

# COPING WITH COMBAT CLAIMS: AN ANALYSIS OF THE FOREIGN CLAIMS ACT'S COMBAT EXCLUSION\*

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## I. INTRODUCTION

Modern military operations depend upon effective legal counsel. As a publication of the U.S. Joint Chiefs of Staff<sup>1</sup> expounds, “Legal counsel participation is paramount in all processes associated with planning and executing military operations. Nearly every decision and action has potential legal considerations and implications.”<sup>2</sup> One of the most pressing legal issues facing troops on overseas deployments is the adjudication of claims by civilians against U.S. military forces for damages to real and personal property or for physical injury and death.

The Foreign Claims Act (“FCA”) governs the resolution of most claims made by foreign nationals harmed by U.S. military operations abroad.<sup>3</sup> The FCA authorizes the Secretary of Defense to appoint commissions, known as Foreign Claims Commissions

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\* This Note received honorable mention by the National Institute of Military Justice for the Rear Admiral John S. Jenkins Writing Award for Student Excellence in Military Legal Studies.

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<sup>1</sup> The Joint Chiefs of Staff Home Page, <http://www.jcs.mil> (last visited Nov. 20, 2009).

<sup>2</sup> JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS III-35 (2006).

<sup>3</sup> Foreign Claims Act, 10 U.S.C. § 2734 (2006):

*To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary [of Defense] . . . may appoint . . . one or more claims commissions . . . to settle and pay in an amount not more than \$100,000 a claim against the United States for — (1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy; (2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or (3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions, and is caused by, or is otherwise incident to *noncombat activities* of, the armed forces under his jurisdiction . . . .*

*Id.* (emphasis added).

(“FCCs”), to “settle” claims of up to \$100,000.<sup>4</sup> The composition of an FCC, discussed *infra*, dictates the amount it can award and whether it can deny a claim.<sup>5</sup> Most relevant to this Note, the FCA authorizes claims arising only from “noncombat activities,”<sup>6</sup> as opposed to combat<sup>7</sup> activities.<sup>8</sup> This restriction severely limits the scope of claims that may be brought under the FCA.<sup>9</sup>

The purpose of this Note is to show that, although the FCA has positively impacted U.S. military operations, the so-called “combat exclusion” severely hampers its effectiveness. Therefore, Congress should eliminate the distinction between combat and noncombat claims and adopt a unified, permanent claims system to

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<sup>4</sup> 10 U.S.C. § 2731 (2006) (defining “settle” as “consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance”).

<sup>5</sup> 10 U.S.C. § 2734(a) (2006).

<sup>6</sup> U.S. DEPT OF THE ARMY, ARMY REGULATION 27-20, 108 (2008), available at [http://www.army.mil/usapa/epubs/pdf/r27\\_20.pdf](http://www.army.mil/usapa/epubs/pdf/r27_20.pdf). Noncombat activities are defined as:

[a]uthorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims. Examples are practice firing of missiles and weapons, training, and field exercises, maneuvers that include the operation of aircraft and vehicles, use and occupancy of real estate in the absence of a contract or international agreement covering such use, and movement of combat or other vehicles designed especially for military use. Certain civil works activities such as inverse condemnation are also included. Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances.

*Id.*

<sup>7</sup> *Id.* at 107 (defining combat activities as “[a]ctivities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict”).

<sup>8</sup> 10 U.S.C. § 2734(b)(3) (2006). The statute provides that a claim is compensable so long as:

it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in *combat*, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, *indirectly related to combat*, and occurring while preparing for, going to, or returning from a *combat mission*.

*Id.* (emphasis added).

<sup>9</sup> 32 C.F.R. §§ 536.138(h)–(i) (2008). These sections provide:

A claim is not payable under the FCA if it . . . is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the governing statute (10 U.S.C. § 2734); for example, claims for property loss or damage, or personal injury or death caused by inhabitants of unfriendly foreign countries or by individuals considered to be unfriendly to the United States, [or], [i]s presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was friendly to the United States.

*Id.*

adjudicate all claims made by civilians against U.S. military forces operating overseas. Part II of this Note explores the origins of the “combat exclusion” in international law, and Part III traces the history of civilian compensation through World War I and World War II. Part IV surveys U.S. military use of the FCA and ad hoc adjudication systems in conflicts after World War II, while Part V sets forth the contemporary claims adjudication framework. Part VI analyzes the strengths and weaknesses of the FCA and proposes a permanent, unified claims system to handle both combat and noncombat claims. This Note generally focuses on U.S. Army-administered FCCs because the Department of Defense (“DoD”) has assigned it sole responsibility for claims resolution in most conflicts, excluding administration by the Navy, Air Force, or Marines.<sup>10</sup>

## II. FOUNDATIONS OF THE COMBAT EXCLUSION

The FCA’s exclusion of combat claims is not arbitrary; rather, it follows precedent from a long line of international law primarily dealing with the doctrine of sovereign immunity. By understanding the origins of the exclusion and the functioning of sovereign immunity, one can better analyze the utility of the exclusion in modern practice.

Customary international law does not recognize any right for victims harmed by combat to make claims against the belligerent party.<sup>11</sup> Francis Wharton, in the first edition of his *International Law Digest*, explains the broad principle prohibiting combat-related claims:

A sovereign is not ordinarily responsible for alien residents for injuries they receive on his territory from belligerent action, or from insurgents he could not control, or whom the claimant government had recognized as belligerents . . . [n]or for acts of legitimate warfare waged by him on his enemy’s soil.<sup>12</sup>

International law makes no provision for aliens to make claims against foreign nations for “belligerent action;” aliens may only make a claim against their home nation pursuant to such nation’s

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<sup>10</sup> See, e.g., U.S. Dep’t of Defense, DoD Instruction 5515.08, Assignment of Claims responsibility (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/551508p.pdf> (referring to “single-service” responsibility).

<sup>11</sup> FRANCIS WHARTON, *INTERNATIONAL LAW DIGEST* §§ 223–24 (1886).

<sup>12</sup> *Id.* (emphasis added).

domestic law.<sup>13</sup> To illustrate this rule, Wharton cites the destruction of British subjects' property by the Dutch bombardment of Antwerp, Belgium in 1830.<sup>14</sup> The British Government found the Dutch government not liable for the damage caused by the bombing, but decided that British subjects could hold Belgium liable.<sup>15</sup> Analogously, "the property of . . . natives of the country, when 'in the track of war,' is subject to war's casualties . . . and no liability whatever is understood to attach to the Government of the country whose flag that army bears . . ."<sup>16</sup> In other words, foreigners and nationals must share equally in the fortunes of war.

To explain the reasoning behind this principle, Wharton refers to the commentary of William Beach Lawrence:<sup>17</sup>

The first right of every independent state is to assure its own preservation by all the means in its power. When a sovereign using this right is obligated to resort to arms . . . it is a public misfortune which foreigners must share with nationals, and which no more gives them the right to an exceptional indemnity than if their reclamation was founded on any other calamity proceeding from the will of men.<sup>18</sup>

Under this reasoning, a state's right to wage war as a means of defense supersedes a claimant's right for compensation from belligerent parties. As early as 1896, however, the U.S. Department of State ("DoS") recognized that "while a state was not obliged to make compensation . . . indemnities had in many cases been voluntarily paid . . . to the effect that a sovereign ought to show an equitable regard for suffering by the ravages of war . . ."<sup>19</sup> Such a philosophy is discernable in the modern-day FCA and the ad hoc programs that exist to adjudicate combat-related damages.

Sovereign immunity, the principle that a state is immune from suit without consent,<sup>20</sup> underlies another rationale for denying combat-related damages; the state does not assume liability with-

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> William Beach Lawrence was a nineteenth century jurist well-known for his scholarship in international law. His commentary on Wheaton's "Elements of International Law" was adopted as a textbook by English universities and used by Congress. See *An Eminent Jurist Dead*, N.Y. TIMES, Mar. 26, 1881, at 5, available at [http://query.nytimes.com/mem/archive-free/pdf?\\_r=1&res=9D00E7DD133FEE3ABC4E51DFB566838A699FDE](http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9D00E7DD133FEE3ABC4E51DFB566838A699FDE).

<sup>18</sup> JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 1032 (1906).

<sup>19</sup> *Id.*

<sup>20</sup> "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

out explicitly waiving immunity.<sup>21</sup> In *Principality of Monaco v. Mississippi*, the U.S. Supreme Court held that the Eleventh Amendment of the U.S. Constitution<sup>22</sup> barred suits against the United States by aliens or foreign states in the absence of express consent by the United States.<sup>23</sup> The FCA, for example, effectuates a waiver of sovereign immunity by establishing an administrative system of adjudication and authorizing specific claims against the U.S. government.<sup>24</sup> Yet, courts cannot imply waivers nor should they liberally construe statutory waivers.<sup>25</sup>

International Humanitarian Law (“IHL”) mandates compensation only in cases of seizure, providing further justification for barring other combat-related damages. In the United States, this interpretation is found in the so-called “Lieber Code,” a set of regulations for the U.S. military dating from 1863.<sup>26</sup> The Code provides that:

Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.<sup>27</sup>

The Code requires compensation only for seized property; there is no requirement for other damages related to combat operations.<sup>28</sup> The Fourth Hague Convention, a modern IHL treaty to which the United States is a party, mandates compensation only for violations of its provisions, so-called “war crimes,” regardless of whether the damage is combat-related, providing, “[a] belligerent

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<sup>21</sup> *Id.*

<sup>22</sup> U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

<sup>23</sup> *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321 (1934) (holding that Monaco’s suit to recover the principal and interest of bonds issued by the state of Mississippi was barred by the Eleventh Amendment).

<sup>24</sup> The Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 (2006), and the Tucker Act, 28 U.S.C. § 1491 (2006), are other examples of waiver. Separately, the Military Claims Act (“MCA”), 10 U.S.C. § 2733 (2006), generally deals with claims by U.S. residents outside the United States, members of the U.S. armed forces, and U.S. civilian employees who cannot file under the FCA, FTCA, or a Status of Forces Agreement (“SOFA”). See 32 C.F.R. § 536.136(b) (2008).

<sup>25</sup> *Balser v. Dep’t of Justice*, 327 F.3d 903, 907 (9th Cir. 2003).

<sup>26</sup> INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LIEBER CODE) art. 38 (1898).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”<sup>29</sup> One such provision proscribes the destruction or seizure of an enemy’s property, “unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>30</sup> By extension, a state can argue that combat-related damages are by definition a necessary part of war and, therefore, they have no legal duty to compensate victims. The Geneva Convention contains a similar provision:

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.<sup>31</sup>

In short, by enumerating the cases in which states should make compensation, IHL excludes liability for any other damages, combat-related or not. While there is no explicit proscription of such compensation, the default rule is the absence of a duty to pay, seemingly because all war necessarily causes combat-related damages and any such duty to compensate would involve an enormous financial and logistical burden. As a theoretical aside, imposing such a duty may be desirable because it would create a disincentive for states to use force: namely, the legal obligation to pay for all damage to civilians related to their military operations. As a strategic matter, compensating victims of combat has intangible benefits and is an effective tactic to gain support among a local population.

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<sup>29</sup> Hague Convention No. IV Respecting Law and Customs of War on Land art. 3, Oct. 18, 1907, T.S. No. 539, 2 A.J.I.L. Supp. 90. See also Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 91, June 8, 1977, S. TREATY DOC. NO. 100-2 (1980), 1125 U.N.T.S. 609 (reaffirming and developing provisions of the Hague Convention; containing a similar provision requiring compensation for parties that violate the treaty’s provisions). The United States has signed, but not ratified, this treaty. *Id.*

<sup>30</sup> Hague Convention No. IV, *supra* note 29, art. 23.

<sup>31</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 55, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

## III. ORIGIN OF THE FOREIGN CLAIMS ACT

The FCA is the latest permutation in a long line of federal legislation designed to improve military-civilian relations in the context of U.S. military operations abroad. In 1917, the year the United States entered World War I, General John J. Pershing, commanding general of the American Expeditionary Force<sup>32</sup> in Europe, cabled a telegram to the War Department,<sup>33</sup> urging appropriation for:

claims for injuries to persons and damages to property resulting from the acts or omissions of the United States military forces in Europe. Inability to pay claims for injuries due to accidents caused by Government motor vehicles and other causes result in much hardship and injustice to French people and seriously injures our reputation as compared with British. . . . [I] [d]esire to inaugurate system employed by British.<sup>34</sup>

General Pershing believed that having the military compensate harmed civilians improves relations and such an improvement is important enough to warrant the appropriation of federal funds. Under the British system, the so-called British Claims Commission (“BCC”), which continued into WWII, dedicated claims offices handled all claims.<sup>35</sup> Commanders would investigate and report claims, forwarding them to the BCC only for final approval.<sup>36</sup> Because of the administrative burden on commanders and the logistical difficulty of coordinating with mobile units, the British military established a permanent claims office to investigate and report

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<sup>32</sup> The Oxford Essential Dictionary of the U.S. Military (2001), available at <http://www.answers.com/topic/american-expeditionary-force> (The American Expeditionary Forces included “[a]ll of the military personnel (the armies, navies, and air forces), equipment and weaponry, medical staff, support and maintenance supplies, and so on sent to the Western front by President Woodrow Wilson after his declaration of war in April 1917, under the command of Gen. John J. Pershing. Pershing arrived in Paris in June 1917 to take up his command, two months after the United States had entered World War I.”).

<sup>33</sup> Until reorganized by the National Security Act of 1947, the Department of War and Department of the Navy were separate entities. The Act placed the Army, Navy, and Air Force (formerly the Army Air Corps and Army Air Forces) under the newly-created post of Secretary of Defense, head of the DoD. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 401 (2006)).

<sup>34</sup> S. REP. NO. 379, at 2 (1918).

<sup>35</sup> REPORT OF THE GENERAL BOARD, U.S. FORCES EUROPEAN THEATER, LEGAL QUESTIONS ARISING IN THE THEATER OF OPERATION 1, 13 (1945), available at <http://www-cgsc.army.mil/carl/eto/eto-087.pdf>.

<sup>36</sup> *Id.*

claims.<sup>37</sup> According to a U.S. military report published during World War II:

Such a system had the advantages of central control, uniform operation, standard procedures, exclusive use of trained experts who devoted their full time to the assigned mission without other distracting duties. . . . Matters of local practice, customs, rules of law, measurement of damages . . . were learned by the semi-permanent claims personnel and added immeasurably to their efficiency of operation. . . . Reputations for fair dealing prompted witnesses to talk more freely and local authorities to make available information obtained in their official capacity. . . . Tactical commanders were freed of a task which they and their subordinate officers were ill-equipped to handle, even at the cost of neglect in training programs or lowered combat efficiency.<sup>38</sup>

Many BCC elements, like application of local law and custom,<sup>39</sup> would later appear in U.S. claims commissions.

In 1918, the Secretary of War transmitted a draft of a bill for “Indemnity for Damages Caused by American Forces Abroad” to the U.S. House of Representatives Committee on Military Affairs.<sup>40</sup> When the bill came before the House for consideration, the floor debate focused on whether the language of the proposed bill would allow for claims made by German citizens.<sup>41</sup> For example, Congressman Joseph Walsh (R-MA), serving in the Sixty Fifth Congress, argued:

While we are at war with Germany and her allies, I do not think any act we pass can be susceptible of conferring any benefit upon the inhabitants of Germany. It seems to me that is the height of absurdity. We are at war with Germany, and we are at war with her allies, and any law that we have heretofore passed, or that we may pass now or in the future, can not [sic] confer any benefit upon our enemies. By every rule of interpretation and by every rule of international law the legislation we pass can be interpreted only as conferring rights, privileges, or benefits upon our own people, or upon people who are associated with us in fighting the common enemy.<sup>42</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 32 C.F.R. § 536.139(a) (2008) (“In determining an appropriate award, apply the law and custom of the country in which the incident occurred . . .”).

<sup>40</sup> H.R. REP. NO. 341, at 1 (1918).

<sup>41</sup> 56 CONG. REC. 4803 (1918).

<sup>42</sup> *Id.* at 4802–03.

In response to the concerns of Walsh and a number of other Congressmen, the bill was amended to prohibit “an enemy or an ally of an enemy” from filing claims against the United States.<sup>43</sup> In April 1918, Congress passed the Indemnity Act (American Forces Abroad),<sup>44</sup> specifically authorizing resolution of claims made by inhabitants of France and allowing those claims from inhabitants of other European countries that were not enemies of the United States.<sup>45</sup> Walsh’s comments may reflect the mindset that the American people were at war against the people of Germany; contrarily, with respect to the present-day conflict in Iraq, President George W. Bush spoke of “liberat[ing]” Iraqis from the rule of Saddam Hussein.<sup>46</sup> When the United States is seeking to build relations with a civilian population, as opposed to fighting a conventional war, claims resolution assumes a magnified importance.

In 1941, as the shadow of another war crept over Europe, the United States offered to contribute to the defense of Iceland.<sup>47</sup> In a formal letter to President Roosevelt, the Prime Minister of Iceland invited U.S. forces into Iceland, but only if the President agreed to a number of conditions, including: “United States undertake defense of the country without expense to Iceland and prom-

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<sup>43</sup> *Id.* at 4803.

<sup>44</sup> Indemnity Act (American Forces Abroad), ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), repealed by Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943). The Indemnity Act reads, in relevant part:

That claims of inhabitants of France or of any other European country not an enemy or ally of an enemy for damages caused by American military forces may be presented to any officer designated by the President . . . . That claims under this statute shall not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occur.

Indemnity Act (American Forces Abroad) §§ 1, 2.

<sup>45</sup> *Id.* The United States entered World War I just one year prior to the Act and, by November 1918, the war was over. Yet, within that period, more than two million U.S. soldiers would fight in France. The large American presence in France, and France’s status as a U.S. ally, may explain why the Act focuses on claims made by French citizens. See Library of Congress, America’s Story from America’s Library, *Great War & the Jazz Age (1914–1928)*, [http://www.americaslibrary.gov/cgi-bin/page.cgi/jb/jazz/wwi\\_2](http://www.americaslibrary.gov/cgi-bin/page.cgi/jb/jazz/wwi_2) (last visited Sept. 17, 2009).

<sup>46</sup> John R. Guardiano, *Bush Hails Iraqi Progress, Discusses Strategy for Victory*, AM. FORCES PRESS SERVICE, Mar. 18, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=15130>. “Liberation” rhetoric parallels the strategic shift from conventional war to stability operations discussed *infra*.

<sup>47</sup> BBC, WW2 People’s War, Fact File: Britain Garrisons Island, <http://www.bbc.co.uk/ww2/peopleswar/> (last visited Sept. 17, 2009) (follow “historical fact files;” then “1940;” then “Britain Garrisons Iceland”).

ise compensation for all damage occasioned to the inhabitants by their military activities.”<sup>48</sup>

Later that year, in a letter<sup>49</sup> to the Speaker of the House, the Acting Secretary of the Navy proposed a bill authorizing the appointment of claims commissions to adjudicate claims for damages caused by U.S. Navy personnel operating in foreign countries.<sup>50</sup> The Secretary noted: “It is believed that the machinery contemplated by the proposed legislation would facilitate the accomplishment of the mission of the forces concerned, due to the good will established as a result of the prompt settlement of legitimate claims for damages.”<sup>51</sup> The Secretary knew that the relationship of the U.S. military with the local civilian population affects mission success, echoing the concerns of General Pershing about the “reputation” of American forces.

In response, Congress enacted the Armed Forces Damages Settlement Act “[t]o provide for the prompt settlement of claims for damages occasioned by Army, Navy, and Marine Corps forces in foreign countries,”<sup>52</sup> specifically to provide for resolution of claims arising from the presence of U.S. forces in Iceland<sup>53</sup> for the

<sup>48</sup> Message from the Prime Minister of Iceland to the President of the United States, 55 Stat. 1547 (1941).

<sup>49</sup> Letter from the Acting Secretary of the Navy to the Speaker of the House of Representatives, Oct. 15, 1941, H.R. REP. NO. 1503 (1941).

<sup>50</sup> *Id.* The Secretary believed that a majority of the claims would involve damage to real and personal property, such as automobiles damaged on the highways. *Id.* at 2.

<sup>51</sup> *Id.* The Secretary further opined: “Experience in connection with the presence of our armed forces in foreign countries has demonstrated that the failure to pay promptly for damages done to native residents by members of our forces is one of the principal sources of irritation which adds considerable difficulty to the maintenance of cordial relations with foreign people.” *Id.*

<sup>52</sup> Armed Forces Damages Settlement Act, Pub. L. No. 77-393, 55 Stat. 880 (1942). The Act provides:

[t]hat during the national emergency declared by the President on May 27, 1941, to exist, and for the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims, the Secretary of War and the Secretary of the Navy are hereby authorized to appoint a Claims Commission or Commissions . . . to consider, adjust, determine, and make payments in final settlement of bona fide claims on account of damages caused by Army, Navy, and Marine Corps forces, or individual members thereof, in a foreign country or possession thereof, including places located therein which are under the temporary or permanent jurisdiction of the United States, to the property, public or private, or the persons of inhabitants of such foreign countries, where the amount of such claim does not exceed \$1,000.

*Id.*

<sup>53</sup> U.S. DEP’T OF THE ARMY, PAMPHLET NO. 27-162, CLAIMS PROCEDURES para. 10-1 (1998).

duration of the national emergency.<sup>54</sup> The Act was modeled on the BCC<sup>55</sup> and was similar to the 1918 Act.<sup>56</sup>

Within two months, the Secretary of War had expanded claims resolution beyond Iceland by appointing a Claims Commission for the European Theater of Operations<sup>57</sup> and establishing the first claims office in Belfast, Ireland.<sup>58</sup> The War Department<sup>59</sup> instituted the practice of “unit investigation,” whereby claimants filed with the nearest base or unit and the commanding officer would refer the claim to an investigating officer or board of officers for investigation, report, and recommendation.<sup>60</sup> By 1943, the Claims Service consisted of: (1) a three-person claims commission for the theater; (2) a one-person base section claims commission; (3) a director of investigation services for the theater, with base section investigation directors; and (4) unit claims officers.<sup>61</sup> The claims commission served in an adjudicatory capacity, while the investigation services conducted fact-finding.<sup>62</sup>

In war-torn Europe, the inflexibility of official compensation rates did not mesh well with high inflation and the general scarcity of goods. While the process left some claimants dissatisfied, a U.S. military report found that the claims system:

created a wholesome respect for our Government and had a pronounced *stabilizing effect* in a situation where virtually all rights of all the people of the nations under the domination of or at war with our enemy were totally disregarded and trampled upon. It can hardly be doubted that in the vast majority of cases, goodwill has been created to the extent of more than justifying the expenditures made under the act.<sup>63</sup>

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<sup>54</sup> Proclamation No. 2487, 55 Stat. 1647 (1941) (President Franklin D. Roosevelt declared a national emergency on May 27, 1941, proclaiming that “an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.”).

<sup>55</sup> Ted Borek, *Legal Services During War*, 120 MIL. L. REV. 19, 42 (1988).

<sup>56</sup> 77 CONG. REC. 10074 (1941).

<sup>57</sup> National Archives, *Records of U.S. Theaters of War, World War II*, <http://www.archives.gov/research/guide-fed-records/groups/332.html#332.2> (last visited Sept. 17, 2009). From 1942–1945, the European Theater of Operations was a U.S. Military headquarters that participated in planning for the Allied invasion of Western Europe. The Theater encompassed the United Kingdom, Iceland, North Africa, and Western Europe, including France. *Id.*

<sup>58</sup> Borek, *supra* note 55, at 42.

<sup>59</sup> *Id.* at 42 n.34.

<sup>60</sup> REPORT OF THE GENERAL BOARD, *supra* note 35, at 1, 15.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 26 (emphasis added).

In other words, the Armed Forces Damages Settlement Act succeeded in promoting and maintaining friendly relations through the settlement of claims. The “stabilizing effect” of that claims system lends strong support to the continuation and expansion of claims adjudication in modern-day stability operations.

The next year, the Secretary of War submitted a draft of a bill to amend the Armed Forces Damages Settlement Act.<sup>64</sup> In a memorandum to the House Committee on Claims, Major Roy L. Deal, Chief of the Foreign Claims Branch, Claims Division, explained:<sup>65</sup>

In the administration of the act of January 2, 1942, claims are not allowed for damages or injuries caused by action against the enemy or by action by the enemy, or arising as an incident to a state of hostilities. This office considered this to be implicit [in the Armed Forces Damages Settlement Act], because, under the laws of war, such claims are not allowed by any country.<sup>66</sup>

The Secretary sought to clarify the status of combat-related claims, even though in the implementation of the Armed Forces Damages Settlement Act, the military was already denying compensation for combat-related claims (probably because of long-standing practice under customary international law).<sup>67</sup> The Committee recommended adopting the proposed amendment and, in April of 1943, Congress amended the Act to read:

That no claim of any national of any country at war with the United States, or of any ally of such enemy country . . . and *no claim resulting from action by the enemy or resulting directly or indirectly from any act by our armed forces engaged in combat, shall be allowed under this Act.*<sup>68</sup>

This amendment represents a substantial change and is the first time Congress explicitly prohibited claims arising from combat. While the Indemnity Act (American Forces Abroad)<sup>69</sup> prohibited the settlement of claims made by enemies or allies of enemies of the United States, the Armed Forces Damages Settlement Act<sup>70</sup> made no such proscription and generally required claims to arise in foreign countries or in areas under the permanent or temporary jurisdiction of the United States.

<sup>64</sup> S. REP. NO. 145, at 3 (1943).

<sup>65</sup> Part of the Judge Advocate General's Department, now known as the Judge Advocate General's Corps.

<sup>66</sup> H.R. REP. NO. 312 (1943).

<sup>67</sup> Armed Forces Damages Settlement Act, *supra* note 52.

<sup>68</sup> Act of Apr. 22, 1943, ch. 67, Pub. L. No 78-39, § 1, 57 Stat. 66, 66–67 (emphasis added).

<sup>69</sup> Indemnity Act (American Forces Abroad), *supra* note 44.

<sup>70</sup> Armed Forces Damages Settlement Act, *supra* note 52.

The FCA, forged by the necessities of the World Wars, has struggled to cope with the irregular armed conflicts of the second half of the twentieth century. In 1956, Congress enacted the FCA into permanent law, using the framework first established by the Armed Forces Damages Settlement Act and including the “combat exclusion” language of the 1943 amendment.<sup>71</sup> As successfully as the Act appears to have functioned in the World Wars, its results in the second half of the twentieth century are marked by ambiguity. In World War I, Congress passed the legislation just seven months before the end of hostilities and in response to General Pershing’s concern about damages from motor vehicle accidents.<sup>72</sup> In World War II, Congress sought to provide primarily for claims arising from the conduct of U.S. forces in Iceland, who never saw combat,<sup>73</sup> and citizens of U.S. allies. In contrast to the clearly defined trenches of World War I and the massive fronts of World War II, the conflicts of the post-World War II era, from the hazy, jungle warfare of Vietnam to the nation-building in Iraq and Afghanistan, have strained the FCA to the breaking point.

#### IV. POST-WWII FCCs (PRE-IRAQ & AFGHANISTAN)

Looking at the U.S. military’s implementation of the FCA after World War II, one sees not only the importance of claims resolution for the success of overseas military deployments, but also the obstacles created by the combat exclusion. Despite the FCA’s explicit exclusion of combat claims, during U.S. military operations in Vietnam, Grenada, Panama, and Somalia, DoD still found the means to compensate combat-related damages. This is strong evidence of the high value that the U.S. military places upon winning the hearts and minds of civilians and compensation as a means to that end.

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<sup>71</sup> Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 154 (codified at 10 U.S.C. § 2734 (2006)).

<sup>72</sup> S. REP. NO. 379, at 1 (1918).

<sup>73</sup> Encyclopædia Britannica Online, *Iceland: Home rule and sovereignty (1904–44)*, <http://www.britannica.com/EBchecked/topic/281235/Iceland/10100/Home-rule-and-sovereignty-1904-44> (last visited Oct. 10, 2009).

## A. Vietnam

From 1966 until the last units left Vietnam in 1972, U.S. Army Vietnam (“USARV”) had single-service responsibility<sup>74</sup> for processing claims filed by Vietnamese or other foreign nationals against U.S. Forces.<sup>75</sup> By 1970, USARV was maintaining two three-person FCCs in Saigon.<sup>76</sup> While one three-person FCC dealt solely with the over 9,000 claims arising from an explosion at an ammunition depot, the other processed 225 claims per month, usually those above the \$1,000 limit faced by the twelve one-person FCCs operating in the field.<sup>77</sup>

Because of the FCA’s combat exclusion, the burden fell on the Vietnamese government to provide compensation for combat-related damages.<sup>78</sup> Yet, because the FCCs spent seventy to ninety percent of claim-processing time investigating, claims determined to be combat-related still consumed a substantial amount of resources, especially because the Vietnamese preferred filing with USARV.<sup>79</sup>

As a result, USARV began processing claims “springing indirectly from combat, provided the loss or damage was caused by the reckless or wanton conduct of U.S. forces” using assistance-in-kind funds from the Military Assistance Command, Vietnam (“MACV”), the senior U.S. military headquarters in the country.<sup>80</sup> According to Colonel Frederic L. Borch, U.S. Army Judge Advocate General’s Corps, “[p]aying these claims demonstrated that the Americans took responsibility for their behavior, showed the Vietnamese people that the law could confer a benefit, and, it was hoped, fostered popular respect for the law in Vietnam.”<sup>81</sup>

## B. Grenada

In October 1983, the U.S. military invaded Grenada to rescue about 1,000 U.S. citizens on the island from violent conflict be-

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<sup>74</sup> See U.S. DEP’T OF DEFENSE, *supra* note 10.

<sup>75</sup> FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* 27 (2004).

<sup>76</sup> *Id.* at 42.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 41.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 42.

<sup>81</sup> *Id.*

tween two factions of the local government.<sup>82</sup> Hostilities ceased within ten days<sup>83</sup> and, pursuant to the FCA, the U.S. Army Claims Service<sup>84</sup> (“USARCS”) appointed three FCCs.<sup>85</sup> These FCCs, however, denied the majority of the claims on the ground of “combat exclusion.”<sup>86</sup> Although the payment of meritorious non-combat claims created some good will for the United States, the combat exclusion created tension between Army lawyers, who sought to execute the FCA lawfully, and other U.S. government agencies, which were anxious to rebuild Grenada.<sup>87</sup>

Recognizing this shortfall, by February 1984, USARCS, in conjunction with DoS and the U.S. Agency for International Development (“USAID”), implemented a program to settle combat damage claims outside the FCA with USAID funds.<sup>88</sup> Out of more than 852 claims filed, 775 were for property damage, including structural damages to dwellings, loss and destruction of personal property, and loss of crops and domestic animals.<sup>89</sup> The program paid out \$1,858,307.25 to 649 claimants, utilizing all available funds.<sup>90</sup> Furthermore, based upon information from those claims and related investigations, the claims lawyers were so successful in intelligence-gathering, including locating a hidden weapons cache and arresting an enemy soldier, that a counterintelligence soldier was assigned to the claims office.<sup>91</sup> Jeffrey Harris, serving as an Army claims lawyer at the time, notes, “[i]n human terms, the program served to alleviate the suffering of hundreds of Grenadians who otherwise would not have received compensation for their combat-related losses. In this regard the program was a resounding success.”<sup>92</sup>

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<sup>82</sup> *Id.* at 61.

<sup>83</sup> *Id.*

<sup>84</sup> See generally U.S. Army Claims Service Home Page, <http://www.jagcnet.army.mil> (follow “U.S. Army Claims Service” hyperlink) (last visited Sept. 17, 2009).

<sup>85</sup> Jeffrey L. Harris, *Grenada—A Claims Perspective*, 1986 ARMY LAW. 7, 7.

<sup>86</sup> *Id.* at 8.

<sup>87</sup> BORCH, *supra* note 75, at 76.

<sup>88</sup> Harris, *supra* note 85, at 8.

<sup>89</sup> *Id.* at 9.

<sup>90</sup> *Id.* at 13.

<sup>91</sup> BORCH, *supra* note 75, at 75–76.

<sup>92</sup> Harris, *supra* note 85, at 13.

## C. Panama

In 1989, U.S. forces entered Panama, in the words of then-President George H. W. Bush, “to create a safe environment for Americans there, ensure the integrity of the Panama Canal . . . and bring Noriega<sup>93</sup> to justice.”<sup>94</sup> Pursuant to the Law of Armed Conflict,<sup>95</sup> during combat operations, U.S. forces seized rental cars and privately owned vehicles to expedite troop movement.<sup>96</sup> Because the FCA does not cover battlefield takings, the FCC, set up by USARCS, received funds from DoD “Operation and Maintenance”<sup>97</sup> monies to settle these claims.<sup>98</sup> Likewise, DoS, in a departure from its approach in Grenada, decided to grant the new Panamanian government funds to compensate for combat-related damages rather than to fund a U.S. Army-administrated program.<sup>99</sup>

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<sup>93</sup> Manuel Noriega, now serving a prison term in the United States for drug trafficking and racketeering, is a former Panamanian general that ruled Panama until the U.S. ousted him. Noriega, although once cooperating with the United States, was found to have accepted payments to allow cocaine to pass through Panama on its way to the United States. Marc Lacey, *In Court Ruling, Noriega is Cleared for Extradition to France*, N.Y. TIMES, Aug. 25, 2007, at A4, available at <http://www.nytimes.com/2007/08/25/world/americas/25noriega.html?partner=permalink&exprod=permalink>.

<sup>94</sup> BORCH, *supra* note 75, at 89.

<sup>95</sup> See Hague Convention No. IV, *supra* note 29, art. 53.

<sup>96</sup> BORCH, *supra* note 75, at 112.

<sup>97</sup> “The Operation and Maintenance, Defense-Wide appropriation provides funding to support a wide range of essential programs that are critical to the accomplishment of the missions of the Military Departments . . . includ[ing] special operations forces, intelligence activities, audit and contract management activities, treaty implementation, nuclear weapons management and analysis, dependents’ education, civilian and military personnel support, and management support for the Department.” DEP’T OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, OPERATION AND MAINTENANCE OVERVIEW 14 (2006), available at [http://www.defenselink.mil/comptroller/Docs/fy2007\\_overview.pdf](http://www.defenselink.mil/comptroller/Docs/fy2007_overview.pdf).

<sup>98</sup> See 10 U.S.C. § 401(c)(4) (2006) (“Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated pursuant to paragraph (1), except that funds appropriated to the DoD for operation and maintenance . . . may be obligated for humanitarian and civic assistance under this section only for incidental costs of carrying out such assistance.”).

<sup>99</sup> BORCH, *supra* note 75, at 113. “[DoS disbursed funds] in Panama to support the Endara government and help to establish its legitimacy. . . . The U.S. and Panama agreed to a Letter of Instruction (LOI) that established the procedures to be followed, listed categories of claims deemed not compensable, and set monetary limits for claims under the FCA that were not barred by the combat claims exclusion. These commissions proceeded to adjudicate and recommend payment on the combat-related claims, essentially using the same procedures already established for the payment of claims under the FCA and incorporating the special requirement of the LOI. \$1.8 million of USAID money was made available: \$200,000 to support the claims

## D. Somalia

In 1992, pursuant to U.N. Resolution 794,<sup>100</sup> U.S. military forces led a multinational coalition into Somalia to provide humanitarian assistance and to restore order.<sup>101</sup> Because the operations were primarily humanitarian, the U.S. command had to decide whether damages caused by U.S. military forces in hostile actions were cognizable under the FCA.<sup>102</sup> Concluding that the FCA excluded payment for damages arising out of force protection<sup>103</sup> or other combat-related activities, the U.S. command nevertheless narrowly defined “security missions”<sup>104</sup> to allow the resolution of meritorious claims.<sup>105</sup>

In addition, after approval from the U.S. Ambassador to Somalia, U.S. forces began the payment of *solatia*.<sup>106</sup> According to the Department of the Army Claims Procedures:

In certain countries, particularly those within Asia and the Middle East, an individual involved in a [potentially compensable event] may, in accordance with local custom, pay *solatia* . . . without regard to liability. An offering of *solatia* seeks to convey personal feelings of sympathy or condolence toward the victim or the victim’s family. Such feelings do not necessarily derive from legal responsibility; the payment is intended to express the remorse of the person involved in an incident. Such payments usually are made as quickly as possible after the incident, in a nominal amount that varies according both to the involved

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office and personnel, and the remainder to pay claims.” THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 320 n.44 (2009).

<sup>100</sup> S.C. Res. 794, para. 10, U.N. Doc. S/RES/794 (Dec. 3, 1992) (authorizing member states to conduct humanitarian relief operations in Somalia). This resolution expressly welcomed an offer made by the United States to lead and to organize a humanitarian operation with Security Council authorization. *Id.* at para. 8; see also Letter from Secretary-General of the United Nations to President of the Security Council, United Nations at 5, U.N. Doc. S/1992/24868 (Nov. 29, 1992).

<sup>101</sup> BORCH, *supra* note 75, at 200.

<sup>102</sup> *Id.* at 210.

<sup>103</sup> The Joint Chiefs of Staff define “force protection” as “[p]reventive measures taken to mitigate hostile actions against DoD personnel (to include family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS GL-14 (2008).

<sup>104</sup> BORCH, *supra* note 75, at 210. “Security missions” were missions “[c]onducted by U.S. troops against hostile Somali clans, bandits, and other armed individuals.” *Id.*

<sup>105</sup> *Id.* (“Consequently, when Somalis were killed or injured in accidents involving U.S.-operated equipment and vehicles on routine missions, claims were paid. Several claims also were paid for Somalis killed or wounded by the accidental discharge of weapons.”).

<sup>106</sup> *Id.* at 211.

party's ability to pay and to local custom. In certain countries, the payment is not always made in money.<sup>107</sup>

This program allowed "the flexibility to pay solatia in those situations in which a claim otherwise could not be paid, while demonstrating to town elders and the families of victims that the United States took responsibility for the actions of its troops."<sup>108</sup>

## V. CONTEMPORARY LEGAL FRAMEWORK

In the absence of a preemptive international agreement, the FCA governs claims adjudication.<sup>109</sup> An international agreement,<sup>110</sup> such as a Status of Forces Agreement ("SOFA"),<sup>111</sup> may preempt the FCA by providing for resolution of claims.<sup>112</sup> The North Atlantic Treaty Organization ("NATO") SOFA, for exam-

<sup>107</sup> PAM. NO. 27-162, *supra* note 53, para. 10-10 (emphasis added).

<sup>108</sup> Borch, *supra* note 75, at 211.

<sup>109</sup> *Aaskov v. Aldridge*, 695 F. Supp. 595, 597 (D.D.C. 1988) (holding that "legislative history and recent congressional debates tend to confirm that the International Agreement Claims Act, which implements SOFA, is the sole remedy for line-of-duty torts, while the Foreign Claims Act may be invoked for torts committed beyond the scope of official duty or in countries that have not signed the NATO SOFA").

<sup>110</sup> 10 U.S.C. § 2734a(a) (2006) ("When the United States is a party to an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States . . . the Secretary of Defense . . . [may reimburse the party to the agreement]."). Furthermore, under § 2734a(b), combat claims are excluded from adjudication under this section. *Id.*

<sup>111</sup> Richard J. Erickson, *Status of Forces Agreement: A Sharing of Sovereign Prerogative*, 1994 A.F. L. REV. 37, 139-40. Erickson explains:

[SOFAs] define the status of United States forces in the territory of friendly states and do not themselves authorize the presence or activities of those forces. . . . [T]he purpose of a SOFA is to share the sovereign prerogative between the receiving and the sending state. It is intended to strike a balance between the rights and obligations of each commensurate with the interests and needs of all parties to the agreement. No SOFA, once concluded, will function well unless all parties understand the reason for 'sharing' and believe their interests have been properly balanced. Dialogue between the parties is essential to this end. An ancillary purpose of a SOFA is to resolve as many issues as possible prior to the arrival of a force in country (or for its continuance there). It establishes a smooth working relationship, thereby reducing the need for dispute resolution.

*Id.*

<sup>112</sup> *Id.* at 153. SOFAs generally include: types of government-to-government claims waived and procedures for un-waived claims, procedures for adjudications of all other claims (except combat and contractual), statute of limitations on claims submissions, and ex gratia claims procedures. *Id.* For claims caused by act or omission of U.S. Personnel, either the U.S. adjudicates and compensates or the host nation adjudicates and compensation is made pursuant to a cost-sharing arrangement. *Id.*

ple, sets forth procedures for adjudicating non-contractual claims by a third-party (a party other than the host nation or the United States) arising from conduct of a member of the armed forces acting within the scope of his/her official duties.<sup>113</sup> This is referred to as a “scope” claim; for instance, in 1968, when a U.S. Air Force bomber crashed in Greenland,<sup>114</sup> a NATO territory, a U.S. District Court found that Danish and American victims could not make claims under the FCA, and that the Air Force acted properly in seeking to resolve the claims pursuant to the NATO SOFA.<sup>115</sup> Contrarily, those claims arising from conduct of soldiers acting outside the scope of their official duties, such as assault, vandalism, or theft, are “non-scope” claims,<sup>116</sup> adjudicated by an FCC under the FCA.<sup>117</sup>

In some cases, the international agreement fails to preclude application of the FCA. During non-combat deployments to Bosnia-Herzegovina and Croatia in the late 1990’s, U.S. forces settled claims pursuant to the FCA, even with SOFAs in place.<sup>118</sup> Because these SOFAs<sup>119</sup> contain no cost-sharing measures and are not binding between the United States and the host nations, the FCA, not the International Agreements Claims Act,<sup>120</sup> remains in effect.<sup>121</sup> Additionally, as explained *infra*, although there is currently a U.S.-Iraq SOFA in effect, the agreement incorporates the FCA by reference and, therefore, is not preemptive.<sup>122</sup> The key takeaway is this:

<sup>113</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VIII, para. 5, June 19, 1951, 4 U.S.T. 1792, available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm?](http://www.nato.int/cps/en/natolive/official_texts_17265.htm?).

<sup>114</sup> The repercussions of this crash linger even today: the bomber was carrying nuclear weapons, at least one of which has not been recovered. See Gordon Corera, *Mystery of Lost US Nuclear Bomb*, BBC NEWS, Nov. 10, 2008, <http://news.bbc.co.uk/1/hi/world/europe/7720049.stm>. Although the crash was not combat-related, the bomber was not merely training either; the Air Force had bombers continuously circling Thule, Greenland so that in the event of a Soviet nuclear strike the bombers could fly directly to Moscow to retaliate. *Id.*

<sup>115</sup> Aaskov, 695 F. Supp. at 599.

<sup>116</sup> David J. Fletcher, *CLAIMS REPORT: The Lifecycle of a NATO SOFA Claim*, 1990 ARMY LAW. 44, 45 (1990).

<sup>117</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, *supra* note 113, at art. VIII.

<sup>118</sup> Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, 1998 ARMY LAW. 1.

<sup>119</sup> These are more commonly known as the “Dayton Accords,” named for Dayton, Ohio, the location of the negotiations leading to the agreements. Steven Erlanger, *The Dayton Accords: A Status Report*, N.Y. TIMES, June 10, 1996, <http://www.nytimes.com/specials/bosnia/context/dayton.html>.

<sup>120</sup> International Agreements Claims Act, 10 U.S.C. § 2734(a) (2006).

<sup>121</sup> Prescott, *supra* note 118, at 2.

<sup>122</sup> OPERATIONAL LAW HANDBOOK, *supra* note 99, at 315.

the FCA attaches the moment U.S. forces set foot on foreign soil and governs until explicitly dislodged.

The Secretary of Defense has the authority to appoint FCCs<sup>123</sup> and may settle claims in excess of \$100,000. In practice, the Commander of USARCS appoints FCCs when the Army has single-service responsibility for claims.<sup>124</sup> Currently, FCCs can adjudicate claims up to \$50,000.<sup>125</sup> Claimants must be “inhabitants of foreign countries” but cannot be “inhabitants of unfriendly foreign countries or by individuals considered to be unfriendly to the United States.”<sup>126</sup> Finally, the FCA grants the Secretary of Defense discretion in claim adjudication and, therefore, is not subject to judicial review,<sup>127</sup> nor does it create a right of action for plaintiffs to pursue personal-injury torts against the United States.<sup>128</sup>

In evaluating a claim, an FCC must apply<sup>129</sup> “the law and custom of the country in which the incident occurred . . . .”<sup>130</sup> This provision of the Army Regulations necessitates that claims attorneys be familiar with custom and local tort law. Where local law is inapplicable because of policy or does not cover the claim at issue, Army claims regulations set out general principles of tort law for FCCs to use.<sup>131</sup> In Somalia, for example, local custom valued a “working man’s life at 100 camels, while a woman’s life was valued at only half this amount. Children were valued at even less.”<sup>132</sup>

<sup>123</sup> 10 U.S.C. § 2734(a) (2006).

<sup>124</sup> OPERATIONAL LAW HANDBOOK, *supra* note 99, at 314 n.17. “USARCS has developed an ‘off-the shelf’ appointment package and can assist in the speedy appointment of FCCs.” *Id.* See generally 32 C.F.R. § 536.140 (2008) (discussing the appointment and function of FCCs).

<sup>125</sup> OPERATIONAL LAW HANDBOOK, *supra* note 99, at 314 n.17. One-member commissions consisting of line officers (officers that are not attorneys) can award up to \$2,500, but have no denial authority; a Judge Advocate (military attorneys, commonly known as “JAGs” or “JAs”) or civilian DoD attorney one-member commissions can award up to \$15,000 and may deny claims; three-member commissions may settle up to \$50,000 and have authority to deny claims of any amount; USARCS adjudicates claims of \$50,000 to \$100,000. *Id.* Claims greater than \$100,000 require approval from the Secretary of the Army or his designee. *Id.* See also 32 C.F.R. § 536.141 (2008) (discussing the composition of FCCs).

<sup>126</sup> U.S. DEP’T OF THE ARMY, REG. 27-20, CLAIMS para. 10-2a, 10-4h (Feb. 8, 2008).

<sup>127</sup> *Aaskov v. Aldridge*, 695 F. Supp. 595, 599 D.D.C. 1988) (holding that, under the FCA, the Secretary of Defense has discretion to settle claims, and, therefore, a court cannot issue a writ of mandamus to compel settlement).

<sup>128</sup> *Towry v. United States*, 459 F. Supp. 101 (E.D. La. 1978), *aff’d*, 620 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (standing for the proposition that the FCA does not waive sovereign immunity).

<sup>129</sup> 32 C.F.R. § 536.139(a) (2008).

<sup>130</sup> REG. 27-20, *supra* note 126, para. 10-5a.

<sup>131</sup> REG. 27-20, *supra* note 126, para. 3-5.

<sup>132</sup> BORCH, *supra* note 75, at 211. Before the government collapsed, camels cost about \$100. *Id.* During the conflict, however, camels went for about \$800, while annual per capita income

## A. The FCA in Iraq and Afghanistan

The FCA remains in force in both Iraq and Afghanistan. In Afghanistan, the U.S. military is currently operating as a member of the International Security Assistance Force (ISAF) pursuant to a U.N. Security Council Resolution (which does not qualify as a SOFA).<sup>133</sup> In November 2009, the United States had approximately 68,000 troops in Afghanistan, with NATO countries contributing an additional 35,000.<sup>134</sup>

From 2003 until January 2009, the U.S. military operated in Iraq under an annually-renewed U.N. Mandate.<sup>135</sup> In November 2008, the Iraqi Parliament approved a SOFA<sup>136</sup> with the United States that explicitly proscribed combat-related claims and called for claims to be settled “in accordance with the laws and regulations of the United States,” incorporating the FCA by reference.<sup>137</sup>

When President George W. Bush declared the end of major combat operations in Iraq on May 1, 2003, the military was still ramping up claims processing.<sup>138</sup> In June 2003, DoD assigned the U.S. Army single-service claims authority for Iraq.<sup>139</sup> By July 31, 2003, FCCs had already adjudicated 1,496 claims and paid 1,168 in the amount of \$262,945.<sup>140</sup> By September 2006, DoD had paid \$26 million to settle approximately 21,450 claims in Iraq and Afghani-

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was only \$500. *Id.* at 211–12. To avoid causing a windfall for the claimant, the military set a maximum \$10,000 payout for wrongful death claims. *Id.* at 212. The cap was “accepted by the Somalis and the village elders who ‘negotiated’ such claims and who, under Somali tradition, received a portion of the money to be used for the benefit of the village.” *Id.*

<sup>133</sup> S.C. Res. 1776, para. 3, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

<sup>134</sup> Elizabeth Bulmiller, *In 3 Tacks for Afghan War, a Game of Trade-Offs*, N.Y. TIMES, NOV. 22, 2009, available at <http://www.nytimes.com/2009/11/23/world/asia/23military.html>.

<sup>135</sup> See S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

<sup>136</sup> Alissa Rubin & Campbell Robertson, *Iraq Backs Deal that Sets End of U.S. Role*, N.Y. TIMES, NOV. 27, 2008, at A1, available at <http://www.nytimes.com/2008/11/28/world/middleeast/28iraq.html?partner=permalink&expprod=permalink>.

<sup>137</sup> Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq art. 21, U.S.-Iraq, Nov. 17, 2008, available at [https://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](https://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf).

<sup>138</sup> Jim Garamone, *Process in Place for Iraqis to Make Damages Claims*, AM. FORCES PRESS SERVICE, Aug. 4, 2003, <http://www.defenselink.mil/news/newsarticle.aspx?id=28640>.

<sup>139</sup> Memorandum from Acting Gen. Counsel, DoD, to Sec’y of the Army, Subject: Claims Responsibility-Iraq (June 17, 2003), cited in Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, 2004 ARMY LAW. 39, 39 n.11 (2004).

<sup>140</sup> *Id.*

stan.<sup>141</sup> That breaks down to an average of 7,150 compensated claims per year, approximately \$1,212 disbursed per claim, and an annual payout total of \$8.6 million.<sup>142</sup> According to the USARCS, most FCA claims in Iraq involved automobile accidents (as General Pershing might have predicted), detainee property claims or injuries, and damage resulting from negligent discharges of weapons (i.e. firing of a weapon absent the intent of the possessing individual).<sup>143</sup>

### B. Compensating Combat-Related Damage in Iraq and Afghanistan

Following precedent from all major conflicts after World War II, the U.S. military soon utilized another ad hoc compensation system, the Commander's Emergency Response Program ("CERP"). After toppling Saddam Hussein's Baath Party,<sup>144</sup> U.S. forces had access to substantial amounts of cash seized from Baathist coffers.<sup>145</sup> Recognizing the need for humanitarian relief, the Coalition Commander established the "Brigade Commander's Discretionary Recovery Program to Directly Benefit the Iraqi People" in May 2003.<sup>146</sup> In June 2003, the Administrator of the Coalition Provisional Authority, Ambassador Paul Bremer, issued a memorandum to the Coalition Commander formally authorizing CERP and explaining:

[t]his Program will enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility, by carrying out programs that will immediately assist the Iraqi people and support the reconstruction of Iraq.<sup>147</sup>

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<sup>141</sup> GOV'T ACCOUNTABILITY OFFICE, *MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN* 50-51 (2007), available at <http://www.gao.gov/new.items/d07699.pdf> [hereinafter "GAO REPORT"].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Baath Party*, N.Y. Times, [http://topics.nytimes.com/top/reference/timestopics/organizations/b/baath\\_party/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/b/baath_party/index.html) (last visited Sept. 17, 2009).

<sup>145</sup> See, e.g., David Zucchini, *Troops Find Baghdad Stash: \$650 Million—Little-noticed Cottages Hold Boxes of Cash*, S.F. CHRON., Apr. 19, 2003, at A-10.

<sup>146</sup> Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, 2004 ARMY LAW. 1.

<sup>147</sup> Memorandum from the Adm'r of the Coal. Provisional Auth. to the Commander of Coal. Forces, subject: Commanders' Emergency Response Program (June 16, 2003), cited in Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and*

Notably, units could use CERP funds to pay claims barred by the combat exclusion of the FCA.<sup>148</sup>

In November 2003, President Bush signed an emergency supplemental appropriations act (“ESAA 2004”), further funding CERP.<sup>149</sup> Similar to the arrangement used in Panama, this Act authorized DoD to allocate up to \$180 million of Congressionally-appropriated “Operation and Maintenance” funds “for the purpose of enabling military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people, and . . . to assist the people of Afghanistan . . . .”<sup>150</sup> With ESAA 2004 formally funding CERP, U.S. military forces elected to exclude seized Baathist assets from the payment of claims related to combat operations.<sup>151</sup> As the statute suggests, Congress intended these funds to be used for more than just claims;<sup>152</sup> the military could spend the funds on education, sanitation, food production, and other reconstruction projects.<sup>153</sup> In 2008, Congressional authorizations for CERP reached more than \$977 million.<sup>154</sup>

Starting in March 2004 in Iraq and in November 2005 in Afghanistan, U.S. forces have been using CERP funds to make “condolence” payments of up to \$2,500 as an:

[e]xpression of sympathy for death, injury, or property damage caused by coalition or U.S. forces generally during combat. In addition, at commander discretion, payments may be made to Iraqi civilians who are harmed by enemy action when working with U.S. forces. Payment is not an admission of legal liability or fault.<sup>155</sup>

For the first time, in April 2006, as a subset of condolence payments, U.S. forces also began disbursing “martyr payments” to those Iraqi army, police, or government civilians killed by United

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*Implementation of the Commander’s Emergency Response Program*, 2004 ARMY LAW. 39, 41 n.31.

<sup>148</sup> Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, 2004 ARMY LAW. 39, 42.

<sup>149</sup> See Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 1110, 117 Stat. 1209 (2003).

<sup>150</sup> *Id.*

<sup>151</sup> Tackaberry, *supra* note 148, at 39 n.29.

<sup>152</sup> GAO REPORT, *supra* note 141.

<sup>153</sup> *Id.*

<sup>154</sup> James Foley, *The Price of One Iraqi Life*, IN THESE TIMES, June 25, 2008, at 30.

<sup>155</sup> GAO REPORT, *supra* note 141.

States, coalition, or other military operations. Prior to April 2006, condolence payments were not permitted to be made to Iraqi security forces.<sup>156</sup>

Under statutory authority separate from the FCA,<sup>157</sup> the Secretary of Defense is currently authorized to fund *solatia*<sup>158</sup> payments from “Operation and Maintenance” funds (those funds not allocated to CERP by the ESAA 2004).<sup>159</sup> Distinct from “condolence” payments, *solatia* in this context are:

[t]oken or nominal payment for death, injury, or property damage caused by coalition or U.S. forces during combat. Payment is made in accordance with local custom as an expression of remorse or sympathy toward a victim or his/her family. Payment is not an admission of legal liability or fault.<sup>160</sup>

In Iraq, this translates into a payment of up to \$2,500 for death and \$1,500 for serious injury; in Afghanistan, it is \$2,336 for death and \$467 for serious injury.<sup>161</sup>

## VI. PROBLEMS AND SOLUTIONS

Because of the combat exclusion, the FCA is unable to fully complete its mission of “promot[ing] and . . . maintain[ing] friendly relations through the prompt settlement of meritorious claims . . . .”<sup>162</sup> The current system of claims adjudication poses three main problems for the U.S. military: (1) meeting the expectations of the local population; (2) locating a source of funding; and (3) defining “combat.” These problems undermine the military’s ability to foster good relations with locals. As the *U.S. Army JAG Corps Operational Law Handbook* recognizes: “The combat-related claims exclusion often directly interferes with the principal

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<sup>156</sup> *Id.* at 26.

<sup>157</sup> 10 U.S.C. § 2242 (2006).

<sup>158</sup> *Solatia* payments are a recognized custom in Federated States of Micronesia, Japan, Korea, and Thailand, and FCCs should consult USARCS for guidance in other countries. 32 C.F.R. § 536.145 (2008).

<sup>159</sup> GAO REPORT, *supra* note 141, at 13 n.(b).

<sup>160</sup> *Id.* at 13. *See also supra* note 107.

<sup>161</sup> *Id.* DoD makes the Iraqi payments in U.S. dollars, while the Afghani payments are in Afghani, the currency of Afghanistan. Therefore, the dollar amounts cited, calculated in May 2007, will fluctuate based on exchange rates.

<sup>162</sup> 10 U.S.C. § 2734(a) (2006).

goal of low intensity conflict/foreign internal defense: obtaining and maintaining the support of the local populace.”<sup>163</sup>

#### A. Meeting the Expectations of the Local Population

Because a local population likely has little or no understanding of the U.S. military’s claims adjudication mechanisms, the combat exclusion may frustrate potential claimants:

Claims personnel will need to carefully discriminate between these payable claims and the prohibited combat-related claims. Making such a distinction may seem arbitrary to the claimant population . . . . Unfortunately, it is widely recognized that the denial of combat claims can undermine support of U.S. military efforts from the local population.<sup>164</sup>

The military could temper any unrealistic expectation on the part of foreign civilians by establishing FCCs early in an operation and working to raise awareness. Writing as a Lieutenant Colonel in USARCS, Ronald Warner argues for the deliberate and timely establishment of FCCs:

If the FCCs are to accomplish the purpose of the FCA, to “promote and maintain friendly relations,” it is obvious that local inhabitants who are injured or who suffer damage or loss must be made aware of the availability of the remedy and the location of the FCC. The manner and degree of publicity will depend upon the size and type of military operation, and the popular and political environment. It is essential, however, that coordination and liaison with the American Embassy/mission/consulate be achieved at the earliest practicable time following deployment . . . . This channel should also be used to educate the local government concerning FCC operations, objectives, and limitations.<sup>165</sup>

Yet, it may be difficult to justify to civilian populations the reason for distinguishing combat and non-combat claims, especially as it is often tricky for FCCs themselves to line-draw. Likewise, if Congress establishes a combat claims system to supplement FCCs, commanders involved with administration of claims need to be inti-

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<sup>163</sup> OPERATIONAL LAW HANDBOOK, *supra* note 99, at 320.

<sup>164</sup> Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 237 (1997).

<sup>165</sup> Ronald Warner, *Planning for Foreign Claims Operations During Overseas Deployment of Military Forces*, 1987 ARMY LAW. 61, 63.

mately aware of operating procedures, lest they be unable to educate locals on how to file claims. The major issue with ad hoc combat claim adjudication is that U.S. military officers will lack familiarity with the system and, therefore, have trouble tempering expectations of the local population. These officers will have to sacrifice time that could be spent adjudicating claims or otherwise contributing to the overarching mission and familiarize themselves with the new system.

## B. Locating Funds

Part and parcel of a commander's ability to quickly adjudicate claims is the availability of funds. Historically, the military has struggled to locate a source of funding to compensate combat claims and relied heavily on circumstantial sources. In Vietnam, although the U.S. military had lawyers handling claims as early as 1965, it was not until 1971 that the senior U.S. military command in Vietnam, MACV, allocated funds to compensate combat claims.<sup>166</sup> In Grenada, DoS and USAID eventually picked up the tab, allowing the Army to adjudicate claims.<sup>167</sup> In Panama, DoS transferred funds and responsibility for claims adjudication to the Panamanian government.<sup>168</sup> In Iraq and Afghanistan, Congress gave DoD the authority and discretion to distribute funds,<sup>169</sup> but prior to that Congressional mandate, the U.S. military in Iraq used funds seized from the Baath party.<sup>170</sup>

Furthermore, combat-related claims constitute a significant portion of all claims and, thus, will require substantial funding to resolve. For example, in the fiscal years 2003 through 2006, DoD paid \$26 million to settle 21,450 claims in Iraq and Afghanistan under the FCA;<sup>171</sup> in comparison, in the fiscal years 2005 and 2006, the DoD spent \$29 million on condolence payments (outside the FCA) in Iraq and Afghanistan.<sup>172</sup> On top of these expenditures,

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<sup>166</sup> BORCH, *supra* note 75, at 41.

<sup>167</sup> Harris, *supra* note 85, at 8.

<sup>168</sup> BORCH, *supra* note 75, at 113.

<sup>169</sup> Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 1110, 117 Stat. 1209 (2003).

<sup>170</sup> Martins, *supra* note 146, at 5.

<sup>171</sup> GAO REPORT, *supra* note 141, at 50.

<sup>172</sup> *Id.* at 20. DoD did not start condolence payments in Afghanistan until November 2005 [fiscal year 2006]; thus, this total does not include fiscal year 2005 for Afghanistan. *Id.*

DoD made another \$1.8 million in *solatia* payments (also outside the FCA) in the same period.<sup>173</sup>

In April 2007, in response to a Freedom of Information Act<sup>174</sup> request by the American Civil Liberties Union (“ACLU”),<sup>175</sup> the Department of the Army released documentation<sup>176</sup> of 505 claims made to the FCCs in Iraq and Afghanistan between 2003 and 2006.<sup>177</sup> Campaign for Innocent Victims in Conflict (“CIVIC”), a non-profit organization that advocates on behalf of victims of armed conflicts, analyzed these files.<sup>178</sup> Of 505 claim files, CIVIC found 490 viable claims, claims containing sufficient information to decipher the incident and a decision.<sup>179</sup> Of the viable claims, 404 of them were denied and the remaining 86 were paid.<sup>180</sup> FCC denied 233 of the 404 under the FCA because of the “combat exclusion.”<sup>181</sup> The average payment for death under the FCA was about \$4,200 and about \$2,200 under condolence.<sup>182</sup> Because the Department of the Army selected claim files for release and likely did not include all files for this time period, the sampling of FCC claims cannot be analyzed statistically for they are not truly random. Yet, the files do provide insight into the impact of the “combat exclusion” and use of condolence payments.<sup>183</sup>

### C. The Difficulty of Defining “Combat”

Because of the combat exclusion, FCCs must always determine whether the damage at issue is combat-related. Cleanly definable on paper, practical application of the definition of

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<sup>173</sup> *Id.* at 42.

<sup>174</sup> 5 U.S.C. § 552 (2006) (generally providing that any person has a right to request access to records or information from federal agencies).

<sup>175</sup> Am. Civil Liberties Union Home Page, <http://www.aclu.org> (last visited Sept. 17, 2009).

<sup>176</sup> See Am. Civil Liberties Union, Claims Filed Under the Foreign Claims Act by Civilians in Afghanistan and Iraq (Apr. 12, 2007), <http://www.aclu.org/natsec/foia/log.html>, for a complete listing of all documents.

<sup>177</sup> CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, ADDING INSULT TO INJURY: U.S. MILITARY CLAIMS SYSTEM FOR CIVILIANS (2007) [hereinafter “CIVIC”].

<sup>178</sup> CIVIC Home Page, <http://www.civicworldwide.org> (last visited Sept. 17, 2009).

<sup>179</sup> CIVIC, *supra* note 177.

<sup>180</sup> CIVIC, *supra* note 177, at 3.

<sup>181</sup> CIVIC, *supra* note 177.

<sup>182</sup> CIVIC, *supra* note 177, at 2–3.

<sup>183</sup> For further discussion of this set of claims and anecdotal evidence of the situation on the ground, see Paul Von Zielbauer, Andrew W. Lehren & Edward Wong, *The Reach of War; Civilian Claims On U.S. Suggest The Toll of War*, N.Y. TIMES, Apr. 12, 2007, at A1.

“combat” has proven elusive.<sup>184</sup> In Vietnam, complicating the delineation of combat from non-combat claims was the fact that the “battlefield was anywhere and everywhere, with no identifiable front lines. Innocent civilians could not avoid the war or its suffering.”<sup>185</sup> This situation mirrors the situations in Iraq and Afghanistan, where there are no static boundaries to armed conflict. According to Captain Karin Tackaberry, then-Chief of Claims at 82nd Airborne Division headquarters in Ramadi, Iraq, “FCCs begin the claims adjudication process with the rebuttable presumption that a combat operation occurs when coalition forces fire weapons. Use of this standard significantly simplifies and standardizes claims adjudication.”<sup>186</sup> Yet, this is an oversimplification of reality, a rule that presumably speeds adjudication, but likely frustrates claimants who, for reasons discussed *supra*, likely have little understanding of FCC procedures. Recognizing the value of compensating as many claims as possible, some units have already been defining “combat” narrowly to increase the number of compensable claims.<sup>187</sup> Judge Advocates in the U.S. Army’s 82nd Airborne Division explained:

We spent much discussion trying to define combat operations. It became quite clear that the command saw the Foreign Claims process as a tool to retain the hearts and minds of the local populace whose property we damaged during normal maneuvers around the country. While many of these maneuvers were conducted in the pursuit of terrorists, much of the damage occurred when no bad guys were found and no rounds were fired. For instance, [a] village might be searched out of abundance of caution rather than because of intel[ligence] of known terrorists and be found to be a friendly village. We argued that damage incurred in such operations did not meet the AR 27-20 [the Army claims regulation] definition, nor the Webster’s definition, of combat. We further argued that paying claims incurred in such operations met the intent and spirit of the Foreign Claims Act. Such claims were routinely paid.<sup>188</sup>

The bottom line is that the line between combat and noncombat is difficult for FCCs to draw and may end up being drawn arbitrarily

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<sup>184</sup> See *supra* note 7.

<sup>185</sup> BORCH, *supra* note 75, at 42.

<sup>186</sup> Tackaberry, *supra* note 148, at 40.

<sup>187</sup> CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS 181 n.33 (2003), available at [http://www.globalsecurity.org/military/library/report/2004/oef\\_oif\\_volume\\_1.pdf](http://www.globalsecurity.org/military/library/report/2004/oef_oif_volume_1.pdf).

<sup>188</sup> *Id.*

and without consideration for what outcome best promotes military-civilian relations.<sup>189</sup>

#### D. Solutions

There are at least three distinct ways for Congress to address the problems created by the combat-exclusion of the FCA. First, Congress could retain the status quo: FCCs for non-combat claims and ad hoc systems for combat claims. Since Vietnam, this is de facto how the military has dealt with claims. A variation on this approach would be the establishment of a separate, permanent system for combat claims. Second, Congress could end all payment of combat-related claims. Finally, Congress could create a unified, permanent system to adjudicate all claims, both combat and non-combat, against the U.S. military overseas. This system could build upon the current FCCs by adding language to allow claims incident to any (combat and non-combat) activities of the U.S. military overseas harming civilian life or property.

While a scheme that simply bars all combat-related claims might, at first blush, appear to be the most economical approach, it has two major flaws: (1) having compensated combat-related claims in every major conflict since Vietnam,<sup>190</sup> U.S. military doctrine holds compensation up as an effective way to foster goodwill; and (2) assuming the doctrine is correct and compensation helps restore stability to a region, the failure to compensate combat claims may prolong conflicts and, thus, negate any financial savings.<sup>191</sup> Conversely, retaining the status quo would only continue to weaken the military's ability to conduct stability operations.<sup>192</sup> As Captain Jeffrey S. Palmer, U.S. Air Force, notes, "While the United States has dealt with combat claims after several recent conflicts, this was only on an ad hoc basis effected through diplomatic and political channels."<sup>193</sup>

Based on the military's experience with claims compensation and the underlying purposes of the FCA and its predecessors, a unified, permanent claims system would be the best solution.

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<sup>189</sup> See *supra* note 105 (describing how FCCs in Somali chose to define combat narrowly allowing, for example, compensation for victims of accidental weapon discharges).

<sup>190</sup> See generally BORCH, *supra* note 75, at 210.

<sup>191</sup> See, e.g., OPERATIONAL LAW HANDBOOK, *supra* note 99, at 320.

<sup>192</sup> *Id.*

<sup>193</sup> Palmer, *supra* note 164, at 237.

CIVIC makes a similar proposal, albeit with a separate, permanent claims system for combat situations aimed at creating goodwill among civilians through fair treatment and clear guidelines for adjudication of claims.<sup>194</sup> Jonathan Tracy, Assistant Director of the National Institute of Military Justice and former JA who served on FCCs while deployed in Iraq, outlines the features of a successful combat claims system, including a permanent and standalone structure, quick implementation, a flexible cap on amount of payments to accommodate meritorious cases, an appeals process for claimants, and adequate training for claims officers.<sup>195</sup>

With funding already in place, a permanent system would enable claims processing mechanisms, like FCCs, to start intake soon after U.S. forces arrive in a conflict zone.<sup>196</sup> Furthermore, by retaining the procedures and format of the current FCA system, a system with which military officers are already familiar, Congress would ensure a smooth transition.<sup>197</sup> Taken together, the U.S. military would be able to immediately educate locals and start adjudicating claims upon entering a conflict zone, an ability that would vastly improve relations and promote the end goal of stability. In the era of stability operations, when the U.S. military may deploy overseas with little notice, and when the ability to compensate those harmed by military operations is crucial to mission success, it is vital for commanders to know the extent of their discretion in paying claimants the moment boots touch the ground.<sup>198</sup> Claims do not wait for a source of funding; the sooner the U.S. forces can dispose of claims, the sooner mission objectives can be achieved.

The permanence of such a system would allow the military to promulgate uniform standards, ensuring fairness for all claimants and more opportunity to train adjudicators.<sup>199</sup> The distinction between combat and noncombat damage, which already appears arbitrary to claimants, could be replaced with a discretionary standard

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<sup>194</sup> CIVIC, *supra* note 177, at 5.

<sup>195</sup> Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, 15 HUMAN RIGHTS BRIEF 18, 18–19 (2007).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> For example, in October 2008, the 82nd Airborne Division of the U.S. Army assumed the “Global Response Force Mission” which entails readiness to deploy anywhere in the world within 18 hours of notification. Donna Miles, *82nd Airborne Trains to Re-assume Global Response Force Mission*, AM. FORCES PRESS SERV., Oct. 28, 2008, <http://www.defenselink.mil/news/newsarticle.aspx?id=51684>.

<sup>199</sup> Tracy, *supra* note 195, at 18–19.

of adjudication.<sup>200</sup> During his Congressional testimony, Tracy notes:

The single greatest achievement I hope for in instituting a permanent condolence payment system is that the program will be implemented uniformly. Permanence will allow the program to be established as quickly as a foreign claims commission is established at the start of any combat engagement—within two weeks instead of four to six months. A permanent program would necessarily be Armed Forces-wide, ensuring that it would be used the same way by all units throughout a combat zone. All victims would be treated equitably. Without a permanent program, such payments will always be haphazard and arbitrary based on each commander's discretion. The senior commanders of an operation may or may not decide to institute a program—as CENTCOM prohibited solatia in 2003—or, senior commanders may piecemeal a new program together—as CJTF-7 did with “solatia-like” payments. A permanent system will nullify this arbitrariness, which will demonstrate the U.S. is committed to treating innocent victims with dignity and respect.<sup>201</sup>

In other words, FCCs could compensate civilians by determining whether compensation would improve military-civilian relations, considering local law, custom, and general expectations. Commanding Officers on the ground, rather than Congress or the Pentagon, are most intimately acquainted with local attitudes and can use that knowledge to disburse funds most effectively, with an eye towards the broader mission.

As this Note has shown, objections to the allowance of combat-related claims based on the legal origins of the combat exclusion are without basis. While customary international law preserves a state's right to self-defense through the use of force, it places no restrictions on compensation for damage related to the exercise of that right;<sup>202</sup> rather, this field of law simply neglects to create a legal duty for compensation. Likewise, IHL only enumerates instances, like war crimes, where a state has an obligation to pay, but makes no provision prohibiting compensation. Just as FCA has created the option for the U.S. military to compensate

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<sup>200</sup> Palmer, *supra* note 164, at 237.

<sup>201</sup> *Aid for Civilian Casualties of War: Hearing Before the Subcommittee on State, Foreign Operations, and Related Programs of the Senate Committee on Appropriations*, Congressional Quarterly Testimony (Apr. 1, 2009) (statement of Jonathan Tracy, Associate Director, National Institute of Military Justice).

<sup>202</sup> MOORE, *supra* note 18 (“The first right of every independent state is to assure its own preservation by all the means in its power.”).

noncombat claims on a case-by-case basis, new legislation would offer further flexibility to cope with combat claims without violating long-standing principles of IHL and customary international law.

A “slippery slope” argument that the payment of combat claims will wholly waive sovereign immunity and flood the courts and FCCs with claims is misplaced. Just as the FCA defines the scope of compensable claims, an amended FCA could continue to function as a limited waiver of sovereign immunity to allow only specified administrative remedies, not judicial remedies.<sup>203</sup> Finally, during World Wars I and II, Congress was concerned about allowing citizens of countries at war with the United States to benefit from compensation. Yet, in modern conflicts, the U.S. military seeks to win the hearts and minds of civilians, while destroying and discrediting insurgent, militant, and terrorist factions. The Iraqi or Afghani civilian of today is not tantamount to the German of Nazi Germany. Generally, one of the most difficult tasks for our military (or any armed forces) is drawing the line between combatant and non-combatant. In the terms of claims, this means distinguishing those deserving of compensation from those directly participating in hostilities or otherwise supporting violence and instability.

As U.S. forces focus more on maintaining peace and nation-building, the importance of conflict resolution mechanisms, such as FCCs, is bound to increase exponentially.<sup>204</sup> The U.S. military operations in Iraq and Afghanistan could be the last of an era; stability operations may replace traditional combat operations as the primary function of the U.S. military.<sup>205</sup> In October 2008, the United States Army released a Field Manual<sup>206</sup> expounding doctrine that represents a paradigm-shift, calling upon the Army to prioritize “stability operations,” such as humanitarian relief and emergency infrastructure reconstruction,<sup>207</sup> comparably with traditional combat operations.<sup>208</sup> In order to succeed in this new era,

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<sup>203</sup> See generally *Aaskov v. Aldridge*, 695 F. Supp. 595 (D.D.C. 1988)

<sup>204</sup> DEP’T OF THE ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, at vi (2008).

<sup>205</sup> Ann Scott Tyson, *Standard Warfare May Be Eclipsed By Nation-Building*, WASH. POST, Oct. 5, 2008, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/04/AR2008100402033.html>.

<sup>206</sup> DEP’T OF THE ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (2008).

<sup>207</sup> JOINT CHIEFS OF STAFF, JOINT PUBLICATIONS 3-0, JOINT OPERATIONS, at xxi (2006).

<sup>208</sup> DoD defines stability operations as “military and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions.” U.S. DEP’T OF DEFENSE, DoD DIRECTIVE 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS 2 (2005).

the U.S. military needs tools flexible enough to adapt to a world of gray, irregular conflicts. The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, considers hard power immensely more effective when paired with soft power.<sup>209</sup> This brand of “smart power” is a hint of what could and should be the future of American foreign policy doctrine.<sup>210</sup>

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<sup>209</sup> John J. Kruzal, *Mullen Urges Emphasis on ‘Soft Power’ in Foreign Policy*, AM. FORCES PRESS SERV., Jan. 13, 2009, <http://www.defenselink.mil/news/newsarticle.aspx?id=52664>.

<sup>210</sup> Hillary Rodham Clinton, U.S. Sec’y of State, Address to the U.S. Agency for International Development Employees (Jan. 23, 2009) (transcript available at <http://www.usaid.gov/press/speeches/2009/sp090123.html>). Clinton also points to the CERP as an example of the military efficiently utilizing monetary resources while admonishing the red tape employees at DoS deal with before being able to make similar disbursements of funds. *Id.*

