torts claims are hashed out in tribunals, claims should not be brought against individuals. Rather, states, non-state armed groups, and the United Nations are the preferable defendants.

### A. Claimants

Who should be able to bring a war torts claim? A state? A harmed individual, or their third-party representative? What about combatants? While considering the respective strengths and limitations of different potential claimants, it is worth keeping in mind that allowing one does not prohibit another; a war torts institution could easily have different eligibility requirements for different types of claimants.<sup>157</sup> Additionally or alternatively, a war torts institution might have a bifurcated process, split between a liability and damages phase; if so, different categories of claimants might be prioritized at the different phases.<sup>158</sup> States might be better equipped to argue the merits of a case, while claimants might be better able to prove the extent of their harms.

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155. Rome Statute, *supra* note 76, art. 17.

156. Cf. Laura A. Dickinson, *Lethal Autonomous Weapons Systems: The Overlooked Importance of Administrative Accountability*, in THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 69, 71, 81–83 (Richard T. P. Alcalá & Eric Talbot Jensen eds., 2019) (discussing how flexible, domestic “administrative accountability” regimes—comprised of “multiple administrative procedures, inquiries, sanctions, and reforms”—could usefully augment other accountability mechanisms); see also *infra* Part III.D.7 (noting that a *res judicata* defense could support domestic war torts institutions).

157. See Robinette, *supra* note 107, at 371–72 (noting that the B.P. Oil Spill Fund had different eligibility requirements for different categories of plaintiffs).

158. Thanks to David Sloss for this point.

### 1. *States*

Historically, states were the only relevant legal actors under international law; accordingly, there is extensive precedent for granting states the power to bring and resolve claims on behalf of their nationals.<sup>159</sup> For example, peace treaties often award funds intended to cover both state and individual losses, with the expectation that the receiving state will distribute those funds appropriately.<sup>160</sup>

States may be the most efficient claimants. While individuals may be better able to value their own harms, states will be better able to create mechanisms that consolidate these individual determinations; states are also better situated to evaluate infrastructural damage and downstream effects of civilian harms, rendering them more capable of bringing claims that encompass the full scale of civilian damages.

A state may also be the entity most able to distribute damages awards in light of relevant domestic law. Imagine that a civilian apartment complex is destroyed in a missile strike. Instead of the corporate owners, insurers, and individual residents all bringing separate claims, it might make more sense and avoid unnecessary duplication for the state to file a collective claim.<sup>161</sup> Particularly in situations where the nature of the harmful act, the madness of war, or the passage of time has made it difficult for individuals to bring or prove their claims, states have more credibility and ability to assert claims on behalf of groups of victims.<sup>162</sup> Further, if war torts claims are litigated in an adversarial environment, claimant states will be on a far more equal footing with a defendant state.

However, states may be influenced by a host of political factors that may

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159. E.g., Bachar, *Collateral Damages*, *supra* note 10, at 387; Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 354–55 (2007).

160. Gillard, *supra* note 99, at 535–36 (discussing the WWII Japanese peace treaty, which indemnified the state for harms inflicted on Allied prisoners of war and was intended to be “a full and final settlement precluding claims from individual victims”).

161. *See infra* Part III.A (discussing claims for different types of harm).

162. *Cf. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Reparations, Judgment, 2022 *I.C.J.* 38, ¶¶ 190, 193 (Feb. 9) (declining to consider the DRC’s compensation claim for 1,710 victims of rape and sexual violence on the grounds that “it is impossible to derive even a broad estimate of the number of victims” and instead awarding compensation as part of a global sum for damage to all persons); *id.* ¶¶ 200, 206 (employing similar reasoning to reach a similar conclusion regarding the DRC compensation claim for the recruitment of 2500 child soldiers).

affect their willingness to bring or argue a war torts claim.<sup>163</sup> States may be more interested in closure than in compensation and therefore willing to sign away their nationals' rights in the interest of promoting peace;<sup>164</sup> relatedly, they may be disinclined to confront or irritate another state with which they had recently been at war. Or states simply may prefer to expend their political capital and resources elsewhere, especially if claims are for sums which are life-changing for individuals but trivial to them. States may also have little interest in championing the rights of or dispensing funds to marginalized populations or other constituencies which have little political influence.<sup>165</sup> Meanwhile, should a state win a war torts claim, it may use the funds to rebuild infrastructure rather than directly compensate harmed individuals.<sup>166</sup> However, history cautions that we should not depend overmuch on states' willingness to recompense their harmed civilians. The fact that applications for compensation for wartime wrongs could traditionally only be made by states rendered both the "process and its outcome uncertain,"<sup>167</sup> which led to the International Committee of the Red Cross proposal that states establish procedures to provide individual reparations for violations of international humanitarian law.<sup>168</sup>

## 2. *Civilians and Third-Party Representatives*

There is growing agreement that civilians have a right to reparation for violations of international humanitarian law.<sup>169</sup> Similarly, civilians who are

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163. For example, the Clinton Administration took steps to quash a number of private claims brought against France, Germany, and Austria in U.S. courts, on the grounds that they were at odds with U.S. foreign policy interests. See Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003). In keeping with their long history of deference to the Executive on matters of foreign policy, U.S. courts dismissed the suits. *Id.*

164. See Andrea Gattini, *To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, 1 J. INT'L CRIM. JUST. 348, 364 (2003).

165. Bachar, *Collateral Damages*, *supra* note 10, at 387–88; Ronen, *supra* note 10, at 220.

166. Abraham, *Belligerent Wrongs*, *supra* note 10, at 814; Bachar, *Collateral Damages*, *supra* note 10, at 387; Ronen, *supra* note 10, at 220.

167. Fleck, *supra* note 10, at 190.

168. *Id.*

169. *E.g.*, *Rule 150. Reparation*, INT'L COMM. RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule150](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150) (last visited Mar. 12, 2023); G.A. Res. 60/147 (Mar. 21, 2006) [hereinafter *Basic Principles*] (a non-binding statement urging states to assist victims who suffer harm as a result of unlawful conduct); CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 33 (Cambridge Univ. Press 2012); Fleck, *supra* note 10, at 179 (noting the "increasing trend . . . of enabling victims to seek reparation directly from the responsible state"); Gillard, *supra* note 99, at 536; Liesbeth

not participating in hostilities should also be recognized as having a right to bring war torts claims for harms suffered due to both lawful and unlawful acts.<sup>170</sup>

Of all potential claimants, harmed civilians will be the most incentivized to seek compensation, they are most likely to have a sense of their individualized damages, and they may garner unquantifiable benefits from the opportunity to voice their experiences in a safe forum.<sup>171</sup> To the extent there may be concerns that permitting individual suits would result in a flood of litigation,<sup>172</sup> that issue could be addressed by permitting and promoting class actions<sup>173</sup> and enforcing statutes of limitations or other procedural bars.<sup>174</sup>

But there is no need to create procedural barriers absent evidence that they are needed, especially given that civilians will already face a host of practical obstacles to bringing claims.<sup>175</sup> If war torts claims are litigated in an adversarial environment, bringing a claim requires perseverance, money, and the mental fortitude to face a psychologically onerous task. And victims might reasonably conclude that they do not have the resources to sue a state, especially as the most accessible tribunal—their own domestic courts—will

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Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 497, 497 (2003). *But see* Gabriella Blum & Natalie J. Lockwood, *Earthquakes and Wars: The Logic of International Reparations*, in *JUS POST BELLUM AND TRANSITIONAL JUSTICE* (Larry May & Elizabeth Edenberg eds., 2013) (noting that the ICRC assessment ignores “the silence of the relevant conventions on this point”). However, structures for the enforcement of this right remain underdeveloped. Fleck, *supra* note 10, at 179; Gillard, *supra* note 99, at 536.

170. “Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.” *Rule 5. Definition of Civilians*, INT'L COMM. RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule5](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5) (last visited Mar. 12, 2023). In this Article, I distinguish between civilians who do not directly participate in hostilities—who should have the right to bring a war torts claim—and civilians who do directly participate—whose right to bring a claim is more debatable. *See infra* Part II.A.3.

171. *See supra* Part I.B (noting potential individualized benefits of associated with different institutional structures).

172. At least one court has cited concerns about a flood of lawsuits as motivating the conclusion that the right to reparation for violations of international humanitarian law was not self-executing. *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).

173. *See* Gillard, *supra* note 99, at 550 n.54 (discussing the 1999 Barclays French Bank Settlement, which established a \$3.6 million fund to compensate Jewish customers who lost their assets during the Nazi occupation).

174. *See infra* Part III.E (discussing potential affirmative defenses).

175. *See supra* notes 137–138; *see also* *Rule 150. Reparation*, INT'L COMM. RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule150](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150) (last visited Mar. 12, 2023) (observing that “individual claimants before national courts have encountered a number of obstacles in trying to obtain compensation”).

likely find their claims barred by foreign sovereign immunity.<sup>176</sup> Even assuming there is a streamlined route to a remedy through an international institution; guaranteed counsel, translation services, a safe environment, and funding for travel and other expenses<sup>177</sup>; and that victims are sophisticated enough to know of all of this, bringing a war torts claim will likely be low on the list of priorities of those who are in an armed conflict or suffering from its effects.<sup>178</sup> Counterintuitively, there is also risk in success that may discourage claimants from bringing valid claims: Compensating civilians in the midst of conflict may render them targets.<sup>179</sup> In light of these constraints, the real concern may be empowering all claimants to seek compensation. To do so, the institution could have a dedicated fund for claimant outreach and support.<sup>180</sup>

Some of these practical limitations on civilian claims could also be mitigated by allowing third-party representatives to bring war torts claims on behalf of other harmed individuals. In domestic legal regimes, organizations and class action plaintiffs bring suits on behalf of others, provided they satisfy certain requirements that ensure they will act in the interest of those they represent. Similarly, non-governmental organizations, class-action claimants, and other third-party representatives might be empowered to bring collective war torts claims. Non-governmental organizations might play a particularly effective role in this context, insofar as they will be able to muster necessary resources, have the time and expertise to fully develop and argue claims, and have incentives to bring

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176. Unless their state has created a cause of action and waived foreign state immunities and other procedural barriers. *See supra* text accompanying note 145.

177. *See* Bachar, *Collateral Damages*, *supra* note 10, at 419 (noting the need for these services in a similar context).

178. Gillard, *supra* note 99, at 539 (noting that individuals are unlikely to be aware of their rights, will be particularly subject to time limitations and difficulties in enforcing judgements, and may fear that bringing claims risks reprisals); Wexler & Robbennolt, *supra* note 10, at 148 (noting that claims processes “can be prohibitive for those who do not have safe passage or the resources to travel”).

179. GANESH SITARAMAN, *THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 54 (2012) (noting that civilians directly compensated in counterinsurgency operations may “make them a target for insurgents”); Bachar, *Collateral Damages*, *supra* note 10, at 393 & n.84 (noting that civil litigation publicizes the dispute and award, rendering successful civilians vulnerable to social sanctions and targeting).

180. For example, the U.S. National Council for Japanese American Redress allegedly paid out funds to 99% of eligible claimants, in part because the program attempted to affirmatively identify and contact eligible claimants. Press Release, U.S. Dep’t Just., Ten Year Program to Compensate Japanese Americans Interned During World War II Closes Its Doors (Feb. 19, 1999), <https://www.justice.gov/archive/opa/pr/1999/February/059cr.htm>.

suits that states might be uninterested in pursuing.<sup>181</sup> Of course, this approach will be subject to many of the same issues that complicate domestic third-party suits.

### 3. *Combatants*

Permitting civilians to bring claims raises the possibility of extending that right to all individuals harmed in armed conflict, which would necessarily include combatants—a term I use here to encompass a state’s traditional military forces,<sup>182</sup> private military companies,<sup>183</sup> and civilians directly participating in hostilities.<sup>184</sup> Certainly, combatants are subject to a panoply of physical and emotional harms in armed conflict. And while I have argued that establishing war torts liability can be justified on the grounds that states are obligated to minimize needless civilian suffering in armed conflict,<sup>185</sup> states also have obligations to minimize needless combatant suffering, which might justify permitting combatant claims.<sup>186</sup> Arguably, allowing claims from all harmed individuals would further realize the “humanity” principle that undergirds the law of armed conflict. It would also be more fair, insofar as it would allow all of those injured in armed

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181. *But see* Gilat Juli Bachar, *Money for Justice: Plaintiffs’ Lawyers and Social Justice Tort Litigation*, 41 CARDOZO L. REV. 2617, 2624 (2018) (observing that traditional human rights organizations may spurn compensation-focused cases and that, to the extent this representation gap is filled solely by traditional personal injury lawyers, it may benefit individual claimants but have detrimental effects on the broader compensatory regime).

182. “Combatants” are “[a]ll members of the armed forces of a party to [a] conflict,” except for medical and religious personnel. *Rule 3. Definition of Combatants*, INT’L COMM. RED CROSS CUSTOMARY INT’L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3) (last visited Mar. 12, 2023).

183. Depending on the environment in which they work, what they are hired to do, and the degree of control a state exerts over their actions, individuals affiliated with private military companies may be considered members of an armed force, civilians directly participating in hostilities, or protected civilians. *See* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts art. 8, (Jan. 28, 2002) [hereinafter Draft Articles]; YORAM DINSTEIN & ARNE WILLY DAHL, OSLO MANUAL ON SELECT TOPICS OF THE LAW OF ARMED CONFLICT 66 (2020); *see also* Michael H. LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL’Y REV. 217, 217 (2011) (noting the increasing use of military contractors in U.S. military operations and discussing how they might be compensated for their injuries).

184. “Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.” *Rule 6. Civilians’ Loss of Protection from Attack*, INT’L COMM. RED CROSS CUSTOMARY INT’L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule6](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6) (last visited Mar. 12, 2023) (noting that there is no precise, agreed-upon definition for what constitutes “direct participation in hostilities”).

185. Crootof, *War Torts*, *supra* note 6, at 1102–07.

186. *See, e.g.*, Geneva Convention I, *supra* note 154; Geneva Convention II, *supra* note 154; Geneva Convention III, *supra* note 154.

conflicts to bring claims—though which claims combatants might bring may be more circumscribed than those permitted by civilians.<sup>187</sup>

Additionally, permitting both civilians and combatants to bring war torts claims would eliminate a potentially problematic incentive. If only “civilians” could bring a war torts claim, attacking states would be incentivized to employ even more expansive definitions for “combatants” and “civilians directly participating in hostilities” in order to avoid war torts liability.

But states will likely resist permitting suits from harmed combatants. Many of the justifications for the distinction obligation—which requires states to distinguish between lawful targets (like combatants) and unlawful targets (like civilians)<sup>188</sup>—could be invoked in this context.<sup>189</sup> Unlike civilians, combatants knowingly (if not always willingly) assume the risk of wartime harms. Unlike civilians, combatants experience reciprocal risks, insofar as they cause harm as well as risk being harmed.<sup>190</sup> And, unlike civilians, combatants have a different relationship with their own state, which might take an insurer-like role with regard to their harms by providing military members and veterans with medical care, financial benefits, and other means of encouraging their enlistment or reducing the impact of their injuries.<sup>191</sup>

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187. See Robert Ackerman, *Congress Fixes – Just a Bit – the Unpopular, ‘Unfair’ Rule that Stopped Injured Service Members from Suing for Damages*, CONVERSATION (Feb. 20, 2020), <https://theconversation.com/congress-fixes-just-a-bit-the-unpopular-unfair-rule-that-stopped-injured-service-members-from-suing-for-damages-129887> (discussing a U.S. statutory limitation on a judicial doctrine that prevented U.S. servicemembers from suing government health providers for medical malpractice, while still prohibiting other suits for other harms incurred incident to service).

188. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 48, 51(2), 52(2), June 8, 1977, 1125 U.N.T.S. 3, 21 [hereinafter First Additional Protocol]; *Rule 1. The Principle of Distinction Between Civilians and Combatants*, INT’L COMM. RED CROSS CUSTOMARY INT’L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) (last visited Mar. 12, 2023).

189. See, e.g., Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 EUR. J. INT’L L. 321, 323 (2019) (discussing moral arguments for and against combatant equality).

190. But see Maja Zehfuss, *Targeting: Precision and the Production of Ethics*, 17 EUR. J. INT’L RELS. 543, 555 (2010) (citing sources on reciprocal risk and arguing that this distinction between civilians and combatants loses its force in conflicts where one side’s combatants may enact harm-at-a-distance, without fear for their own safety).

191. See, e.g., *Feres v. United States*, 340 U.S. 135, 144–46 (1960) (holding that the United States is not liable under the Federal Tort Claims Act for injuries to members of its armed forces sustained while on active duty due to negligence of others in the armed forces because, among other reasons, U.S. service personnel are eligible for government compensation, pensions, and other benefits, which serves as an alternative to a tort remedy); LeRoy, *supra* note 183, at 225 (noting that, unlike military contractor employees, U.S. “[s]ervice members and their dependents already have an elaborate benefit

Should combatants not be recognized as claimants, steps must be taken to avoid the problematic incentive to expand who constitutes a combatant. While the definition of “combatant” is fairly well established in international law, it has been somewhat stretched recently.<sup>192</sup> To reduce the likelihood that war torts liability will encourage attacking states to employ even more expansive definitions, war torts institutions should establish and police an objective and constrained definition. Additionally, “mistake of fact” shouldn’t be an affirmative defense; otherwise, defendant states would be able to evade liability by claiming that they mistakenly identified a civilian as a combatant or civilian directly participating in hostilities.<sup>193</sup>

### B. Defendants

While either a tribunal or an indemnification system will need to determine who can bring a claim, only a tribunal must address the question of defendants. In a tribunal system, who should be liable for civilian harms in armed conflict?

There are many potential individual defendants. The individuals who carry out an ordered attack; the commander overseeing the mission; if

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system for [wartime] injuries”); *id.* at 231 (discussing U.S. soldier benefits, including survivor benefits, a Death Gratuity Program, and Service Members Group Life Insurance).

Additionally, U.S. courts have noted that there may be an issue with permitting combatants to sue their own military leadership, as permitting such suits might adversely affect the relationship between soldiers and their superiors, which in turn could undermine military discipline. *Chappell v. Wallace*, 462 U.S. 296, 299–300 (1983).

192. The proportionality requirement and reputational costs of harming civilians already indirectly incentivizes expansive definitions. The United States, for example, has been critiqued for presuming that military-aged males in certain zones are combatants, rather than civilians, to both legitimize targeting these individuals and artificially deflate their numbers of civilian casualties. *See, e.g.*, John Vandiver, *AFRICOM Denies Amnesty International Claims that US Air Strikes Killed Civilians in Somalia*, STARS & STRIPES (Mar. 20, 2019), <https://www.stripes.com/theaters/africa/africom-denies-amnesty-international-claims-that-us-airstrikes-killed-civilians-in-somalia-1.573342> (quoting an Amnesty Report alleging that a U.S. general stated that “all military-aged males observed with known Al-Shabaab members” in “specific areas” are “considered legitimate military targets” and AFRICOM’s response that the purported statement “does not accurately reflect [international humanitarian law] targeting standards”).

193. In international criminal law, a mistake of fact—even an unreasonable mistake of fact—negates the mental element and thus operates to bar individual liability for what might otherwise constitute a war crime. Marko Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part I*, EJIL: TALK! (Jan. 14, 2020), <https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/>. However, for violations of international humanitarian law evaluated under the law of state responsibility, mistakes of fact must be “both honest *and* reasonable to exonerate the state.” *Id.* I argue that there should be no “mistake of fact” defense in a war torts regime, as it would foster this problematic loophole. *See also infra* Part III.D.1.

civilians were harmed due to an information error, perhaps those charged with gathering, processing, or recording intelligence;<sup>194</sup> if there was a weapons malfunction, perhaps the programmer, designer, or manufacturer,<sup>195</sup> or possibly the weapons procurer or approver.<sup>196</sup>

In prior work, I argued that “[i]t is possible to make moral arguments for imposing liability on any entity whose actions contributed to causing civilian harm,” but as a legal matter, “it is theoretically and practically preferable to hold states accountable.”<sup>197</sup> When compared with individual defendants, I argued that fairness, incentives, and practical arguments weighed in favor of holding the state liable, as the state is the entity that (1) best represents the varied individuals who make decisions which cause civilian harm; (2) can best make the cost-benefit analysis regarding appropriate precautions and act on its evaluation; (3) is easiest for claimants to identify as the relevant defendant; (4) is most likely to have the resources to pay damages awards; and (5) can best spread those costs according to internal policy determinations about which domestic entities should bear them. Accordingly, I concluded that holding states liable “will increase the likelihood that victims are compensated and encourage states to develop domestic structures, policies, and practices to minimize and appropriately distribute the costs of civilian harm.”<sup>198</sup> Meanwhile, holding individuals or private entities liable would likely bankrupt them without furthering the regime’s aims of compensating victims or spurring the systemic changes

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194. In 2017, for example, U.S. intelligence agents did not convey information about the protected nature of a potential target with a commander who later ordered a strike on it. *Transcript of Pentagon’s Al Jinah Investigation Media Briefing*, AIRWARS (June 27, 2017), <https://airwars.org/news/transcript-of-al-jinah-investigation-briefing/> (describing this strike as a “preventable error”). See also Asaf Lubin, *The Reasonable Intelligence Agency*, 47 YALE J. INT’L L. 119 (2022) (arguing that states should be held liable for unreasonably faulty intelligence).

195. See, e.g., HUM. RTS. WATCH & INT’L HUM. RTS. CLINIC HARV. L. SCH., LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS 42–44 (2012) (discussing this possibility in the context of autonomous weapon systems); Daniel N. Hammond, Comment, *Autonomous Weapons and the Problem of State Accountability*, 15 CHI. J. INT’L L. 652, 665–67 (2015) (arguing that designer and manufacturer liability for the acts of autonomous weapon systems will be unlikely to promote safety).

196. See, e.g., Geoffrey S. Corn, *Autonomous Weapon Systems: Managing the Inevitability of Taking the Man Out of the Loop*, in AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS, POLICY 209 (Nehal Bhuta, Susanne Beck, Robin Geiß, Hin-Yan Liu & Claus Kreß eds., 2016) (arguing that those who procure weapons be held responsible for the consequences of their use).

197. Crootof, *War Torts*, *supra* note 6, at 1110. Cf. Wuerth, *supra* note 163, at 35 (noting that the U.S. International Claim Settlement Commission allows individuals to file claims relating to the taking of property against foreign governments but not against private parties).

198. Crootof, *War Torts*, *supra* note 6, at 1110–13 (elaborating on these arguments).

needed to minimize future civilian harm.<sup>199</sup>

But what of non-state armed groups? At present, there are “around 600 armed groups [which] have the capacity to cause violence of humanitarian concern . . . [and] more than 100 of those can—as a matter of international humanitarian law—be considered parties to armed conflicts.”<sup>200</sup> Many of the arguments for why states are legitimate defendants would justify claims against non-state armed groups as well.

But if non-state armed groups are somehow judgement proof (even if well-funded, these groups may be able to evade enforcement actions), should host states be liable for their actions? Many of the state liability arguments are not applicable in this scenario. Assuming the group is operating without the host state’s consent or sanction, fairness and incentives arguments for state liability evaporate. The host state no longer represents the collective source of the resulting harm, nor can it make the relevant cost-benefit analyses and act on them. But more practical, compensation-focused arguments persist: It will still be easier for claimants to identify and bring a claim against the state, the state is more likely to pay damages awards, and the state can still anticipate and enact domestic policies to spread the costs of those awards. Given my focus on increasing the likelihood of victim compensation, I believe a war torts regime should at least develop a test for evaluating when host states can be held jointly liable for the acts of non-state armed groups.<sup>201</sup>

One final wrinkle: What of UN peacekeepers, who often operate in conflict zones?<sup>202</sup> Article 105 of the UN Charter provides that the United Nations “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”<sup>203</sup> Absent an explicit waiver, this provision might be interpreted as conferring immunity on UN missions, leaving those harmed by peacekeepers without recourse. To eliminate this potential loophole, the General Assembly should

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199. *Id.* at 1112 (noting the risk of delegitimizing the regime, insofar as it is unfair to hold a combatant liable for following lawful orders).

200. Bruno Demeyere, *Editorial: Non-State Armed Groups*, 102 INT’L REV. RED CROSS 915, 979 (2021).

201. Undoubtedly, the attribution rules under the law of state responsibility will inform any such analysis, *see infra* note 312, as might the more contested “unwilling or unable” doctrine, *see* Blum & Goldberg, *supra* note 29, at 63.

202. *UN Peacekeeping: 8 Facts About UN Peacekeeping Today*, VISION OF HUMAN., <https://www.visionofhumanity.org/eight-facts-about-united-nations-peacekeeping-in-todays-world/> (last visited Apr. 4, 2023) (noting that peacekeepers are increasingly deployed to active armed conflicts).

203. U.N. Charter art. 105(1).

clarify that Article 105 does not apply to war torts claims<sup>204</sup> and establish a dedicated fund to compensate victims of peacekeeping activities.

The possibility that claimants may not be able to enforce damages awards against certain defendants—poor states, rogue states, elusive non-state armed groups, and the protected United Nations—is not an argument against establishing war torts any more than the existence of powerful, reluctant, acrimonious, and judgement-proof defendants in domestic law means we should do away with tort claims. Rather, it is reason (1) to develop enforcement mechanisms which maximize the likelihood of payment<sup>205</sup> while allowing for the adjustment for state wealth when appropriate<sup>206</sup>; and (2) to finance victims’ funds to cover the costs of those who are unable to pay or might otherwise evade paying full damages.<sup>207</sup>

### III. ELEMENTS OF A CLAIM

This Part identifies and explores relevant considerations in crafting the elements of a war torts claim. Certain elements—such as the harm requirement—will be relevant regardless of whether a war torts regime is structured more as a tribunal or more as a non-fault system; others—such as the liability standard and affirmative defenses—will be only applicable in adversarial institutional structures.

#### *A. Harm Requirements*

What kind and amount of harm might justify bringing a claim for war torts? Obviously, civilians can be injured or killed and civilian objects can be damaged or destroyed. But those are far from the only injuries associated with armed conflicts—“harm” might also easily encompass psychological, economic, institutional, and environmental harms, as well as violations of

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204. The General Assembly can limit the applicability of Article 105 immunity. *Id.* art. 105(3).

205. In domestic law, this might manifest in procedures for garnishing tortfeasors’ wages. In the international sphere, this might take the form of creating procedures for nationalizing foreign state property.

206. *See infra* Part III.D.8 (discussing the possibility of an “incapacity to pay” defense).

207. In domestic law, examples of this include requiring employers to pay fees towards workers’ compensation funds or obligating individual drivers to carry automobile insurance. In the international sphere, this might take the form of requiring the funding of a Civilian Victims’ Fund, *see supra* Part I.B.4 (identifying baseline structural requirements for an international war torts institution), and the expansion of insurance for war torts claims, *cf.* Asaf Lubin, *Public Policy and the Insurability of Cyber Risk*, 5 J.L. & TECH. TEX. 45 (2021) (noting the increase in insurance options for terrorism); *id.* (noting the increase in insurance options for ransomware and other malicious cyberoperations).

human rights.<sup>208</sup> Some harms occur to individuals or to groups; others occur regionally or nationally.<sup>209</sup> Some harms asymmetrically affect members of vulnerable or disadvantaged populations; others are more diffuse across a broader populace. Some harms are immediately obvious, others manifest more slowly. Some harms are permanent, others transient. Further complicating matters, many injuries in armed conflict are not traceable to a single act; rather, they accrue from the cumulative effects of living in a war zone.<sup>210</sup> Nor are these aggregate harms inconsequential. Estimates suggest that “at least 200,000 people—and perhaps many thousands more—have died each year [in the years leading up to 2008] in conflict zones from non-violent causes . . . that resulted from the effects of war on populations.”<sup>211</sup>

There are certainly arguments for not placing limits on which harms might be the basis of a war torts suit. As the International Court of Justice recently acknowledged when awarding reparations for internationally wrongful acts, “the Court may award compensation for non-material (‘moral’ or ‘non-pecuniary’) elements of the injury caused to individuals and their surviving relatives as a result of the psychological harm they have suffered.”<sup>212</sup> It cited the *Diallo* case for the idea that “any quantification of compensation for such injury necessarily rests on equitable considerations.”<sup>213</sup> While the Court seemed to presume that non-material damages awards would only accompany suits for material damages, a growing body of scholarly literature argues that equity demands an increased

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208. *See, e.g.*, Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Reparations, Judgment, 2022 I.C.J. 38, ¶¶ 162, 181, 193, 206, 225, 258, 366 (Feb. 9) (awarding damages for civilian deaths, injuries, rape and sexual violence, child soldier recruitment, forced displacement of populations, property damage, and damage to natural resources); EMANUELA-CHIARA GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT 19 ¶ 57 (Chatham House 2018) (discussing the range of harms civilians experience, ranging from conflict-related disease to mental harm, in the context of evaluating the scope of proportionality evaluation).

209. Many wartime harms—to infrastructure, to places of cultural value, to the environment—are experienced by individuals, but might be better assessed by a claimant able to represent a larger group. *See supra* text accompanying notes 161–62 (observing that states might be a preferable plaintiff for certain types of collective harms).

210. *Cf.* Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT’L L. STUD. 159, 174 (2020) (discussing cumulative wartime harms, with a focus on mental harms).

211. THE GENEVA DECLARATION ON ARMED VIOLENCE & DEV., GLOBAL BURDEN OF ARMED VIOLENCE 2 (Geneva Declaration Secretariat 2008).

212. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Reparations, Judgment, 2022 I.C.J. 38, ¶ 164 (Feb. 9) (citing Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 I.C.J. Rep. 324, ¶ 18 (June 19)).

213. *Id.*

recognition of the legitimacy of suits for pure emotional distress<sup>214</sup> and pure economic loss,<sup>215</sup> grounded on both fairness<sup>216</sup> and incentives arguments.<sup>217</sup> Further, in the interests of legal harmonization, it may make the most sense to define harm broadly, as many legal instruments already define “victims” expansively as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”<sup>218</sup>

That being said, various policy and practical considerations may weigh in favor of creating significance or type harm requirements. Many domestic regimes, for example, often have minimum damage thresholds for bringing specified types of claims<sup>219</sup> as well as caps on certain types of damages.<sup>220</sup> Certainly, these limitations risk undermining the declarative function of suits by arbitrarily drawing a line between individuals who can and cannot seek compensation for their injuries, as well as the compensatory function of

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214. “Pure” emotional distress entails pain and suffering, mental harms, and other non-physical harms, though such harms may sometimes have physical manifestations. *E.g.*, Martha Chamallas, *Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 499, 530 (1998) (arguing that there are social incentives to permit claims for emotional and relational harms, but bias has fostered their devaluation); Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 834 (2015) (arguing that recognizing the objective causes of emotional distress can facilitate law’s recognition of pure emotional harm claims); Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 843 (2018) (arguing that failure to compensate for emotional harm incentives breach, since breaching parties will not be held responsible for all caused harms); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 176 (1992) (observing that the social tendency to view emotional harms as self-inflicted relieves that acting party of responsibility).

215. “Pure” economic loss entails the loss of money without any attendant physical damage. *E.g.*, DAN B. DOBBS, *THE LAW OF TORTS* § 452 (2000) (defining it as “economic harm [that] stands alone, divorced from injury to person or property”); Robert M. Stonestreet, *Replacing a Solid Wall with a Chain-Link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Loss*, 105 W. VA. L. REV. 213 (2002) (discussing justifications for and against the economic loss rule).

216. *E.g.* Chamallas, *supra* note 214, at 499 (articulating a fairness argument for compensating emotional harms); Stonestreet, *supra* note 215, at 215 (same for purely economic harms).

217. *E.g.*, Keren, *supra* note 214, at 843 (articulating an economic argument for compensating emotional harms).

218. Basic Principles, *supra* note 169; *see also* G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ¶ 1 (Nov. 29, 1985). In certain cases, the term “victim” might encompass those directly harmed as well as “the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” *Id.* ¶ 2.

219. The Israeli Ex Gratia Committee, which can recommend awarding compensation to Palestinians and foreign nationals injured by Israeli security forces, generally only reviews cases of bodily harm; it may recommend compensation for property damage in rare cases where it causes extreme financial distress and security or diplomatic considerations support the award. Bachar, *Collateral Damages*, *supra* note 10, at 402 & n.133.

220. For example, the U.S. Foreign Claims Act caps the amount of damages that can be paid for legitimate claims. Rowell & Wexler, *supra* note 121, at 549.

suits by capping damages. But these requirements also limit claims (and their associated absorption of institutional resources) to entities with more significant injuries. Harm restrictions may be of particular relevance if the institution is structured as a claims commission: Given that there may be limited funds, it may be necessary to prohibit claims from those who have lesser injuries to ensure that civilians with more significant harms are compensated.<sup>221</sup>

Domestic regimes also often restrict what types of harms can be the basis for a claim. There are various policy arguments against pure emotional harm claims, on the grounds that this type of harm is subjective, common, easily feigned, and difficult to objectively evaluate—and, as a result, recognizing it would both result in an overwhelming flood of both valid and fraudulent claims<sup>222</sup> and be difficult to administrate.<sup>223</sup> Similarly, there are concerns that permitting suits grounded in pure economic harms would create unpredictable, unbounded liability—a reasonable fear in the armed conflict context.<sup>224</sup>

Limitations on what level and type of harm is required to bring a war torts claim may develop officially or organically. If states draft a written instrument structuring a war torts regime, they may include formal restrictions on bringing claims. Alternatively, states bringing, debating, and settling war tort cases over time will develop state practice regarding what injuries may be compensated.<sup>225</sup>

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221. Cf. “Who Gets What”—Setting Compensation After Tragedy, TRAVELERS INST. (Feb. 23, 2022), [https://www.travelers.com/travelers-institute/webinar-series/symposia-series/Ken\\_Feinberg](https://www.travelers.com/travelers-institute/webinar-series/symposia-series/Ken_Feinberg) (discussing the balancing act between compensating all harms and compensating all victims).

222. E.g., Kenneth W. Miller, *Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 692 (1998) (noting that the physical injury requirement is employed as a means of screening out frivolous suits). *But see supra* note 214 (citing sources contesting these assessments).

223. Christopher J. Robinette, *Harmonizing Wrongs and Compensation*, 80 MD. L. REV. 343, 354 (2021).

224. E.g., Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1536 (1985); *see also* Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1203–04 (1988) (arguing that the risk of unlimited liability “supports only a limitation on recovery for purely economic harm, not a total denial”).

225. Cf. Rebecca Crootof, *International Cybertorts: Expanding State Accountability in Cyberspace*, 103 CORNELL L. REV. 565, 609 (2018) [hereinafter Crootof, *International Cybertorts*] (“States, like plaintiffs in domestic law, will determine what injuries they will absorb and which are worth challenging; other states’ responses to such accusations will be instrumental in developing norms about what constitutes significant harm.”); *id.* (arguing that “the inherent ambiguity of [the harm requirement] is a strength: it is a relatively tech-neutral standard that permits coherent but flexible legal development”).

### B. *Liability Standards*<sup>226</sup>

Should war torts regime be developed in adversarial tribunals, the extent of state liability will depend on whether a “strict liability” or “reasonable care” standard is employed.<sup>227</sup> A strict liability standard imposes liability for caused harms, while a reasonable care standard imposes liability only when an entity’s failure to exercise appropriate care in the circumstances causes harm. Selecting between the two entails selecting a default presumption regarding who bears the costs of injuries that occur regardless of whether everyone acts with reasonable care. Under a strict liability standard, the entity who causes harm must shoulder the associated costs; under a reasonable care standard, the costs of unanticipated harms fall on the victims.<sup>228</sup> Accordingly, in developing a victim-focused compensatory regime, there is a heavy thumb on the scale in favor of strict liability. That being acknowledged, there are arguments for employing a reasonable care standard in certain situations.

#### 1. *Arguments for a Strict Liability Standard*

“Strict liability” regimes hold an entity that causes harm liable, regardless of what or how much care the entity took to minimize the risk. While less well represented in both domestic and international law, there is some international precedent for strict liability regimes: The 1972 Convention on the International Liability for Damage Caused by Space Objects, for example, provides that “[a] launching state shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.”<sup>229</sup> Strict liability was also used as the standard of

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226. This section expands on arguments I introduced in Crootof, *War Torts*, *supra* note 6, at 1118–20.

227. Domestic tort regimes also may include tort liability standards that encompass different levels of intentional action, such as the U.S. torts of “assault,” “battery,” and “intentional infliction of emotional distress.” Absent the creation of new war torts for specific non-criminal actions, most actions in armed conflict that result in intended civilian harm—such as the intentional targeting of civilians, the intentional use of indiscriminate weapons, or the intentional failure to take feasible precautions—would already implicate the law of state responsibility’s “obligation to make full reparation for the injury caused by the internationally wrongful act.” Draft Articles, *supra* note 183, art. 31.

228. Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1235 (1988) (reviewing WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)).

229. Convention on International Liability for Damage Caused by Space Objects art. II, Mar. 29,

liability in the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.<sup>230</sup>

In the war torts context, strict liability fairly places costs on the entity which creates nonreciprocal risks to further its own interests, incentivizes states to prepare for the costs of harmful activities (and may also incentivize minimized engagement and greater care), and eliminates significant evidentiary problems for claimants.<sup>231</sup>

Between the state which created nonreciprocal risks to achieve its own objectives and the civilians who suffer the consequences, it is far more fair that the state shoulder the monetary costs associated with its actions.<sup>232</sup> When one actor engages in a self-serving activity that risks harming others, especially when doing so while limiting its own risk—say, when a commander decides to reduce the likelihood that her troops will be harmed by employing a weapon that increases the probability of civilian injury<sup>233</sup>—fairness requires that the actor be held strictly liable for resulting harms.<sup>234</sup>

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1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Space Objects Treaty]. The treaty also includes more complicated standards—including joint and several liability—for off-Earth damage. *Id.* arts. III, IV.

230. Int'l Law Comm'n, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries, U.N. Doc. A/61/10, at 79 (2006) [hereinafter Draft Principles on the Allocation of Loss].

231. The following analysis assumes that states (or possibly non-state armed groups) are defendants; the arguments do not hold equally well if combatants are defendants. *See supra* Part II.B.

232. *Cf.* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 541–42, 548 (1972) (“If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence.”); *see also* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 343 (1996) (arguing that “the permissibility of a particular risk imposition depends on directly comparing the burdens that the untaken precaution imposes on the injurer’s freedom of action, with the burden that foregoing that precaution places on the security of prospective victims”).

233. *See* Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1, 34, 41 (2015) (discussing how incentives to develop weapons which could cause harm at a distance had devastating effects for civilians); Reisman, *Compensating*, *supra* note 10, at 11–12 (arguing that shifting uncompensated risks from one’s forces to foreign civilians is particularly egregious in “elective” armed conflicts).

234. Fletcher, *supra* note 232, at 542 (arguing that unexcused nonreciprocal risks—where the defendant “generates a disproportionate, excessive risk of harm, relative to the victim’s risk-creating activity”—unfairly shift losses). In contrast, to the extent risks are reciprocal and equally distributed between two or more actors, a reasonable care regime is fair; every actor tolerates or assumes a risk similar to the one they are generating. *Id.* For example, two states engaged in armed conflict create reciprocal risks to each other and fairly incur comparable duties.

Thus, while it might seem unfair to “punish” a state with liability even when it and its agents took reasonable care to minimize foreseeable harms, it is still far more fair to place those costs on the state than on relatively powerless civilians.

To the extent one believes that war torts might incentivize states to minimize civilian harm, incentive arguments also favor employing a strict liability standard.<sup>235</sup> Strict liability generally encourages the liable actor to engage in socially valuable yet potentially dangerous activities only when the anticipated benefits outweigh the expected costs;<sup>236</sup> to employ reasonable care when engaging in such activities;<sup>237</sup> and to prepare to provide compensation when costs materialize.<sup>238</sup> Accordingly, strict liability is often applied when a reasonable care standard would not adequately disincentivize actors from engaging in activities with a high risk of injuring others.<sup>239</sup> Like abnormally dangerous activities, wartime conduct is often socially valuable yet extremely hazardous and likely to cause harm regardless of how much care actors employ;<sup>240</sup> a strict liability regime would theoretically incentivize both less activity and more care. Additionally, regardless of whether one thinks that strict liability will directly incentivize states to change their wartime behavior, a strict liability regime would encourage them to prepare for costs by providing advance notice of liability. Again, when compared to civilian victims, a state is clearly better situated to anticipate, prepare for, and

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235. I believe that any actualized war torts regime will not directly incentivize state action. See Crotoof, *War Torts*, *supra* note 6, at 1105–06. But I also believe that the existence of war torts will indirectly foster safer practices. See *id.* at 1120–29.

236. Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 718 (1965) (“[O]ne of the functions of accident law is to reduce the cost of accidents, by reducing those activities that are accident prone.”); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 3, 7, 11–12, 18–19 (1980).

237. See Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 REV. LAW & ECON. 153, 159–60 (2008) (finding that actors take reasonable care under strict liability based on a formula).

238. See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677, 702–04 (1985) (arguing for imposing strict liability on the party that can best conduct the cost-benefit analysis and then act on it) (citing GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 24–94 (1970)).

239. *Cf. Indiana Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1176–77 (7th Cir. 1990) (observing that strict liability may be preferred to negligence when taking extra care is unlikely to reduce the frequency of injury associated with an activity).

240. Reisman, *Compensating*, *supra* note 10, at 8; Schulzke & Carroll, *supra* note 10, at 386–90; see also Rebecca Crotoof, *War Torts: Accountability for Autonomous Weapons*, 164 U. PA. L. REV. 1347, 1395–96 (2016) (characterizing the use of autonomous weapon systems as an abnormally dangerous activity). *But see* Ronen, *supra* note 10, at 219 (suggesting that, because military activity is routinely hazardous, it cannot be characterized as an abnormally dangerous activity).

spread the costs of harms.<sup>241</sup>

Practical considerations also bolster these doctrinal arguments for implementing a strict liability regime. In many situations, because claimants will face significant evidentiary obstacles in establishing that a state failed to act reasonably or that such failure caused their harm, a reasonable care standard would effectively perpetuate the problematic status quo of little state liability.<sup>242</sup> Not only will the acting state be the only entity with information regarding its internal policies and what it actually did in a given incident, outside direct evidence will often be destroyed or inaccessible. In domestic law, blasting operations, fireworks accidents, and other explosion-related activities are often considered abnormally dangerous and thus subject to strict liability, both because of their inherent danger and because defendants would effectively be insulated from suit due to the evidence having been destroyed.<sup>243</sup> To the extent civilian harm results from similarly destructive acts that may make it difficult or impossible to collect evidence, analogous arguments favor the imposition of strict liability for harmful acts in armed conflict.<sup>244</sup> Meanwhile, as with strict products liability, claimants face difficulties in establishing which entity in a closed, complex system failed to act with reasonable care, justifying removing the obligation to prove that the defendant breached this duty.<sup>245</sup> Eliminating this element does not entail a slam dunk suit; under some institutional structures, claimants will still face various evidentiary hurdles in establishing harm and causation.<sup>246</sup> But it does dispense with one element of a war torts claim that would be particularly difficult for claimants to prove.

Haim Abraham has critiqued employing a strict liability regime for

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241. For a discussion on why the state is both the cheapest cost avoider and best cost spreader when compared with individual combatants, see *supra* Part II.B.1. Similar arguments apply when comparing the state to civilian victims.

242. See LANDES & POSNER, *supra* note 228, at 65–66; see also Marco Longobardo, *The Relevance of the Concept of Due Diligence for International Humanitarian Law*, 37 WIS. INT'L L.J. 44, 82 (2020) (“[S]ince states enjoy discretionary powers with respect to the conduct to be undertaken in order to fulfill a certain obligation, it may be difficult to scrutinize before a competent court the decision to adopt certain measures rather than others.”).

243. *E.g.*, *Siegler v. Kuhlman*, 502 P.2d 1181, 1185 (Wash. 1972) (arguing, in justifying the application of a strict liability standard, that “the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on”).

244. *Cf.* Abraham, *Combatant Activities*, *supra* note 119, at 904 (quoting one Israeli government attorney as stating that compensation claims are difficult to litigate in part because “[t]he ability to locate evidence and witnesses was extremely problematic”).

245. *Cf.* *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“An injured person, however, is not ordinarily in a position to . . . identify the cause of the defect. . .”).

246. See *supra* Part I.A.2. Thanks to Jennifer Robbennolt for this point.

wartime harms on the grounds that it is “divorced . . . from international humanitarian law”<sup>247</sup> and thus from the normative underpinnings of tort law.<sup>248</sup> He argues that it is only appropriate to establish tort liability for “wrongs,” and in the context of an armed conflict, what is “wrong” is defined by the standards set by international humanitarian law.<sup>249</sup>

On this point, we simply disagree; as I have argued previously, “it is not doctrinally inappropriate to establish legal liability for harms caused by lawful actions.”<sup>250</sup> For example, the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities gives reasons to justify imposing liability without proof of fault that echo the arguments I made above: (1) “[I]t would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as secret”; (2) it is appropriate for activities that are “ultrahazardous or abnormally dangerous”; and (3) “[t]he case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant.”<sup>251</sup>

Granted, a strict liability regime in this context is somewhat counterintuitive, insofar as so many international humanitarian law requirements require “reasonable” or “feasible” actions, words often associated with a reasonable care regime.<sup>252</sup> But those standards currently are used to identify when there is an internationally wrongful act implicating the law of state responsibility or a war crime implicating individual criminal liability. As with differing evidentiary standards in domestic law for torts and crimes,<sup>253</sup> it is appropriate to set a lower bar when determining whether an act implicates a duty to compensate rather than an unlawful and possibly

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247. Abraham, *Belligerent Wrongs*, *supra* note 10, at 816.

248. *Id.* at 817.

249. *Id.* at 809–10.

250. Crootof, *War Torts*, *supra* note 6, at 1115 (discussing how domestic law regularly holds entities strictly liable for lawful but harmful acts and that both international tribunals and claims commissions have decided against distinguishing between victims of lawful and unlawful acts when awarding damages).

251. Draft Principles on the Allocation of Loss, *supra* note 230, at 78–79.

252. For example, descriptions of the feasible precaution requirements sound akin to what would be expected in a reasonable care regime. See, e.g., Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 459–61 (2005) (arguing that the precautions a state must take in an attack are context-specific and that “belligerents bear different legal burdens of care determined by the precision assets they possess”).

253. In the United States, the elements of a crime must be proven beyond a reasonable doubt, while the elements of a tort must merely be proven by a preponderance of the evidence. E.g., *In Re Winship*, 397 U.S. 358, 371–72 (1970).

criminal label. To the extent some might fear that holding states strictly liable for all of their wartime acts that cause civilian harm might result in “too much” state liability, that concern can be alleviated with limitations on pleading requirements, causation cut-offs, and affirmative defenses.

## 2. *Arguments for (and Against) a Reasonable Care Standard*

Under a “reasonable care” standard, an actor is only held accountable for caused harm if they did not act reasonably in light of the circumstances.<sup>254</sup> While there is no international tort law, numerous treaty regimes employ a reasonable care liability standard for various types of accidental harms (such as nuclear disasters, oil spills, or other accidents involving hazardous materials) or for activities that endanger shared spaces (such as international watercourses, transboundary waters, and outer space).<sup>255</sup> Similarly, states have various “due diligence” obligations to minimize harm due to third party action, a standard which attempts to balance states’ obligations to take preventative measures against harm with the fact that certain risks are unforeseeable or unpreventable.<sup>256</sup>

A reasonable care standard is flexible, capable of being adjusted according to the circumstances of different operations, different contexts, and different times.<sup>257</sup> This capacity for situational calibration is rightly celebrated, especially insofar as it allows the standard to improve with technological advances and improvements in best practices.<sup>258</sup> In contrast to a strict liability regime—which would hold states with different capabilities and resources to the same standard and thus risks becoming yet

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254. See, e.g., *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 197 (Apr. 20) (observing that compliance with reasonable care standards “entail[] not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators”).

255. Crootof, *International Cybertorts*, *supra* note 225, at 602 & nn.162–65 (citing approximately twenty relevant treaties).

256. Antonio Coco & Talita de Souza Dias, *Cyber Due Diligence: A Patchwork of Protective Obligations in International Law*, 32 EUR. J. INT’L L. 771, 775–78, 783–804 (2021) (detailing states’ varied “due diligence” obligations to prevent, stop, and redress harm). For a strong argument that “due diligence” requirements are best understood as a standard of liability, rather than only as a freestanding independent duty, see Beatrice A. Walton, Note, *Duties Owed: Low-Intensity Cyber Attacks and Liability for Transboundary Torts in International Law*, 126 YALE L.J. 1460, 1480 (2017).

257. Haim Abraham, *Queering the Reasonable Person*, in DIVERSE VOICES IN TORT LAW (Kirsty Horsey ed., forthcoming 2023) (discussing how the “reasonable person” standard—which is often used to determine what would constitute “reasonable care”—could be understood expansively and vary with different types of people but instead is often understood as implying that the imagined individual is white, straight, and male).

258. E.g., T.J. Hooper, 53 F.2d 107 (S.D.N.Y. 1931).

another procedurally equal standard with differential effects—a reasonable care regime allows for variation in application.<sup>259</sup> What constitutes “reasonable care” in a situation may differ depending on what a state is able to do, thereby “maintain[ing] the *legal* equality of belligerents along with taking into account the *factual* asymmetries that may affect their compliance with international humanitarian law.”<sup>260</sup>

However, there are many reasons to resist employing a “reasonable care” standard in the war torts context. First, the proportionality, feasible precautions, and other requirements that obligate combatants to minimize civilian harm describe what might constitute acting with “reasonable care” in the circumstances of armed conflict.<sup>261</sup> But, to the extent “reasonable care” simply reflects extant international humanitarian law rules regarding targeting, a state’s compliance with these rules will operate to insulate them from liability for lawful acts—undermining a fundamental premise of a war torts regime.<sup>262</sup> Granted, a reasonable care standard need not be minimal or easily-satisfied;<sup>263</sup> it could be set (perhaps artificially) high, such that only states which take unusually proactive measures will meet it.<sup>264</sup> However, it is unlikely states will set the standard to require more than current common state practices, rendering it relatively easy for them to meet it and thereby avoid war torts liability altogether.

Further, the standard’s flexibility also introduces opportunities for gaming by savvy and powerful actors. For example, how best to categorize defendant State A when determining whether it acted reasonably in a given situation? Is it possible or fair to compare State A to a generic “reasonable state”? If not, what standard is best? A “reasonable state from the same

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259. In U.S. law, for example, there are times when courts evaluate what a “reasonable woman” or “reasonable blind person” might do in certain situations. *E.g.*, *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a reasonable woman standard); *Roberts v. State*, 396 So. 2d 566, 567 (La. Ct. App. 1981) (applying a reasonable blind person standard).

260. Longobardo, *supra* note 242, at 85.

261. *See* Ronen, *supra* note 10, at 185 (arguing that Articles 57 and 58 of the First Additional Protocol “lay down a due diligence standard”).

262. Crootof, *War Torts*, *supra* note 6, at 1113–16 (arguing that civilian victims of both lawful and unlawful acts are entitled to compensation).

263. Thanks to Asaf Lubin for the suggestion that it might be appropriate to adjust the standard based on the situation, as there might be reason to limit war torts liability depending on the specific injury-causing activity, its desirability, and prevalent attitudes towards it.

264. *Cf.* Longobardo, *supra* note 242, at 83 (arguing that, “in a situation of armed conflict, where the risks inherent to the conduct of hostilities are dramatically high, the standard of diligence must be set accordingly”); *id.* (arguing that due diligence standards “widen state responsibility”); *cf.* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Nauru v. Tonga), Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 IJLOS Rep. 9, ¶ 117 (noting that standards “change in relation to the risks involved in the activity”).

region”? A “reasonable state with a similar GDP”—or “percentage of GDP spent on its military”? “A reasonable state which engages in a similar amount of military activity”? Suits could easily get bogged down in debates about the appropriate standard for a particular defendant in a particular situation, with lots of opportunities for political pressure and wrangling that would enable states to escape liability for their actions.<sup>265</sup> And, to the extent that reasonable care standards evolve over time, reflecting changes in customary practices, the standards might degrade. Some new technological developments make it easier to minimize civilian harm; others—the nuclear bomb, drones, autonomous weapon systems—may introduce legal loopholes<sup>266</sup> or incentivize interpretations of what is “reasonable” or “feasible” that result in greater civilian harm.<sup>267</sup>

While a strict liability standard risks further entrenching existing power disparities between states,<sup>268</sup> the benefits of increasing the likelihood of victim compensation outweigh that concern—especially as the reasonable care standard is also subject to this critique. Politically powerful states will have outsize influence on what constitutes “reasonable care”; to the extent these states also tend to spend more on their military (and that Venn diagram is nearly a circle), there is a risk that the standard may be set at a level that is easy for them to meet but difficult for less wealthy states to satisfy.<sup>269</sup> Accordingly, a “reasonable care” standard could easily become a standard that allows military powerhouses to continue doing what they’ve

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265. Cf. Maryam Jamshidi, *How Law Can Make War Inhumane and Banal*, VOLKERRECHTSBLOG (June 23, 2021), <https://voelkerrechtsblog.org/how-law-can-make-war-inhumane-and-banal/> (discussing how “humanitarian law is created and shaped by the work of . . . military lawyers, who often exploit the malleability of humanitarian law to serve the military interests of their governments”).

266. Cf. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8) *reprinted in* 35 I.L.M. 809 (finding the use of nuclear weapons unlawful but refusing to reach a final decision given the possibility of “an extreme circumstance of self-defence, in which the very survival of a State would be at stake”).

267. Cf. Vandiver, *supra* note 192 (noting interpretative disagreement on whether all “military-aged males” should be presumed to be combatants or civilians when evaluating the proportionality of drone strikes); Rebecca Crootof, *A Meaningful Floor for “Meaningful Human Control,”* 30 TEMPLE INT’L & COMP. L.J. 53 (2016) (arguing that a “meaningful human control” standard for autonomous weapon systems should never be interpreted to lessen the distinction, proportionality, or other targeting protections).

268. Crootof, *War Torts*, *supra* note 6, at 1136–37.

269. It is common for powerful entities to support regulations that will have little to no effect on them but will significantly impact their less-powerful competitors. Cf. Aaron Sankin, *Ask the Markup: What Does Facebook Mean When It Says It Supports “Internet Regulations”?*, THE MARKUP (Sept. 16, 2021), <https://themarkup.org/the-breakdown/2021/09/16/what-does-facebook-mean-when-it-says-it-supports-internet-regulations> (noting that Facebook lobbies for regulations that mirror policies it already implements, which allows it to “crowd out tougher legislation” while simultaneously hurting competitors less able to implement those policies).

always done, while imposing new costs on weaker, poorer states—neither of which will increase the likelihood of civilian compensation.

Still, one might reasonably ask whether the fairness and incentives arguments for strict liability still hold when civilian harm arises in part due to another entity's action, such as an adversary's unexpected involvement. Consider a situation where a weapon is hacked by an unknown perpetrator and used to harm civilians. Any system built on code, employing algorithms, or incorporating artificial intelligence is at risk of being hacked, spoofed, or gamed; should a state still be held strictly liable when these systems operate unpredictably due to adversarial interference? It does seem unfair at some level to blame the targeted state for the malicious acts of another; accordingly, under peacetime law, there is increasing support for employing a reasonable care standard in evaluating a state's responsibility for another's harmful cyberoperations.<sup>270</sup> However, if the targeted state had not fielded a vulnerable system, the harm would not have occurred: Strict liability will prod states to minimize their risk exposure by improving their cybersecurity measures or limiting their use of such systems.<sup>271</sup> Allowing a state to escape liability because it fielded a weapon with weak cybersecurity (or claimed in bad faith that an inadvertent action was due to adversarial interference) would undermine a war torts regime. Not only would civilians be left uncompensated, the law's "deterrence rationale would be defeated if those enabling wrongdoing can escape judgment by shifting liability to [those] who cannot be caught and thus deterred."<sup>272</sup> Adversarial action is foreseeable in an armed conflict; given this, states should still be held strictly liable for the associated harmful consequences (though they may be able to raise a contributory action defense<sup>273</sup>).

The best doctrinal argument for a reasonable care regime is that it might govern more types of state conduct, expanding state liability to include the harmful consequences of third-party acts. For example, under the law of state responsibility, a private actor's conduct is attributable to a state only when the state "controls" them, a notoriously high threshold that often operates to minimize state responsibility.<sup>274</sup> If a similar attribution standard

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270. *E.g.*, Coco & de Souza Dias, *supra* note 256, at 777.

271. *Cf.* Oren Gross, *Cyber Responsibility to Protect: Legal Obligations of States Directly Affected by Cyber-Incidents*, 48 CORNELL INT'L L.J. 481, 491–99 (2015) (arguing that a state victim to a harmful cyberoperation should bear some costs for its failure to take appropriate precautions).

272. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1837 (2010) (citing Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 444 (1999)).

273. *See infra* Part III.D.3.

274. Draft Articles, *supra* note 183, art. 8.

were employed in the war torts context, states would hardly ever be liable for the harmful acts of non-state armed groups. In contrast, a reasonable care or due diligence requirement could be used to hold states accountable whenever they could have influenced or stopped a private actor's harmful conduct and failed to take good-faith steps to do so.<sup>275</sup>

In such situations, there will be a tradeoff between the benefits of holding states strictly liable for acts of non-state armed groups—which is less doctrinally justified but will better fulfill the aim of compensating victims—and a reasonable care standard—which may be more appropriate, but will result in victims shouldering more costs of conflict. When weighing these options, it is worth considering the extent to which the defendant state, subject to an arguably-unfair strict liability standard, might be somehow able to recoup costs from the non-state armed group.<sup>276</sup>

Ultimately, there is no need to take a hard line as to which standard will always be preferable; rather, as in domestic tort law, a war torts regime can accommodate both strict liability and reasonable care standards. A state could be held strictly liable for harms caused by its own acts and subject to a reasonable care standard for acts of non-state actors within its territory.

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This Section focused primarily on doctrinal arguments, which support a strict liability standard. That being said, the most compelling argument for a “reasonable care” standard is a realist one, in that it is more likely to be accepted by states—and without state consent, there will be no war torts regime at all.<sup>277</sup>

If a reasonable care standard is employed, it should be subject to a rebuttable presumption that the defendant state did not act with reasonable care. In light of the evidentiary difficulties claimants will face in acquiring even circumstantial evidence regarding the amount of care the defendant state took, the defendant state should have the burden of disproving this element.<sup>278</sup>

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275. Longobardo, *supra* note 242, at 83.

276. *See infra* Part III.D (arguing that, if a state incurs war torts obligations due to legitimate self-defense, it can recoup those costs from the aggressor state).

277. Thanks to David Sloss for this point; *see also* Citron, *supra* note 272, at 1831 (observing that “second-best solutions can be preferable to first-order ones that have little chance of adoption”).

278. *See supra* text accompanying notes 59–62.

*C. Causation Analyses*

Regardless of the liability standard, much will turn on a claimant's ability to establish causation.<sup>279</sup> The question of "what caused a harm" can be evaluated under a variety of tests (including directness, proximity, and foreseeability), each of which can be interpreted narrowly or expansively. The choice between tests and interpretations is often grounded on policy determinations about the appropriate scope of defendant liability or who is an appropriate recipient of compensation.<sup>280</sup> While some regimes vest this discretionary power with the decisionmaker in individual cases,<sup>281</sup> it is far preferable—from a predictive and law-making stance—to make it at the institutional level.<sup>282</sup>

Some war tort causation analyses will be relatively straightforward, regardless of the causation test employed. If State A's missile strike destroys Civilian X's crops in State B, Civilian X's claim meets all of the varied causation tests. But for the missile strike, the crops would not be destroyed. The act and its consequence are directly related; the destruction of crops was proximate in space and time to the missile strike; and it is objectively foreseeable that a missile strike would destroy crops.

But other scenarios will stretch casual chains to their breaking point. Imagine that Civilian Y's crops are the main source of food for Town Z, such that any interference with them will trigger a famine. If State A's attack destroys Civilian Y's crops in State B, is State A responsible for the resulting deaths? What if Town Z is located in a third country, State C? What if the attack may have had the effect of stunting the crops—but their underperformance might also be attributed to unusually poor weather? What if State A never engaged in an operation in the area—but the threat of an attack prevented Civilian Y from caring for the crops? What if a friend of Civilian Y died due to State A's attack in another region, and Civilian Y's

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279. Vladyslav Lanovoy, *Causation in the Law of State Responsibility*, 90 BRIT. Y.B. INT'L L. 1, 3 (2022) (noting that causation "plays a crucial role in determining the availability, form and extent of reparation, by linking the internationally wrongful act of the State with the injury for which reparation is sought").

280. See John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1480 (2008) (observing, in the context of analyzing an *ex gratia* award, that "law offers no escape from the thorny problems of discretion and judgement . . . Resort to law does not provide determinate answers. It merely provides a framework in which to reason toward answers.").

281. Lanovoy, *supra* note 279, at 4 (noting that the International Law Commission delegated the decision about which causation test to use for evaluating the law of state responsibility to the decisionmaker in a particular case).

282. *Id.* at 6, 45, 62, 83 (arguing for using a uniform "foreseeability" test for evaluating causation in the context of evaluating state responsibility in different institutions and situations).

emotional distress was so incapacitating that they failed to care for the crops?

Or consider the “they made me do it” issue. If State C conducts an armed attack on State D, and State D responds with defensive force that harms civilians in State C, who “caused” the harm to State C’s civilians? Who pays, given that there’s a strong argument that defensive and responsive uses of force are entirely foreseeable?

Clearly, lines must be drawn somewhere. But where?

### 1. *Cause in Fact*

At the very least, there must be “cause in fact” (which is sometimes termed “factual cause” or “actual cause”). This is the idea that there must be a causal link between an act and the resulting harm; in the war torts context, the claimant must be able to trace one of the causes of their harm to an action associated with an armed conflict.

International tribunals have adopted various tests to evaluate whether an act or omission is a cause in fact: These “range between the stricter *but for* or *sine qua non* (i.e., would the harm have occurred but for the wrongful act) and a more lenient test of the necessary element of a sufficient set (NESS) (i.e., whether the wrongful act was one among many other possible causes of the harm).”<sup>283</sup> Under either the *but for* or NESS test, the cause in fact must be *a* cause of the harm, but it need not be *the only* cause of the harm.<sup>284</sup>

For example, in the armed attack hypothetical at the beginning of this Section, it may well be that State C and State D both “caused” State D’s responsive use of force which harmed State C’s civilians. (Again, to pass the *but for* test, an act needs to be *a* cause, not the *only* cause.) But, as I discuss below, State D might be able to pass the war torts costs of its defensive actions onto State C under the law of state responsibility.<sup>285</sup>

### 2. *Proximate Cause*

The concept of “proximate cause” or “legal cause” is grounded on the

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283. *Id.* at 14.

284. However, as evidenced by U.S. law, there may be situations where it is appropriate to make an exception to this rule, such as when there are multiple sufficient causes, *see* *Anderson v. Minneapolis, St. P. & S. St. M. Ry. Co.*, 179 N.W. 45 (Minn. 1920), or alternative causes, *see* *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948).

285. *See infra* Part III.D.2.

idea that it is unjust to hold an entity liable for all of the consequences of their actions; while the *but for* or NESS tests identify whether an act is a cause of harm, the proximate cause analysis identifies whether an act is a *legally relevant* cause of harm.

International and domestic tribunals have employed various tests—including directness, proximity, and foreseeability—to determine when the causal link between an act and the resulting harm is so attenuated or fortuitous that the actor cannot legitimately be held liable. The Draft Articles of State Responsibility, which describe when states must make reparations for injuries caused by their internationally wrongful acts, notes these and other potentially relevant factors in evaluating causation:

[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity.” But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.<sup>286</sup>

In evaluating whether states were responsible for caused harm, the International Court of Justice (ICJ),<sup>287</sup> the International Tribunal for the Law of the Sea,<sup>288</sup> and the UN Compensation Commission<sup>289</sup> employ a “directness” test. As stated by the ICJ in its first case using this standard, “directness” requires a “sufficiently direct and certain causal nexus.”<sup>290</sup> Of

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286. Draft Articles, *supra* note 183, art. 31 cmt 10; *see also* *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Reparations, Judgment, 2022 I.C.J. 38, ¶ 384 (Feb. 9) (rejecting the DRC’s claims for macroeconomic damage because the DRC had not demonstrated that “a sufficiently direct and certain causal nexus exists between the internationally wrongful acts of Uganda and any possible macroeconomic damage”). In the interests of legal harmonization, then, one might argue that if states aren’t liable for remote damage associated with unlawful acts under the law of state responsibility, they certainly shouldn’t be liable for remote damage that may have stemmed from lawful actions.

287. *Lanovoy*, *supra* note 279, at 13–14, 49.

288. *Id.* at 13–14, 50.

289. *Id.* at 45, 51 (noting that this was required by the Commission’s constitutive instrument). *But see id.* at 53 (noting that the Commission was willing to stretch the standard to encompass less obviously direct harms, such as allowing compensation for costs associated with monitoring studies to assess environmental damage).

290. *E.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 462 (Feb. 26).

the proximate cause tests, it is the strictest and thus the easiest to apply.<sup>291</sup> But its narrow scope has been critiqued, as it can be easily interpreted to not encompass situations where acts may have long-lasting or wide-ranging harms, nor situations where there are multiple causes of harm, even where the harms were entirely predictable.<sup>292</sup>

The proximity test, which evaluates whether the injury is “not too remote from [the harmful act] so as to preclude reparation,” is “[t]he most common standard found in the practice of international courts and tribunals today.”<sup>293</sup> The issue with this test is its inherent flexibility; it is difficult to predict what a decisionmaker will determine is sufficiently proximate or too remote.<sup>294</sup> Accordingly, some have suggested using the concept of “foreseeability” to demarcate what is or is not a “proximate” harm.<sup>295</sup>

In addition to being a factor in a “proximity” test, “foreseeability” has also been used by the International Centre for Settlement of Investment Disputes,<sup>296</sup> the Iran-U.S. Claims Tribunal,<sup>297</sup> and the EECC<sup>298</sup> as a standalone test for proximate cause.<sup>299</sup> As a standalone test, it “focuses not only on the proximity of the consequences, whether spatial, personal or temporal, but mainly on whether the harmful outcome was foreseeable” by the defendant.<sup>300</sup> The foreseeability standard is slightly more objective and predictable than a “proximity” standard<sup>301</sup>—though different judges will undoubtedly apply it in different ways.<sup>302</sup>

Selecting a war torts causation standard is a policy determination. A more restrictive standard will make it difficult or impossible for otherwise

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291. Lanovoy, *supra* note 279, at 46 (“[I]t is patently easier for judges or arbitrators to determine whether a given injury follows directly and immediately from an internationally wrongful act, and thus automatically discard any other injuries which may be slightly more remote in space and time from the wrongful act”).

292. *Id.* at 81, 83–84.

293. *Id.* at 54–56 (discussing its use by early 20<sup>th</sup> century arbitral decisions, various mixed claim commissions, investor-State arbitral tribunals, regional human rights courts, and investment treaty arbitration).

294. *Id.* at 55–56 (noting that human rights tribunals applying a “proximity” test have sometimes appeared to be using a “directness” like standard but other times have simply assumed a causal link between an act and caused harm).

295. *Id.* at 57.

296. *Id.* at 58.

297. *Id.*

298. *Id.* at 45, 60.

299. *Id.* at 57–58.

300. *Id.* at 58.

301. *Id.* at 62.

302. *Id.* at 61 (acknowledging that “any causal analysis remains fact-intensive, leaving adjudicators with considerable margin of discretion even where the relevant standard is clear”).

deserving claimants to receive compensation; a broader standard may limit state support, especially if other elements of a claim are construed to increase the likelihood of state liability. Accordingly, the selection of a causation standard is necessarily intertwined with the selection of an institutional structure, a harm requirement, a liability standard, allowed defenses, and other design choices.

That being acknowledged, the foreseeability test may strike the best balance between ensuring claimants are compensated and limiting the scope of a war torts regime. It is more expansive than the directness test (and thus permits “consideration of the full range of consequences that flow” from a harmful act<sup>303</sup>), more predictable and objective than the proximity test, and yet still bounds the universe of legally relevant causes.<sup>304</sup>

### 3. *Intervening Actors*

The possibility of malicious adversarial action raises special causation questions, as arguably a particular harm would not occur if not for outside interference. At present, “international courts and tribunals appear to be divided on how to construe cases of multiple causes and their effects on reparation” under the law of state responsibility.<sup>305</sup> In the context of war torts, however, there is a stronger argument for not allowing enabled intervenors to break the chain of causation.

Consider the question of whether a criminal intervenor breaks a chain of causation in U.S. law. Traditionally, criminal intervenors cut off liability for other actors, as no one could be expected to foresee unlawful acts.<sup>306</sup> Today, however, U.S. courts are increasingly comfortable with holding “enabling” actors liable for third-party criminal acts, at least in situations where the act was foreseeable and the enabler had a special relationship with the plaintiff or somehow facilitated the harm.<sup>307</sup>

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303. *Id.* at 64–65.

304. *See also id.* at 60–61 (noting that different types of tribunals tend to employ different causation standards, with those addressing inter-state conflicts applying a narrower standard, while those addressing public/private conflicts tend to apply a more expansive standard). *But see id.* at 61 (acknowledging exceptions to this general rule).

305. *Id.* at 69.

306. *E.g.*, *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244 (Neb. 2003).

307. Rabin, *Enabling Torts*, *supra* note 272; *e.g.*, *Addis v. Steele*, 648 N.E.2d 773 (Mass. App. Ct. 1995) (holding an inn liable after arson, for failure to provide an escape route); *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999) (holding business owners liable for failure to take reasonable measures to minimize the risk of foreseeable criminal acts); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 487 (D.C. Cir. 1970) (holding landlord liable for failure to protect tenants from foreseeable criminal actors).

These domestic law arguments justifying holding the “enabler” liable, even when the harm is partially or even entirely caused by a malicious third-party actor, apply all the more strongly in armed conflict, where there is a pervasive expectation that adversaries will do whatever they can to sabotage military operations.<sup>308</sup> Accordingly, intervening enemy acts should not cut off causation for a defendant state that had enabled those acts<sup>309</sup>; intervening acts may, however, support a contributory action defense.<sup>310</sup> (This is, implicitly, another argument for employing a “foreseeability” test for proximate cause, rather than a “directness” test.<sup>311</sup>)

This “enabler” analysis is also relevant when applied to the acts of non-state armed groups. Regardless of whether a more expansive or narrow causation standard is employed, state acts or omissions which cause civilian harms for war torts liability purposes will likely encompass more activities than the actions or omissions that can be attributed to a state under the law of state responsibility. Namely, a private actor’s conduct can only be attributed to the state if the state’s action satisfies the high threshold for “control.”<sup>312</sup> Should a state know of a private actor’s harmful conduct, have

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308. As the UN Compensation Commission has noted, “intervening acts of a third person that are a reasonable and foreseeable consequence of the original act do not break the chain of causation, and hence do not relieve the original wrongdoer of liability for losses which his acts have caused.” Comp. Comm’n, Rep. on the Second Instalment of “E2” Claims, ¶ 72, UN Doc S/AC.26/1999/6 (Mar. 19, 1999). In contrast, there is a stronger argument for limiting liability for the third-party acts in peacetime. See Crootof, *International Cybertorts*, *supra* note 225, at 580, 614–15.

309. See also Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 658–60 (2019) (noting that employing an expansive approach to evaluating whether enablers break a causal chain “does not entail doing away with [limits on causation] entirely”).

310. See *infra* Part III.D.4; see also Crootof, *International Cybertorts*, *supra* note 225, at 615 (noting, in arguing for state liability for harmful cyberoperations that occur in peacetime, that a “victim state’s particularly egregious [poor] cybersecurity practices might be treated as a kind of contributory or comparative negligence that mitigates another state’s liability”).

311. See *supra* text accompanying note 304.

312. States may be held responsible for the conduct of non-state actors who are *de facto* state organs, although the standard for attribution remains unresolved. For the International Court of Justice’s “effective control” test, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 109–10 (June 27) (using the phrase “complete dependence” to refer to a similar control standard). For the ICTY’s “overall control” test, see Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, ¶ 131 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). Additionally, states may sometimes be held responsible for the conduct of non-state actors who act “on the instructions of, or under the direction or control of” a state in carrying out an operation, or who engages in acts which the state later acknowledges and adopts as its own. Draft Articles, *supra* note 183, arts. 5, 8, 11; see also *id.* art. 8 cmts. 3, 8 (adopting the higher “effective control” standard to establish

the power to stop it, and elect not to do so, the conduct could not be attributed to the state—but state could be said to have contributed to causing the resulting civilian harm.<sup>313</sup>

#### *D. Affirmative Defenses*

After a claimant has made their case, a defendant state might challenge it on the merits. Alternatively, it might assert an affirmative defense—a responsive claim that it cannot be held liable because (1) its conduct was somehow justified or immunized; (2) another entity is more responsible; or (3) some procedural bar has not been surmounted. Any affirmative defense risks frustrating a war tort regime’s goal of providing victim compensation: A successful defense will result in less state liability and, by extension, a lowered likelihood of compensation for harmed civilians. If a defense is to be recognized, it must be grounded on strong policy justifications. What affirmative defenses—if any—might be appropriate?

This Section considers the affirmative defenses of lawful action (and mistake of fact), self-defense, contributory action, statute of limitations, peace treaty settlement, res judicata, and incapacity to pay. While all of these defenses are relevant in an adversarial process, a few—namely, statute of limitations and settlement defenses—may also be relevant in an indemnification system. Of course, the following analysis presumes that any war torts regime would eliminate blanket state immunity, possibly by state consent to an implementing treaty.<sup>314</sup>

##### *1. Lawful Action (and Mistake of Fact)*

One of the thorniest questions in developing a war torts regime is determining whether states should be liable for civilian harm that is incident to a lawful attack—that is, injuries resulting from an attack that complies with the proportionality, feasible precautions, and other targeting requirements. Even if there is a presumption that all civilian harm can be

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attribution only for acts that occur in the context of an operation over which a state exercises effective control, and only for ultra vires actions that are an “integral part” of the operation).

313. Cf. Eric Talbot Jensen & Sean Watts, *A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?*, 95 TEX. L. REV. 1555, 1564 (2017) (suggesting a similar solution for resolving the attribution problem for malicious peacetime cyberoperations).

314. For a discussion of why states might be interested in consenting to the creation of such a regime, see Conclusion.

the basis for a war torts suit, as I have argued for previously,<sup>315</sup> there might still be an argument that states should be able to invoke an affirmative defense of lawful action.

On one hand, this affirmative defense might balance the competing interests at play, insofar as it would shift the burden of proving lawful action to the defendant state and thus operate as a useful information-generating tool. If a state could only take advantage of this defense by providing information it would otherwise keep confidential—such as details about its process for conducting proportionality analyses—a state would only make use of this defense when it has evidence it was willing to share about the legality of its action. To the extent it is deployed, then, this defense might beneficially increase transparency around states' targeting practices, weapons review, rules of engagement, and other often-hidden but hugely influential procedures.<sup>316</sup>

On the other hand, creating an affirmative defense of lawful action risks creating a loophole that would both undermine the war torts regime and incentivize problematically expansive understandings of targeting requirements. First, the law of armed conflict is not intended nor designed to incentivize safer action; one impetus for creating a war torts regime is that, all too often, “awful” acts are “lawful.” If lawful acts are excluded from a war torts regime, civilians will continue to bear the costs of war.

Second, as a practical matter, it will be easy for states to claim (and difficult for opponents to disprove) that their acts were lawful. Many legal requirements focus on the “reasonableness” or the “feasibility” of a particular action, evaluated based on the information available to a commander before conducting a strike. Accordingly, even if states have the burden of proof in establishing an act was lawful, they will easily meet that burden, both because the law permits significant harm and because the state controls the relevant evidence.

Indeed, this defense might indirectly foster greater overall civilian harm.

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315. Crootof, *War Torts*, *supra* note 6, at 1113–16. For an argument that states should only be liable for their unlawful acts in armed conflict, see Abraham, *Belligerent Wrongs*, *supra* note 10, at 810–12.

316. *See* Crootof, *War Torts*, *supra* note 6, at 1124–30 (discussing how increased transparency in state practices would contribute to the development of customary international humanitarian law). However, this benefit might disproportionately incentivize transparency from poorer states, contributing to state power disparities (and, possibly, incomplete information about state practices for the purposes of developing customary international law). Relatively poor states might rely on this defense to evade liability at the cost of sharing more information than they would prefer, while wealthier states could afford to forego the defense in the interest of keeping their secrets and pay awards.

Much of the law of armed conflict is comprised of tech-neutral standards, which are subject to states' evolving, adaptive interpretations. An affirmative defense of lawful action would further bolster existing incentives for states to employ expansive interpretations of the law—say, to permit greater relative amounts of expected civilian harm under the proportionality analysis or require fewer precautions—such that, over time, once-protective standards will evolve to require less.<sup>317</sup> Meanwhile, states will be implicitly incentivized to employ less stringent domestic rules of engagement<sup>318</sup> and remain willfully blind to the actual status of potential targets.

On balance, there should be no defense of lawful action. Relatedly, there should also be no mistake of fact defense.<sup>319</sup> If, however, lawful action is permitted as an affirmative defense, the defendant should have to prove that the action fulfilled all targeting and other requirements; similarly, if mistake of fact is permitted as an affirmative defense, the defendant should have to prove that the mistake was both honest and reasonable.<sup>320</sup>

## 2. *Self-Defense*

Both international and domestic law recognize that “self-defense” may excuse otherwise-prohibited actions.<sup>321</sup> But should it also excuse states from war torts liability? In the shadow of Russia's illegal war on Ukraine, it seems deeply unfair to expect a state victim to an unlawful attack by an aggressor state to have to pay the costs of unavoidable civilian harm associated with defending itself.

But a self-defense affirmative defense in this context is also deeply unfair (to harmed civilians) and creates other problems. In recent years, “self-defense” has become a fig leaf for aggressive state action. The United

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317. This argument is similar to that made in the discussion of permitting combatants to bring war torts claims. See *supra* Part II.A.3.

318. See Abraham, *Belligerent Wrongs*, *supra* note 10, at 829 (suggesting that compliance with *in bello* requirements could be indirectly determined by evaluating compliance with states' rules of engagement).

319. See *supra* Part II.A.3 (discussing why permitting a mistake of fact defense would foster problematic incentives).

320. The issue here—whether a mistake should allow a defendant to evade liability—is more akin to a question of state responsibility than criminal liability; accordingly, to the extent it is permitted, I would tie the standard for a “mistake of fact” defense to the higher one associated with the law of state responsibility. See Milanovic, *supra* note 193.

321. *E.g.*, U.N. Charter art. 51; *Self-Defense*, LEGAL INFORMATION INSTITUTE, CORNELL L. SCH., <https://www.law.cornell.edu/wex/self-defense> (last visited July 21, 2022) (noting that, “[i]f justified, self-defense is a defense to a number of crimes and torts involving force, including murder, assault and battery”).

States invaded Iraq in “self-defense”; Russia has invaded Crimea and Ukraine in “self-defense.”<sup>322</sup> Permitting states to evade liability with a “self-defense” defense would create an exception that would eat the entire war torts regime.

Nor is it likely that the possibility of war torts liability would deter a state from taking necessary defensive military action. Not only will any such potential future costs fade into a background consideration when a state’s security is at stake,<sup>323</sup> it is unlikely that the international community of states will create a war torts regime that significantly deters common military activities.<sup>324</sup>

States acting in self-defense should not be able to evade war torts claims with an affirmative defense. For the same reasons that aggressor and victim states are held to the same *in bello* standards and for the same reasons that individuals in aggressor and victim state militaries may be prosecuted for war crimes, both aggressor and victim states should be equally liable for their war torts.

That being said, states victim to another state’s unlawful aggression should be able to either cross-claim in the aggressor state or file an independent claim for all damages they incur due to the aggressor state’s internationally wrongful acts under the law of state responsibility. Ukraine has already filed such a suit against Russia, in which it asks for “full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia’s false claim[s].”<sup>325</sup> Under a war torts regime, this would include Ukraine’s war torts liabilities. Not only would this approach increase the likelihood of victim compensation and harness the International Court of Justice’s more established enforcement powers, it might indirectly dampen the use of bad-faith self-defense claims by increasing the costs of waging aggressive wars. And while it will sometimes result in a victim state unfairly bearing the costs of civilian harm in situations where the aggressor state is somehow judgement proof, this

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322. Michael N. Schmitt, *Russia’s “Special Military Operation” and the (Claimed) Right of Self-Defense*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/> (discussing and dismissing Russia’s various self-defense arguments).

323. Crootof, *War Torts*, *supra* note 6, at 1105–06, 1132–34.

324. Abraham, *Combatant Activities*, *supra* note 119 (reporting on research that demonstrates how civilian compensation regimes can be structured in ways that do not impede military decision making and action).

325. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed.), Application Instituting Proceedings, at 16 (Feb. 27, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

situation is not that different from the status quo, insofar as victim states must sometimes rebuild without compensation for the harms they and their citizens suffer.

### *3. Security Council Authorization*

To the extent there is concern that the threat of war tort liability might over-deter states from engaging in lawful and necessary defensive military actions, it might be mitigated by creating state immunity for actions authorized by the UN Security Council.

Immunity for authorized acts would have two benefits. First, while there is a temptation to create state immunity for “good” military engagements, like humanitarian interventions or peacekeeping missions, doing so runs the same risk of creating a loophole with the capacity to eat the regime as the defense of self-defense. Tying immunity instead to authorized actions minimizes the likelihood that states will engage in self-interested “humanitarian interventions.” Second, it would reaffirm the import of Security Council authorizations and the power of the United Nations in the international legal order by making it more costly for a state to unilaterally engage in military actions.<sup>326</sup> Some might consider this a drawback; as someone interested in increasing barriers to unilateral state uses of force, I view it as a benefit. That being said, this benefit does come at a cost. Establishing this defense would further empower those states with a permanent Security Council seat and veto power, as they would have a new, additional ability to grant discretionary relief to favored states or causes.

### *4. Contributory Action*

Rather than claiming its act was justified or conferred some sort of immunity, a defendant state might argue that another entity bears some or greater responsibility for the claimant’s harm. Perhaps opposing forces failed to comply with the requirement to wear identifying insignia or locate military objectives away from civilians and thereby increased the risk of civilian misidentification. Perhaps subversives shared inaccurate information or employed adversarial imaging to provoke an attacking state into mislabeling civilian infrastructure as military objects. Perhaps an

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326. Cf. Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT’L L. 237, 290–98 (2016) (discussing the differing legal assessments of the threatened 2013 U.S. intervention in Syria and why one grounded in state consensus is preferable to idiosyncratic treaty interpretations).

adversary hacked into another state's weapon systems and caused it to fire indiscriminately. Perhaps an act was taken based on information provided by or at the request of an allied or coalition state. Or perhaps civilians mistakenly or intentionally entered a designated battlespace, increasing their own risk of harm. Depending on the scenario, this defense may well be appropriate, provided that it does not impair victims' ability to receive compensation.

To take the easiest case first: Civilians should not lose their ability to claim compensation because they did something which increased their risk of harm, provided their action does not constitute direct participation in hostilities.<sup>327</sup> Civilian carelessness and mistakes are foreseeable in the confused and confusing armed conflict environment. All of the arguments for strict liability for states—especially that they are the entities best able to take precautions—outweigh the little that civilians might be able to do to minimize their risk, and all of the doctrinal underpinnings of a war torts regime—to increase the likelihood of victim compensation and indirectly incentivize safer state practices—counsel against employing a contributory action defense in this context.

However, it is less obvious that an attacking state should have to pay the full costs of a civilian harm when allies, adversaries, and other also contribute to causing that harm. As noted above, the fairness and incentives arguments for state liability disappear when the state does not cause the harm, benefit from the act causing the harm, or is able to take steps to spread the costs of the harm.<sup>328</sup> Accordingly, provided that there is a joint-and-several liability doctrine, to ensure claimants are fully compensated, it may be reasonable to allow a defendant to argue that a third party is also responsible for the harm and that liability should be apportioned between two or more “joint tortfeasors.”<sup>329</sup>

States should only receive the benefit of the contributory action defense, however, if they can prove that another identifiable entity's intervening action was another cause of the harm. For example, State A could offer

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327. See *supra* Part II.A.3 (classifying civilians directly participating in hostilities as combatants).

328. See *supra* text accompanying notes 200–01 (discussing whether non-state armed groups should be defendants in a war torts regime).

329. Existing treaty regimes model how to split this difference. The Space Objects Treaty, for example, creates absolute liability for a launching state whose object causes in-atmosphere damage. Space Objects Treaty, *supra* note 229, art. II. However, this absolute liability is subject to the defense that the damage resulted “wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.” *Id.* art. VI.

evidence that State B's malicious action was a partial cause of the resulting civilian harm; State A could not simply claim that "someone" hacked the system.<sup>330</sup> And, unless State B can pay its share, State A may still have full liability for damages under joint-and-severable liability. Unfortunately, this approach will necessarily result in states unfairly bearing the costs associated with harms that arise from a combination of their actions and other, non-state causes (such as natural causes)—but between the state and the claimant having to unfairly bear this burden, it should fall on the state.<sup>331</sup>

Absent such a defense, a strict liability war torts regime might create perverse incentives; for example, defending states may be less inclined to take appropriate precautions to enable attackers to distinguish between lawful and unlawful targets if they know that the attacking state must pay for the associated harms.<sup>332</sup>

Accordingly, a limited defense of contributory action should be permitted, applicable only when there is an identifiable other and subject to a joint-and-several liability regime.

##### 5. *Statutes of Limitation*

Statutes of limitations are artificial, procedural obstacles that bar otherwise-legitimate claims after a set period of time has passed. Both treaty and customary international law invalidate statutes of limitations for war crimes,<sup>333</sup> but there may be policy reasons to institute them for war torts.

The strongest argument against a statute of limitations defense is its inherent unfairness. Why should two claimants who suffer similar harms have different opportunities to claim compensation, just because one brought a claim before an arbitrarily-set date and the other did so afterwards?

But there are a host of policy and political reasons to prioritize closure,

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330. Under a joint-and-several liability regime, two or more tortfeasors can be held individually liable for the full amount of damages; they can then file a claim against the other tortfeasor(s) for the amount they "overpaid." See also *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 357–58, ¶ 73 (Nov. 6) (separate opinion by Simma, J.) (arguing for applying joint-and-several liability in evaluating state responsibility for a harm caused by the acts of two states). There may be a rebuttable default that all states party to a conflict are equally liable for any civilian harms, or a rebuttable default that the attacking state is fully liable for civilian harms resulting from a particular attack.

331. See *supra* text accompanying note 232 for related arguments.

332. Ronen, *supra* note 10, at 201–02 (using this example to argue that, should states be held strictly liable for unintended civilian harm, liability should be subject to a defense of contributory fault).

333. See, e.g., Rome Statute, *supra* note 76, art. 29; *Rule 160. Statutes of Limitation*, INT'L COMM. OF THE RED CROSS CUSTOMARY INT'L HUMANITARIAN L. DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule160](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160) (last visited Mar. 23, 2023).

especially after an armed conflict. First, there is the potential sheer amount of war torts suits, which may need to be procedurally limited. In interviews with Israeli government employees who litigated conflict-related claims, for example, multiple individuals noted that there had been a “flood” of cases, which in turn had prompted the expansion of a domestic law procedural defense (the combatant activities exception).<sup>334</sup> Second, there is also a risk that evidence becomes too sparse or degraded over time, making it difficult for claimants to prove their claims and for defendants to rebut them. In the *Armed Activities* Reparations Judgement, which occurred nearly seventeen years after the decision on the merits, the DRC claimed that Uganda owed reparation for 180,000 civilian deaths.<sup>335</sup> But due in part to the absence of victim identification forms and corroborating documentation (and in part due to the Court’s unwillingness to consider other forms of indirect evidence), the Court ultimately held that Uganda owed reparation for “10,000 to 15,000 persons.”<sup>336</sup> Similar evidentiary difficulties may justify foreclosing otherwise legitimate claims altogether, to preserve funds and institutional time for other claimants. Third, if there is never any formal closure, states will have difficulty accurately estimating the amounts they need to set aside for successful claims and budget accordingly, which may increase resentment of war torts liability.<sup>337</sup>

Given the unfairness to plaintiffs, legal systems which incorporate statutes of limitation also usually adopt various doctrines that soften the defense’s impact, including equitable tolling, discovery notice, and eliminating it altogether for certain types of claims. In recognition of the difficulties claimants may face in bringing a claim, any use of a statute of limitations in the war torts context should also apply mitigating doctrines.

#### 6. *Peace Treaty Settlement*

Classically, states can waive both their own and their nationals’ right to file reparation claims in peace treaties.<sup>338</sup> In the Convention of 1800, France agreed to return captured American ships, while the United States agreed to

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334. Abraham, *Combatant Activities*, *supra* note 119, at 904–05.

335. *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Reparations, Judgment, 2022 I.C.J. 38, ¶ 135 (Feb. 9).

336. *Id.* ¶ 162.

337. Similar arguments are made in the domestic context, insofar as industries uncertain of their tort liability may not invest funds in socially beneficial ways.

338. Gattini, *supra* note 164, at 349.

assume over \$20 million in French debts owed to American citizens.<sup>339</sup> Article 15 of the 1847 Treaty of Guadalupe-Hidalgo obligated the United States to cover debts owed to American citizens by the Mexican government.<sup>340</sup> In the 1901 Boxer Protocol, China agreed to pay more than \$330 million in reparations to eight other states, which included amounts owed to states, companies, foreign individuals, and Chinese nationals.<sup>341</sup> The 1919 Treaty of St. Germaine-en-Laye and the Treaty of Versailles both obligated state parties to pay for civilian damages. In the former, Austria was obligated to pay for damage done to the civilian population and to their property;<sup>342</sup> in the latter, Germany agreed to pay over \$33 billion in reparations, which included amounts owed to civilians.<sup>343</sup>

There are arguments for and against preserving a state's right to negate its nationals' claims against foreign states, which reflect the tension between "the interest of the individual in obtaining reparation for the suffered wrongs and the possibly opposite interest of the state in reaching a globally satisfying settlement."<sup>344</sup> On one hand, a state's ability to dispose of claims respects state sovereignty, which encompasses a state's right to determine whether the political benefit of settling claims and reestablishing friendly relations with another state outweighs its nationals' interest in compensation.<sup>345</sup> Undermining that right might also undermine states' support for a war torts regime. On the other hand, this right might be doctrinally limited. Andrea Gattini argues that, "since the violation of certain humanitarian rules is by now firmly considered to be a breach of *jus cogens*, a settlement through which states would reciprocally condone such breaches, would be invalid."<sup>346</sup> Not only would this limitation on states' treaty powers better respect foundational international legal rules, it would "probably have the beneficial effect of spurring states to reach settlements more consistent with international law."<sup>347</sup> Relatedly, certain activities might justify the

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339. Convention of 1800, Fr.-U.S., arts. 3–5, July 31, 1801, 8 Stat. 178; *see also* E. Wilson Lyon, *The Franco-American Convention of 1800*, 12 J. MOD. HIST. 305, 324–25 (1940).

340. The Treaty of Guadalupe-Hidalgo, Mex.-U.S., art. 15, Feb. 2, 1848, 9 Stat. 922.

341. Eric Yong Joong Lee, *The "Peace Treaty" as a U.S. Doctrinal Option and its Application to the DPRK: A Historical and Analytic Review*, 51 CORNELL INT'L L.J. 101, 110 (2018).

342. Treaty of Saint-Germain-en-Laye art. 178, Sept. 10, 1919, 226 Consol. T.S. 9.

343. Treaty of Peace with Germany (Treaty of Versailles) arts. 231–32, June 28, 1919, 1919 U.S.T. 7.

344. Gattini, *supra* note 164, at 349.

345. *See id.* at 364 ("[I]t seems inconceivable that any individual could disturb or even disrupt the whole process of peacemaking for the pecuniary satisfaction of a purported right, whose foundation in international law is still dubious.")

346. *Id.* at 366.

347. *Id.* at 367.

recognition of non-delegable state duties, which could not be settled absent input from the harmed parties.<sup>348</sup>

Absent a major shift in how current and future armed conflicts are conducted, however, this theoretical defense is unlikely to often be employed. Contemporary armed conflicts rarely end with peace treaties—indeed, contemporary armed conflicts rarely end.<sup>349</sup> Should the possibility of post-conflict suits spur states to sign peace treaties with comprehensive settlements, there should be a mechanism for ensuring that certain rights are protected.<sup>350</sup>

### 7. *Res Judicata*

A new war torts institution will not necessarily displace extant institutions (like the International Court of Justice or domestic courts) or future, more tailored institutions (like the proposed International Claims Commission for Ukraine). However, should victims take advantage of alternate routes of compensation—say, by filing a *partie civile* claim<sup>351</sup>—doing so might preempt a war torts claim. Such a defense would minimize the likelihood of unjust enrichment by plaintiffs able to pursue claims in multiple venues,<sup>352</sup> and possibly spur states to develop robust domestic war torts law.<sup>353</sup>

### 8. *Incapacity to Pay*

Martins Paparinskis has argued that a state should not be obligated to pay compensation for its internationally wrongful acts when doing so would incapacitate the state or its people.<sup>354</sup> Similar arguments might justify

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348. *Cf.* GOLDBERG ET AL., *supra* note 109, at 629 (discussing non-delegable duties in the context of inherently dangerous activities).

349. *See* LEWIS, BLUM & MODIRZADEH, *supra* note 69.

350. Gattini, *supra* note 164, at 367.

351. In some civil law systems, should a state charge a defendant with a war crime, affiliated victims may join the suit and file claims for compensation. Gillard, *supra* note 99, at 547. However, this route to a remedy is problematic, insofar as damages are only awarded in cases where the war crime is proven—subjecting the compensation claim to the higher standards and more protective defenses associated with criminal law. Crootof, *supra* note 6, at 1087.

352. *Cf.* Gattini, *supra* note 164, at 365–66 (noting that the UN Compensation Commission, which permitted individuals who had settled claims with Iraq through the Commission process to also bring domestic suits, which may have reduced Iraq's support for the Commission's process).

353. *See supra* Part I.C (discussing how a war torts regime might be developed within domestic law).

354. Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020).

formalizing a limited “incapacity to pay” defense, provided that there is some sort of associated victims fund able to cover the damages the defendant state is unable to provide.<sup>355</sup>

### *E. Remedies*

Remedies may take many forms. Under the law of state responsibility, reparation for internationally wrongful acts may entail “restitution, compensation and satisfaction, either singly or in combination.”<sup>356</sup> The Basic Principles expand this list to include rehabilitation and guarantees of non-repetition.<sup>357</sup> Meanwhile, advocates for civilian amends recommend a variety of procedures, including a public or private acknowledgement of harm caused, developing administrative means of facilitating the amends process, and creating internal procedures for responding to claims for compensation.<sup>358</sup> What remedies are appropriate for war torts?

At the very least, war torts victims should be awarded compensatory damages.<sup>359</sup> As the name implies, compensatory damages are intended to compensate individual victims for the harm they suffer due to another’s actions. While they never make a victim whole,<sup>360</sup> compensatory payments do address many needs of victims and their families. At the practical level, compensatory funds can be used for funerals, prostheses, medication, and

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355. *See supra* note 207 and accompanying text.

356. Draft Articles, *supra* note 183, art. 34. Restitution requires “re-establish[ing] the situation which existed before the wrongful act was committed.” *Id.* art. 35. Monetary compensation is required to the extent damage is not made good by restitution. *Id.* art. 36; INT’L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1056 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), [https://tile.loc.gov/storage-services/service/ll/llmlp/Commentary\\_GC\\_Protocols/Commentary\\_GC\\_Protocols.pdf](https://tile.loc.gov/storage-services/service/ll/llmlp/Commentary_GC_Protocols/Commentary_GC_Protocols.pdf) (noting that, if a serious violation of the law of armed conflict results in injurious damage and it is impossible to restore the situation to its pre-violation state, the default reparation is compensation). Satisfaction—which may entail acknowledging the breach, expressing regret, or a formal apology—is required to the extent the damage cannot be made good by restitution or compensation. Draft Articles, *supra* note 183, art. 37. Interest payments may be necessary to ensure full reparation. *Id.* art. 38.

357. Basic Principles, *supra* note 169, ¶ 18.

358. *See, e.g.,* Annie Shiel & Archibald Henry, *Here’s What the New DoD Policy on Civilian Harm Should Include*, JUST SEC. (May 8, 2020), <https://www.justsecurity.org/70077/heres-what-the-new-dod-policy-on-civilian-harm-should-include/>.

359. In this way, a war torts regime is distinguishable from the law of state responsibility: Under the former, compensation is the default remedy; under the latter, compensation is relevant only if restitution is not possible. *See* Draft Articles, *supra* note 183, art. 36.

360. *E.g.,* Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 445 (David Kairys ed., 1998) (observing that tort law fosters the fiction that all harms are compensable with monetary damages).

property repair and replacement; at the emotional level, compensatory funds may satisfy needs for acknowledgement, respect, and closure.<sup>361</sup>

That being said, it may be difficult to determine what should constitute compensatory damages. Should they encompass emotional harm? Lost future wages? Lost profits?<sup>362</sup>

Also, how does one fairly calculate damages when we are talking about valuing human lives?<sup>363</sup> If all lives are “worth” the same amount, claimants from states with higher costs of living will effectively receive “less” than those from poorer ones, and civilian harms will be relatively “cheap” for wealthier states.<sup>364</sup> If different lives are valued differently, the lives of some individuals will be “worth” more, a fundamentally offensive conclusion, and states will arguably be more deterred from waging war against wealthier states than against poorer ones.<sup>365</sup> This problem has long bedeviled tort law and cannot be easily resolved. Instead, “[t]hose who are charged with structuring a war torts regime and those who evaluate claims and award damages must keep these concerns in mind and do what they can to balance consistency with flexibility and mitigate disparities.”<sup>366</sup>

The choice of institution also affects how personalized awards are. It is relatively easy to award tailored compensatory damages in a tribunal setting.<sup>367</sup> But, as noted above, indemnification systems often employ settlement tables to standardize the payment of damages awards, which may result in payments that are perpetually outdated and do not come close to compensating claimants for their harms.<sup>368</sup> These non-tailored awards risk becoming merely symbolic amounts, which “may be perceived as unsatisfactory, even insulting, compared to the scope of the injury.”<sup>369</sup> They certainly don’t ensure the regime’s aim of compensating wartime victims.

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361. Crootof, *War Torts*, *supra* note 6, at 1103.

362. *See supra* Part III.A (noting some of these questions in the context of discussing what harms might be the basis for a war torts claim).

363. For an in-depth discussion of the challenges of and different methods for valuing foreign lives in domestic compensation regimes, see Rowell & Wexler, *supra* note 121, at 562–72.

364. Crootof, *War Torts*, *supra* note 6, at 1137.

365. *Id.*

366. *Id.*

367. *E.g.*, *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (noting that damage assessments are “particularly judicially manageable”). This may depend, however, on the time that has elapsed between the harmful event and the damages evaluation. *See, e.g.*, *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, *Reparations, Judgment*, 2022 I.C.J. 38, ¶¶ 163–64, 166 (Feb. 9) (declining to adopt the methods proposed for valuing civilian lives lost and instead awarding a global compensatory sum for this category of harm).

368. *See supra* Part I.B.2.

369. Bachar, *Collateral Damages*, *supra* note 10, at 411.

Accordingly, any institution which employs a settlement table should also have the formal obligation to update its table and underlying datasets, as well as a dedicated budget line and a designated responsible party.

Claimants in domestic tort systems sometimes receive punitive damages as well as compensatory ones. In considering whether states should be held liable for wartime acts at all, Haim Abraham argues for distinguishing between accidents resulting from violations of international humanitarian law and those which occur despite good-faith compliance.<sup>370</sup> While I disagree with him on this point,<sup>371</sup> I find his arguments relevant when considering the possibility of awarding punitive damages.<sup>372</sup> In domestic tort regimes, punitive damages may be imposed when an actor's conduct is outrageously egregious or there is a concern that awarding only compensatory damages will not be a sufficient deterrent, either because the harms will be too diffuse or the harmed individuals will be unlikely to bring a successful suit. Extrapolating from these arguments, punitive damages may be appropriate for egregious violations of international humanitarian law or where a state's callous lack of adherence to preventative policies for foreseeable accidents results in widespread but individually minimal harm.<sup>373</sup> If used in this manner, punitive damages might help preserve the distinction between lawful and unlawful conduct.<sup>374</sup> However, punitive damages risk inappropriately importing criminal law concepts into a tort regime, and as such should be used carefully and sparingly.<sup>375</sup>

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370. Abraham, *Belligerent Wrongs*, *supra* note 10, at 812. Although Abraham's account focuses on domestic tort regimes, the reasoning can be similarly applied at the international level.

371. Crootof, *War Torts*, *supra* note 6, at 1113–16.

372. Ironically, Abraham has argued that domestic courts should not award punitive damages against defendant states. Haim Abraham, *Awarding Punitive Damages Against Foreign States is Dangerous and Counterproductive*, *LAWFARE* (Mar. 1, 2019), <https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive>. However, neither of the reasons he proffers—that punitive damages will harm other plaintiffs by depleting a state's foreign holdings and that domestic law courts do not have the authority over other states to make such awards—are applicable to international tribunals or organizations.

373. Notably, this would not be possible under the law of state responsibility alone, as reparations may not be punitive. *Cf.* *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, *Reparations*, Judgment, 2022 I.C.J. 38, ¶ 102 (Feb. 9).

374. Rainer Hofmann, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*, 74 *INT'L L. ASS'N REP. CONF.* 291, 306 (2010) (noting that, while victims of lawful harm in armed conflict might have a right to compensation, “[c]are should be taken not to render the distinction between lawful and unlawful conduct meaningless” and that “[t]he fact that victims may be entitled to reparation for harm caused by lawful conduct does not mean that responsible parties are to be equally liable for consequences of lawful and unlawful conduct”).

375. Acts that are sufficiently egregious to warrant the award of punitive damages will likely also

Finally, what of injunctive relief and other non-monetary awards? Personally, I think this goes beyond the bounds of a war torts regime. While damage assessments are “particularly judicially manageable” and relatively non-intrusive, injunctions would require courts to second-guess and limit states’ strategic decision making.<sup>376</sup> To reiterate what I have written previously:

[A] war torts regime is not an amends program. Monetary recompense is far from sufficient redress for the varied harms civilians suffer in armed conflict. A comprehensive amends process would include a host of reparative measures, including ‘other material assistance, service, expressions of remorse or sympathy, apologies, accounts or other information about what happened, and promises of forbearance,’ ideally customized according to the cultural context and tailored to the individual situation. A war torts regime has a more limited aim—to increase the likelihood that harmed civilians are compensated—but in achieving that, it could contribute to the amends movement by helping to shift norms regarding what the humanity principle requires.<sup>377</sup>

#### CONCLUSION

Proposing the creation of a new legal regime is audacious. Absent some hope that it might be established, wrestling with the implementation questions risks being academic navel-gazing: Theoretically fascinating to scholars of tort law and the law of armed conflict, but of little relevance in the real world. And I confess, there were times while writing this that I wondered why I was devoting so much time to these implementation questions, when the antecedent one is so hard to answer: Why would states ever establish a war torts regime in the first place?<sup>378</sup> I contented myself with

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give rise to criminal liability for serious violations of international humanitarian law. Again, however, the two regimes can be mutually reinforcing: Successful criminal prosecutions of individuals reinforce the law and punish wrongdoers, while a tort suit encourages states to minimize the likelihood of such events occurring and increases the likelihood that the victims will receive compensation.

376. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

377. Crotoof, *War Torts*, *supra* note 6, at 1103.

378. In earlier works on this topic, I discussed how establishing a “war torts” regime could be a helpful contribution to the ongoing international discussion on how best to regulate autonomous weapon systems. Namely, in an arena where the main alternative would be inappropriately-expanded criminal liability, states might be willing to experiment with a limited form of war torts liability. Crotoof,

the fact that there is utility in highlighting the accountability gap at the heart of international humanitarian law and thinking through how to address it, in case there ever was a moment when it could be actualized.

Over this past year, however, there has been a dramatic uptick in interest in holding states accountable for wartime civilian harms that gives me hope that this idea might not be a purely academic one. Within the United States, this has manifested in increased attention to U.S.-caused harm, ranging from Azmat Khan's exceptional reporting on U.S.-led airstrikes in Iraq and Syria<sup>379</sup> to the Department of Defense's current pledge to create new policy on civilian casualty mitigation<sup>380</sup> to two recently-proposed federal bills.<sup>381</sup> Meanwhile, at the international level, Russia's illegal war with Ukraine has spurred states to seek legitimate justifications for transferring at least some of the nearly \$300 billion in frozen Russian assets to Ukraine.<sup>382</sup>

The historical parallels are provocative. Seventy years ago, German aggression led to the creation of war crimes. This movement to increase

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*War Torts*, *supra* note 6, at 1137–40 (discussing the unique accountability questions raised by autonomous weapon systems and why experimenting with a limited, tech-specific war torts regime might avoid problematic expansions of individual criminal liability); *see also* Crootof, *Accountability for Autonomous Systems*, *supra* note 240, at 1395–96 (making the same argument).

379. *See, e.g.*, Azmat Khan, Lila Hassan, Sarah Almkhtar & Rachel Shorey, *The Civilian Casualty Files*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/us/civilian-casualty-files.html>.

380. *See, e.g.*, Memorandum from Lloyd Austin III, Sec'y of Defense, to Secretaries of the Military Department et al., Improving Civilian Harm Mitigation and Response (Jan. 27, 2022), <https://media.defense.gov/2022/Jan/27/2002928875/-1/-1/1/DEPARTMENT%20OF%20DEFENSE%20RELEASES%20MEMORANDUM%20ON%20IMPROVING%20CIVILIAN%20HARM%20MITIGATION%20AND%20RESPONSE.PDF>; Luke Hartig, *A Big Step Forward or Running in Place?: The Pentagon's New Policy on Civilian Casualties*, JUST SEC. (Feb. 8, 2022), <https://www.justsecurity.org/80131/a-big-step-forward-or-running-in-place-the-pentagons-new-policy-on-civilian-casualties/> (“[O]n Jan. 27, the Department of Defense (DOD) . . . [released] a memorandum from Secretary of Defense Lloyd Austin, accompanied by a report from the RAND Corporation, outlining a roadmap for tackling longstanding concerns about civilian casualties. It’s an encouraging first step but the proof will be in the follow through.”).

381. In April 2022, two bicameral bills were introduced: The Protection of Civilians in Military Operations Act and the Department of Defense Civilian Harm Transparency Act. Annie Shiel & Sarah Yager, *Congressional Action on Civilian Harm Resulting from U.S. Military Operations: Part I*, JUST SEC. (Apr. 28, 2022), <https://www.justsecurity.org/81303/congressional-action-on-civilian-harm-resulting-from-u-s-military-operations-part-i/>.

382. *E.g.*, Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE (May 12, 2022), <https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine>; Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>; *Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options*, WORLD REFUGEE & MIGRATION COUNCIL (July 26, 2022), [https://wrmcouncil.org/publications/frozen-russian-assets-and-the-reconstruction-of-ukraine-legal-options/?doing\\_wp\\_cron=1670970394.6881890296936035156250](https://wrmcouncil.org/publications/frozen-russian-assets-and-the-reconstruction-of-ukraine-legal-options/?doing_wp_cron=1670970394.6881890296936035156250).

accountability for wartime wrongs began with Nuremberg, led to the creation of numerous bespoke tribunals, and finally produced the International Criminal Court and modern international criminal law. But the focus on individual criminal liability obscured the need for accountability for unintended systemic harms<sup>383</sup> and the fact that that justice often requires a tort remedy.<sup>384</sup>

Today, Russian aggression may make possible the creation of war torts. Russia's unlawful war and unlawful tactics have focused the world's attention on the need for wartime accountability mechanisms, as it is painfully clear that existing institutions—the International Court of Justice, the International Criminal Court, and the myriad other entities designed to hold states accountable for wartime acts—are not able to provide harmed civilians with the funds needed to rebuild their shattered lives. This may result only in the creation of the proposed International Claims Commission for Ukraine,<sup>385</sup> which would be a success in its own right. But it may also pave the way for establishing a permanent international war torts institution with broad jurisdiction, which would benefit *all* wartime victims—in Ukraine and in the future.<sup>386</sup>

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383. Cf. Laurel E. Fletcher, *A Wolf in Sheep's Clothing?: Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT'L L.J. 447, 447 (2016) (observing that “[t]he rise of international criminal law is celebrated as an achievement of the international rule of law, yet its advance effectively may come at the expense of holding States accountable for their role in mass violence”); Rebecca J. Hamilton, *State-Enabled Crimes*, 41 YALE J. INT'L L. 301, 313 (2016) (arguing for the recognition of “state-enabled crimes”—crimes that could not have occurred without the state playing an integral role—to address the fact that too often states evade liability for their contributions); Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. CO. L. REV. 327, 390–94 (2009) (noting that “criminal prosecutions of a few individuals fail to acknowledge the role that the state plays in atrocities” and arguing for state responsibility for genocide).

384. Crootof, *War Torts*, *supra* note 6, at 1072.

385. Giorgetti et al., *Launching*, *supra* note 3.

386. Rebecca Crootof, *The Case for War Torts—In Ukraine and Beyond*, LAWFARE (Dec. 14, 2022), <https://www.lawfareblog.com/case-war-torts%E2%80%94ukraine-and-beyond>.

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