PETE McKENZIE

DOING OUR DUTY?

The New Zealand Defence Force, *Ex Gratia* Payments and the Law of Armed Conflict

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2020

Abstract

*This paper examines the adequacy of New Zealand's current system for supporting victims of wrongful acts by the New Zealand Defence Force. New Zealand has a duty in international law to make reparations for certain wrongful acts. However difficulties regarding whom that duty is owed to (states or individual victims) and what it involves (restitution, compensation and/or satisfaction) mean the orthodox approach in international law to fulfilling this duty may not sufficiently support victims. This paper then examines whether the compensatory/*ex gratia *approaches of New Zealand and comparable security partners are sufficient to support civilian victims of wrongful acts. It concludes that they are not and sets out three potential reforms to improve New Zealand's compensatory mechanism: the introduction of a Defence Force Order developing and clarifying internal NZDF procedures in relation to claims for civilian harm, the introduction of an Independent Inspector-General of Defence with compensatory power where civilian harm is demonstrated, or the pursuit of a treaty recognising and giving effect to state responsibility for wrongful civilian harm. It concludes that in order to effectively support victims of internationally wrongful acts, New Zealand ought to introduce an Independent Inspector-General of Defence with power to at least recommend compensation.*

Keywords:

"Ex Gratia", "Reparations", "Law of Armed Conflict", "New Zealand Defence Force"

Contents

I Introduction[*]

In 2019, the *Stuff Circuit* documentary "Life + Limb" landed like a bomb in New Zealand's military and political discourse. Reports from the United Nations Mine Action Service (UNMAS) in Afghanistan, local leaders and victims or their families indicated that 17 civilians had been killed or injured in incidents related to explosive ordnance present on firing ranges formerly used by New Zealand's Bamiyan Provincial Reconstruction Team.[1]

The documentary's fallout led to a commitment by the government to a thorough subsurface clearance of the ranges. Major-General John Boswell, Chief of Army, was later asked by the producers of "Life + Limb" whether the injured and families of the dead ought to be compensated. Major-General Boswell responded that, "[c]ompensation for harm that can be linked to New Zealand would require very careful consideration across government."[2]

Major-General Boswell's statement was surprising, not because it opened the door to such consideration, but because it indicated that such consideration may not have already occurred. New Zealand is subject to a duty in international law to make reparations for internationally wrongful acts, such as if it violates ratified instruments like the 1987 Geneva Conventions or Protocol V to the 1980 Convention on Certain Conventional Weapons.[3] The duty to make

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∗ Submitted for the LLB(Hons) program. I am grateful to my supervisor, Professor Alberto Costi, for his invaluable advice and inexhaustible patience throughout the writing process. A disclaimer: I serve as a Second Lieutenant in the New Zealand Army Reserve. The opinions in this paper are mine alone and do not represent those of the New Zealand Defence Force.

[1] Paula Penfold and Eugene Bingham "Life + Limb" (17 November 2019) Stuff Circuit <https://interactives.stuff.co.nz/2019/circuit/>.

[2] Eugene Bingham and Paula Penfold "It'll be Years Before NZ's Firing Ranges in Afghanistan are Safe: PM" (18 November 2019) Stuff Circuit <https://www.stuff.co.nz>.

[3] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention (III) Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention (IV) Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978); and Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain

reparations for certain wrongful acts may involve the payment of compensation. Even where it does not, New Zealand may provide *ex gratia* payments as a non-legal recognition of harm.

This paper does not aim to prove New Zealand is breaching a legal duty. Instead it demonstrates that where the has been a breach of international legal obligations giving rise to a duty to make reparations, the practical expectation is that those reparations will provide effective support to victims. It demonstrates that New Zealand's current approach to reparations provides insufficient support, and that the *ex gratia* system New Zealand has supplemented it with is also inadequate. It argues it is time "careful consideration" took place about how that system could be reformed.

This paper is in four parts. First, I establish the origin and nature of New Zealand's duty to make reparations for internationally wrongful acts. Second, I consider the reparation and *ex gratia* approaches of comparable security partners. Third, I examine the reparation and *ex gratia* approach of New Zealand. Fourth, I provide a spectrum of potential reforms and recommend that the forthcoming Independent Inspector-General of Defence (IIGD) have compensatory power.

II New Zealand's Duties in International Law

As the International Committee of the Red Cross (ICRC) observed, "[i]t is a basic rule of international law that reparation is to be made for violations of international law."[4] This Part will contextualise the type of violations which may give rise to such a duty through the case study of explosive ordnance left on the NZDF's Bamiyan firing ranges. It will then examine the nature of New Zealand's duty to make reparations for internationally wrongful acts and the extent to which that duty effectively supports individual victims.

Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 2399 UNTS 1 (opened for signature 28 November 2003, entered into force 12 November 2006).
November 2003, entered into force 12 November 2006).

[4] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (2nd ed, Cambridge University Press, Cambridge, 2009) at 537; see also *Factory at Chorzów (Germany v Poland), Merits* (1927) PCIJ (series A) No 9 at 29, which held that, "Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."

A Explosive Ordnance in Bamiyan Province, Afghanistan

To contextualise New Zealand's international obligations, it is useful to examine a situation in which New Zealand has arguably committed an internationally wrongful act. Consider the death or injury of 17 civilians in Bamiyan Province, Afghanistan, as a result of explosive ordnance present on firing ranges which the NZDF had previously operated.[5]

New Zealand accepted an international legal duty regarding the clearance of Explosive Remnants of War (ERW) when in 2007 it ratified Protocol V to the 1980 Convention on Certain Conventional Weapons (CCW).[6] Article 3 of Protocol V requires signatories to "mark and clear, remove or destroy [ERW] in affected territories under its control" as soon as feasible after active hostilities end.[7] This is to be done with the International Mine Action Standards (IMAS) – a set of standards for mine clearance agreed on by the UN Inter-Agency Coordination Group on Mine Action – in mind.[8] New Zealand's resulting international legal duty was recognised by the NZDF in its 2017 *Manual of Armed Forces Law: Law of Armed Conflict* (LOAC), which noted that insofar as it controlled any territory at the end of active hostilities, it had a duty to engage in the "marking and clearing, removing and/or destroying [of] ERW…".[9]

Protocol V defines explosive ordnance as "conventional munitions containing explosives".[10] Its definition of ERW includes 'abandoned explosive ordnance', which are:[11]

[5] Penfold and Bingham, above n 1.
[6] Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, above n 3; and "Treaties, States Parties and Commentaries: New Zealand" (accessed 15 September 2020) International Committee of the Red Cross <https://ihl-databases.icrc.org>.
[7] Art 3.3.
[8] Art 3.4.
[9] NZDF HQ "Manual of Armed Forces Law: Law of Armed Conflict" (7 August 2017) DM 69/2 (Vol 4) at [7.9.9].
[10] Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, above n 3, art 2.1.
[11] Art 2.3.

> … explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it…

The explosive ordnance present on the Bamiyan firing ranges after the NZDF's departure included "40mm grenades and mortars".[12] This comes under Protocol V's scope. The UN Mine Action Service (UNMAS) is responsible for developing and administering mine action standards;[13] its representatives criticised the NZDF's 2013 ERW clearance as unsatisfactory since approximately 18 million square metres of the firing ranges were not cleared and the 'clearance' of approximately 297,000 square metres was to an allegedly unsatisfactory standard.[14]

Article 8 of Protocol V specifically generates a regime for supporting victims of ERW, noting that each contracting party shall "provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war."[15] This can be done through the United Nations (UN) or other international or national organisations.[16] This provides a clear explanation of New Zealand's responsibility in the aftermath of the civilian harm caused by ERW on the Bamiyan ranges. Insofar as states do not comply with these provisions, their responsibility may be engaged in international law through the duty to make reparations.[17] However where a treaty does not specify remedies for breach, it is more difficult for civilian victims to get effective support through international law.

Given the foregoing analysis it is arguable that by not (or unsatisfactorily) clearing parts of the ranges and not providing effective support for victims of ERW, New Zealand may have breached its duty under the CCW.

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[12] Penfold and Bingham, above n 1.
[13] "IMAS Management Structure and Terms of Reference for Review Board Members" (accessed 5 September 2020) International Mine Action Standards <https://www.mineactionstandards.org/en/about-imas/>.
[14] Penfold and Bingham, above n 1.
[15] Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, above n 3, art 8.2.
[16] Art 8.2.
[17] *Factory at Chorzów (Germany v Poland) Merits*, above n 4, at 29.

B Duty to Make Reparations in International Law

Where it breaches an international legal duty, as it arguably did by improperly clearing the Bamiyan firing ranges, New Zealand is obligated to make reparations.[18] An early example of states accepting this duty's force in international law is the 1907 Hague Convention (IV), art 3 of which establishes that:[19]

> A belligerent 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.

This is unambiguous apart from the phrase "if the case demands".[20] This refers to the interplay between restitution and compensation – it is only if the former cannot be achieved that the latter is required.[21] This interpretation arises from art 36 of the International Law Commission's (ILC) Draft Articles on State Responsibility (which were later recognised by the UN General Assembly), which asserts that states must "compensate for the damage caused… insofar as such damage is not made good by restitution".[22] The nature of physical injury or death means that restitution in kind may not possible; in such cases, art 3 requires compensation.

The duty has been recognised in other international legal instruments, including Additional Protocol I to the Geneva Conventions,[23] the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafer, the Basic Principles and

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[18] At 29; see also Ian Brownlie and James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2012) at 523.
[19] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land USTS 539 (opened for signature 18 October 1907, entered into force 26 January 1910), art 3.
[20] Art 3.
[21] Henckaerts and Doswald-Beck, above n 4, at 538.
[22] At 539.
[23] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), above n 3, art 91.

Guidelines on the Right to a Remedy),[24] and the ILC Draft Articles on State Responsibility.[25] According to the ICRC, this established the duty to make reparations for internationally wrongful acts as "a long-standing rule of customary international law".[26]

C Legal and Practical Meaning of "Reparations"

The ILC Draft Articles on State Responsibility defined "reparations" in the following terms: "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination".[27] Restitution "re-establish[es] the situation that existed before the wrongful act was committed", typically through restitution in kind; compensation is payment of damages for loss where restitution in kind would be insufficient or impractical; satisfaction is an "appropriate modality" such as acknowledgment of the breach, expression of regret and/or formal apology.[28]

While it may be permissible in strict legal terms to discharge the obligation to make reparations for internationally wrongful acts through satisfaction, apologies and acknowledgements, this does little to support victims in practice. As the Hon Ron Mark MP, Minister of Defence, observed in his Ministerial Foreword to the 2018 Strategic Defence Policy Statement, to be effective the NZDF "must operate at high levels of public trust and confidence".[29] As he remarked in an elaboration of New Zealand's foreign policy principles delivered at the National Defence University in the People's Republic of China, that requires the NZDF to "act to promote New Zealand as a good international citizen, supporting the rules-based order and operating in accordance with law, including the Law of Armed Conflict and International Humanitarian Law."[30] Accordingly New Zealand could purport to fulfil its obligation to make reparations through mere satisfaction, if that was the form of reparations

[24] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147 (2006), art 12(a).
[25] *Responsibility of States for Internationally Wrongful Acts* GA Res 56/83 (2002), art 36.1.
[26] Art 34.
[27] Art 35.
[28] Henckaerts and Doswald-Beck, above n 4, at 538; see also Brownlie and Crawford, above n 18, at 553.
[29] New Zealand Defence Force "2018 Strategic Defence Policy Statement" (July 2018) at 3.
[30] Hon Ron Mark MP "Responsibilities, Challenges and Values: The New Zealand Defence Perspective" (Speech to the PLA National Defence University, People's Republic of China, 2 July 2019).

demanded by the injured state, doing so might weaken domestic and international trust in New Zealand by leaving victims of harm practically unsupported.[31] It is for that reason that New Zealand has chosen to establish an *ex gratia* compensation scheme for victims. Insofar as New Zealand is obligated to make reparations for internationally wrongful acts, it should provide restitution or compensation.

D Scope of the Duty to Make Reparations

Where a duty exists to make reparations for internationally wrongful acts, a question arises regarding who precisely reparations should be made to. Some international legal instruments specify the recipient of such duties, as was the case with Protocol V of the CCW which refers to the duty to provide "care and rehabilitation" to victims of ERW.[32] In the absence of such certainty, international law typically obliges states which commit internationally wrongful acts to make reparations to the state affected.[33] According to Theo van Boven, this meant:[34]

> … wrongs committed by a State against nationals of another State may only give rise to claims by the other State as asserting its own rights and not the rights of individual persons or groups of persons.

There is a risk that the orthodox approach of making reparations to states does little to practically support victims of internationally wrongful acts. A number of human rights regimes have addressed this issue by extending the compensatory obligations of states to individual victims.[35] Multiple international legal instruments (of both regional and general

[31] Brownlie and Crawford, above n 18, at 552 and 567; and Henckaerts and Louise Doswald-Beck, above n 4, at 538.
[32] Protocol on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, above n 3, art 8.2.
[33] *Letter dated 2005/01/31 from the Secretary-General addressed to the President of the Security Council – Regarding the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* UN Doc S/2005/60 (1 February 2005) at [593]; see also Brownlie and Crawford, above n 18, at 106 and 567.
[34] Theo van Boven "Victims' Rights to A Remedy and Reparation: The New United Nations Principles and Guidelines" in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers, Boston, 2009) 19 at 21.
[35] Miriam Cohen *Realizing Reparative Justice for International Crimes* (Cambridge University Press, Cambridge, 2020) at 20; see also Brownlie and Crawford, above n 18, at 111.

scope) have specified that victims of violations of human rights are entitled to effective remedies,[36] such as the International Covenant on Civil and Political Rights,[37] regional human rights instruments such as the European Convention on Human Rights, the American Convention on Human Rights, and the Optional Protocol to the African Charter establishing an African Court of Human Rights,[38] and the Basic Principles and Guidelines on the Right to a Remedy.[39] According to the Basic Principles and Guidelines on the Right to a Remedy, a victim's right to remedies include:[40]

> (*a*) Equal and effective access to justice;
>
> (*b*) Adequate, effective and prompt reparation for harm suffered;
>
> (*c*) Access to relevant information concerning violations and reparation mechanisms.

In explaining this duty to provide effective remedies to victims, it emphasises that an appropriate remedy for "physical or mental harm" is compensation.[41]

The question which then arises is whether, when no other options are left at international law, New Zealand's system of *ex gratia* payment is a sufficiently effective remedy to support individual victims in practice. Parts III and IV will examine this question through a comparative analysis of the *ex gratia* approaches of New Zealand and analagous security partners.

III A Comparative Analysis of Compensatory Mechanisms

In the context of an international duty to make reparations for internationally wrongful acts,

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[36] See International Convention on the Elimination of all Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969), art 6; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 14; and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 39.
[37] *International Covenant on Civil and Political Rights* GA Res 2200A (1966), art 2.3.
[38] Cohen, above, n 35, at 30.
[39] *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian,* above n 24.
[40] Art 11.
[41] Art 20(a).

the practical expectation that states will effectively support victims and a desire to avoid attempts at domestic litigation or strategically harmful civilian resentment, a number of comparable security partners (like the United States of America, the North Atlantic Treaty Organisation (NATO) and the United Nations) have developed compensatory mechanisms for cases where they cause civilian harm.[42] To contextualise New Zealand's approach to reparations and *ex gratia* payments, this Part analyses the sufficiency of these comparable partners' mechanisms. I place particular emphasis on reparations in Afghanistan given, as will later be shown, New Zealand's reparations have largely occurred in that context. Figure 1.1 below provides a brief summary of the differences in approach taken by different security partners.

Figure 1.1: Comparative Approaches	*Clear Compensation System?*	*Ex Gratia System?*	*Systemised Independent Investigations?*	*Specific Guidance for Officials?*
New Zealand	Yes.	Yes – up to $200 in the first instance in Afghanistan.	No.	No.
United States of America	Yes.	Yes – up to USD$2,500 in the first instance.	No.	Yes.
United Kingdom	Yes.	Yes.	No.	Yes.
Australia	No.	Yes – up to AUD$2,500 in the first instance.	No.	Unclear.
Canada	No.	Yes – up to	No.	Unclear.

[42] Christopher Kolenda, Rachel Reid, Chris Rogers and Marte Retzius "The Strategic Costs of Civilian Harm" (Open Society Foundations, New York, 2016) at 10.

		CAN$2,000 in the first instance.		
NATO	No.	No.	No.	No.
United Nations	No.	Yes – with regional variations.	No.	No.

A The United States of America

The United States' most important compensatory tool is the Foreign Claims Act (FCA).[43] Prior to 1918, victims of civilian harm had no remedies against the United States' armed forces:[44]

> [I]n American law (as in international law) [the rule] was one of sovereign immunity: a state may not be hauled against its will into its own civil courts or into those of coequal sovereigns.

In 1918 President Woodrow Wilson offered a path to a remedy by adopting the claims process of any country in which American troops were deployed – if a claim would have been payable had that country's military caused it, it would be payable by American forces.[45] This legislation was updated for the Second World War – eventually resulting in the Foreign Claims Act (FCA) – and allowed foreign nationals to make claims to Foreign Claims Commissions (FCCs) for non-combat related harm.[46] "Meritorious [single] claims" can be settled up to $50,000, depending on the FCC's composition.[47]

[43] Foreign Claims Act 10 USC § 2734-2736.
[44] John Fabian Witt "Form and Substance in the Law of Counterinsurgency Damages" (2008) 41 Loyola L.A Law Review 1455 at 1458.
[45] At 1458.
[46] At 1461.
[47] Foreign Claims Act 10 USC § 2734; and Witt, above n 44, at 1462.

The FCA was to act as a "non-lethal weapons system" – by supporting the victims of harm, the American "military attempt[ed] to win the hearts and minds of civilians in war zones".[48] However civilians harmed by combat-related damage could not make claims under the FCA.[49] To address this shortfall, American forces were also permitted to make *ex gratia* payments.[50] Making informal amends became common, albeit ad hoc, practice.[51] *Solatia* or *ex gratia* is now paid in accordance with local custom where authorised by the Department of Defense.[52] Funds for *solatia* come from unit operations budgets or discretionary funding; funds for *ex gratia* come from the Commander's Emergency Response Program (CERP), otherwise used to fund infrastructure and humanitarian relief.[53] The Department of Defense determined condolence payments were customary in Afghanistan in 2003 and in Iraq in 2004; by 2007 USD$30 million had been paid in condolences to Afghan and Iraqi civilians.[54] The Department of Defense recently issued an interim policy regulation to standardise the payment of *solatia/ex gratia* by commanders, which will limit the inconsistencies which previously arose.[55]

The combination of a regularised claims process for non-combat harm and an *ex gratia* process for other harm has allowed the United States to address a significant portion of direct civilian harm. However the American approach is still flawed. While the FCA – with its $50,000 limit – allows large claims to be settled fairly, the combat exclusion prevents it from addressing the majority of harm caused.[56] *Solatia* or *ex gratia* cannot sufficiently address the shortfall, since they are typically limited to approximately $2,500 (insufficient for many instances of harm).[57] The FCA authorises but does not require the establishment of Claims Commissions, meaning victims in some operational contexts may be left entirely without

[48] At 1456.
[49] Jordan Walerstein "Coping with Combat Claims: An Analysis of the Foreign Claims Act's Combat Exclusion" (2009) 11 Cardozo Journal of Conflict Resolution 319 at 320.
[50] At 323.
[51] Witt, above n 44, at 1462.
[52] Walerstein, above n 49, at 342.
[53] At 340.
[54] Witt, above n 44, at 1462.
[55] Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That is Incident to Military Operations 2020, pursuant to National Defense Authorization Act for Fiscal Year 2020 Pub. L. 116–92 §1213; and Annie Shiel "DOD's New Ex Gratia Policy: What's Right, What's Wrong, and What's Next" (10 July 2020) Just Security <https://www.justsecurity.org>.
[56] Witt, above n 44, at 1462.
[57] Walerstein, above n 49, at 338.

remedy.[58] The United States' compensatory approach does not specify accountability measures for soldiers involved in civilian harm; discipline remains the (inconsistently exercised) prerogative of responsible officers.[59] The system is also subject to concerns of bias (claims are assessed by officers internal to the American military system and potentially connected to the alleged perpetrators of harm or subject to career consequences for adverse findings),[60] and obstacles to justice (it is unclear to whom allegations of civilian harm should be addressed in the first instance, and there are difficulties around ensuring claims are passed up the chain of command given the incentive to avoid accountability through minimising or ignoring allegations),[61] that this paper engages with more comprehensively in relation to New Zealand's compensatory system.[62]

B The United Kingdom

The United Kingdom structured its reparations system by analogy to domestic law. In Afghanistan, it provided *ex gratia* payments when victims could demonstrate on the balance of probabilities that they were harmed by negligent behaviour by British armed forces which would have given rise to liability were the victim British.[63] Area Claims Officers have delegated authority from the Ministry of Defence's Head of Common Law Claims and Policy (HCLP) to make payments of up to £75,000 for injury/property damage; more serious claims required direct approval from HCLP.[64] By 2016 the United Kingdom had paid £19.8 million to settle Iraqi claims.[65]

The reparations payable under the United Kingdom's system are significant. It is useful that some clarity – a negligence-based common law standard – regarding the basis on which

[58] Witt, above n 44, at 1466.
[59] Anna Khalfaoui, Daniel Mahanty, Alex Moorehead and Priyanka Motaparthy "In Search of Answers: U.S Military Investigations and Civilian Harm" (Columbia Law School, New York, 2019) at 12.
[60] At 2.
[61] Rebecca Barber "No Time To Lose: Promoting the Accountability of the Afghan National Security Forces" (Oxfam, Oxford, 2011) at 15.
[62] Walerstein, above n 49, at 342.
[63] Chris Rogers "Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces" (Center for Civilians in Conflict, Washington DC, 2010) at 8.
[64] At 8.
[65] Thomas Gregory "The Costs of War: Condolence Payments and the Politics of Killing Civilians" (2019) 46 RIS 158 at 161.

claims are to be judged has been provided. However the United Kingdom's system, run by non-independent Ministry of Defence officials, suffers from the same concerns of bias, lack of independence and obstacles to justice as the United States' approach. Similarly to the United States, there is no indication that the British compensatory approach connects to accountability mechanisms for soldiers involved in civilian harm. Moreover, it is unclear what standard of legal expertise is required of Area Claims Officer or what the standard of care (conduct falling below which constituting negligence) the Ministry of Defence considers is applicable to its forces.[66]

C Australia

In 2009 Australia introduced the Tactical Payments Scheme – a compensatory scheme likely based off of the American *ex gratia* approach – which allowed senior officers to make *ex gratia* payments of up to AUD$2,500 for civilian harm or property damage.[67] Between 2018 and 2019 the Australian government paid AUD$8,705 under the scheme for property damage caused by motor vehicles.[68] It is unclear whether *ex gratia* of up to AUD$2,500 is sufficient to cover the significant physical and emotional harm which can arise from wrongful acts by military personnel. The same concerns of bias and obstacles to justice observed in relation to the United States and British approaches arise here.

Australia also has an Inspector-General of the Australian Defence Force (IGADF). This role is primarily focused on ensuring the integrity of the military justice system, but there is scope for the IGADF to conduct inquiries into any matter concerning the Australian Defence Force when directed by the Minister of Defence or Chief of Defence Force.[69] The IGADF is currently pursuing an inquiry into allegations that ADF personnel breached LOAC in Afghanistan.[70] However the IGADF's inquiry appears focused on identifying misconduct and

[66] Rogers, above n 63, at 7.
[67] Gregory, above n 65, at 161.
[68] Governance and Reform Division "Department of Defence Annual Report 2018-19" (Australian Department of Defence, 2019) at 65.
[69] Defence Act 1903 (Cth), ss110A, 110C(e) and 110C(f).
[70] Annual Reports to Parliament "Inspector-General of the Australian Defence Force – Annual Report 01 July 2018 to 30 June 2019" (25 November 2019) at 6.

recommending appropriate sanctions and structural reforms to prevent recurrence.[71] Recommending reparations, while not specifically prohibited, does not appear to be a significant part of the IGADF's role. As this paper will address in Part V, this is an oversight.

D Canada

Canada provides *ex gratia* payments for civilian harm on an ad hoc basis. According to the Centre for Civilians in Conflict, the Canadian Legal Advisor in Kandahar, Afghanistan, was authorised to make reparations payments of up to CAN$2,000; claims for more than CAN$2,000 had to be approved by the Canadian Ministry of Defence.[72] This compensatory approach gives rise to the same concerns of bias, lack of independence and obstacles to justice previously noted. The CAN$2,000 limit for immediate compensatory payments was too low, and the requirement that higher claims receive approval from the Ministry of Defence could result in delays of "weeks or months".[73]

E The North Atlantic Treaty Organization (NATO)

NATO has no official policy on reparations for civilian harm. Its 2016 *Policy on the Protection of Civilians*, intended to provide a set of overarching principles for civilian harm mitigation by NATO member-states, made no mention of remedial measures like reparations. Stephen Hill (the Policy's architect) and Andreea Manea identified this as a potential "shortcoming of the policy."[74] NATO engaged with reparations through the NATO International Security Assistance Force's (ISAF) limited *Non-Binding Guidelines on Monetary Payments to Civilian Casualties in Afghanistan* – nine statements of general intent, such as to "[p]romptly acknowledge combat-related cases of civilian casualties".[75] These provided little specific policy support to member-states, who remained responsible for reparations decisions. Later ISAF-specific reforms around investigations, transparency, and

[71] At 9.
[72] Rogers, above n 63, at 11.
[73] At 11.
[74] Steven Hill and Andreea Manea "Protection of Civilians - A NATO Perspective" (2018) 34 Utrecht Journal of International and European Law 146 at 154.
[75] NATO "NATO Nations Approve Civilian Casualty Guidelines" (press release, 6 August 2010).

making amends had some tactical benefit, but have not been standardised across NATO operations – despite the UN Human Rights Council's express recommendation that NATO extend its guidelines to its Libya operations.[76]

The absence of specific guidance (such as the quantum of *ex gratia* payments which should be made, the nature of the system through which claims should be considered and processed or when and how such claims should be reported) regarding reparations and *ex gratia* payments for civilian harm makes NATO a weak international actor in this field. This is especially problematic since, according to the Center for Civilians in Conflict (CIVIC), "Coalition structures play a key role in the absence of amends… [because they] may reduce transparency by allowing one nation to hide behind the many."[77]

F United Nations (UN) Peacekeeping Forces

The UN treats reparations for civilian harm caused by its forces as an optional tool for protecting civilians. It lacks any specific, overarching guidance on the topic. Its recent text, *The Protection of Civilians in UN Peacekeeping Handbook*, suggests reparations for civilian harm as an option just twice, mainly in the following terms:[78]

> Specifically, [a] mission may, inter alia:
>
> …
>
> - Support, through ensuring conducive security conditions, the provision of civilian-led humanitarian, rehabilitation and/or recovery assistance and *promote the compensation of victims of violence*, as applicable. [Emphasis added]

Reparations are thus a matter for individual UN Missions. For example, the UN's peacekeeping mission in the Democratic Republic of the Congo (MONUSCO) does provide

[76] Kolenda, Reid, Rogers and Retzius, above n 42, at 32; Hill and Manea, above n 74, at 155.
[77] Annie Shiel "Sum of All Parts: Reducing Civilian Harm in Multinational Coalition Operations" (Center for Civilians in Conflict, Washington DC, 2019) at 24.
[78] Baptiste Martin and Tara Lyle "The Protection of Civilians in UN Peacekeeping Handbook" (United Nations Department of Peace Operations, New York, 2020) at 142.

monetary payments to civilians for damage it has caused. However, according to CIVIC, "it does this in an ad hoc way with no standard operating procedure (SOP) or guidelines."[79] Consequently, different MONUSCO regional offices took different approaches and "there was confusion amongst both MONUSCO and UN agency officials as to how and when the Mission addresses civilian harm."[80] This inconsistency and opacity is problematic in ensuring civilians have access to effective remedies for wrongful acts by UN personnel.

IV New Zealand's Flawed Compensatory Mechanism

The compensatory approaches taken by analogous security actors raise questions concerning (among other things) quantum of compensation available, potential bias in assessing claims of civilian harm and significant obstacles to initially reporting those claims. With this context it is possible to examine New Zealand's approach. The NZDF has no comprehensive reparations policy. It has, however, set out ad hoc rules for certain circumstances. This section will examine the nature of that mechanism and explain why it is incapable of effectively supporting victims of internationally wrongful acts.

There is limited public information available, but in response to an Official Information Act request, the NZDF stated:[81]

> [The NZDF has] no explicit policy or procedure regarding payments to civilians or local nationals who may have suffered death, injury or property damage as a result of NZDF activities. Each situation is dealt with on a case by case basis.

Defence Order 77 authorises the payment of reparations (entailing an admission of liability) and *ex gratia* payments (which do not necessarily entail liability). Depending on the size of

[79] Lauren Spink "From Mandate to Mission: Mitigating Civilian Harm in UN Peacekeeping Operations in the DRC" (Center for Civilians in Conflict, Washington DC, 2017) at 32.
[80] At 32.
[81] Letter from G.R Smith (Commodore RNZN, Chief of Staff HQNZDF) to Dr Thomas Gregory (Senior Lecturer, University of Auckland) regarding the NZDF's policies on ex-gratia payments (OIA-2018-3159) (29 August 2018): With regards reparations, the CDF can authorise up to $150,000, Defence Minister up to $750,000, and Cabinet over $750,000; with regards ex gratia payments, the CDF can authorise up to $30,000, Defence Minister up to $75,000, and Cabinet over $75,000.

the expenditure, payment must be authorised by the Chief of Defence Force (CDF), the Defence Minister, or Cabinet.[82] In Afghanistan, a proposal for a financial delegation of up to $200 to the Senior National Officer (SNO) for *ex gratia*/*solatia* was approved by CDF in May 2010.[83] This was a response to a 2009 tactical directive from International Security Assistance Force (ISAF) Commander General Stanley McChrystal. Between 8 October 2009 and 22 March 2011, 14 reports of property damage by SAS personnel were received. 13 were deemed to merit reparations under the financial delegation, leading to cumulative reparations of $3,000.

A Inconsistency of Treatment Between Victims

A key problem of the NZDF's system is that it facilitates inconsistency of treatment across victims. This is driven by differentiation in reparations procedures between Afghanistan and elsewhere and the lack of clear procedures in either scenario.

First, consider the differentiation in reparations procedures between Afghanistan and other operational contexts. Only in Afghanistan does the SNO have official authority to independently award reparations for civilian harm; in other operational contexts, that decision must be made by more senior officials.[84] Compared to other operational contexts, Afghan complainants may find the compensatory process more efficient since they have to engage with fewer layers of bureaucracy, but more biased since the decision-maker is more directly connected with the case. This produces inconsistency in treatment of cases of civilian harm between Afghanistan and elsewhere.

Second, insofar as the NZDF deals with claims on a "case by case basis" without a unifying set of guiding principles, there will be inconsistency of treatment across professed victims.[85] In addition to the sparse guidance regarding civilian harm which the NZDF publicly disclosed, private NZDF directives guiding SNOs and commanders in relation to allegations of civilian

[82] At Enclosure 1.
[83] At Enclosure 2.
[84] At Enclosure 2.
[85] At Enclosure 2.

harm, according to the Operation Burnham Inquiry's report, "lacked specific guidance".[86] Without guidance about the required standard of proof, rules of evidence, time limits for lodging claims, recommended investigative process or quantum of reparations to be awarded, and with inevitable variance between different SNOs across operations, discretion will be exercised in different ways.[87] Similar inconsistency has been identified by Columbia Law School and CIVIC in the investigative practices of the American military, which has a similarly decentralised command approach to the NZDF, in Iraq and Afghanistan:[88]

> The U.S. military preference for decentralized decision-making and command discretion, along with other variables, helps to explain the procedural complexity of investigations and the wide degree of variation observed in U.S. military practice over time, across different 13 operations, and across commands.

The likelihood of inconsistent treatment has undesirable implications. Inconsistency of treatment undermines even the thinnest conception of the rule of law – claimants do not know how their claim will be assessed, cannot be sure of consistency of treatment and are subject to the individual preferences of the officer in the role at that time. This is worrying, given that most of New Zealand's peacekeeping operations overseas are intended to support and deepen the application of the rule of law.[89] Inconsistency of treatment also risks aggravating and further alienating the local population.[90] Finally, and most problematically, the likelihood of inconsistent treatment makes it difficult for New Zealand to consistently and effectively support victims of civilian harm.

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[86] Terence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham* (Government Inquiry into Operation Burnham, July 2020) at [58].
[87] Thomas Gregory and Pete McKenzie "Civilian Casualties and the New Zealand Defence Force" (New Zealand Alternative, Wellington, 2019) at 16.
[88] Khalfaoui, Mahanty, Moorehead and Motaparthy, above n 59, at 13.
[89] "2018 Strategic Defence Policy Statement", above n 29, at 6.
[90] Emily Gilbert "The Gift of War: Cash, Counterinsurgency and 'Collateral Damage'" (2015) 46 Security Dialogue 403 at 409; Jonathan Tracy "Responsibility to Pay: Compensating Civilian Casualties of War" (2007) 15 Human Rights Brief 16 at 18 <https://digitalcommons.wcl.american.edu>.

B The Difficulty of Initiating a Complaint

The current system does not adequately address the procedural obstacles confronting those who allege civilian harm or claim reparations. Given the wide operational authority of SNOs, and the NZDF's Afghanistan-specific compensatory system, allegations of civilian harm should presumably be initially directed towards the SNO.[91] Even on the assumption that alleged victims sufficiently understand the NZDF to know to do so, communicating such a claim is difficult; Rebecca Barber identified for CIVIC that Afghan civilians had difficulty identifying the appropriate individuals or institutions to which they should direct allegations of civilian harm even in relation to the Afghanistan National Security Forces – the problem is presumably even worse in relation to international military forces.[92] While one would hope SNOs maintain relationships with civilian leaders who could pass on such claims, there is no guarantee this will be the case.[93] CIVIC began supporting a small number of 'Community Civilian Protection Councils' in Afghanistan in 2017, which could facilitate connections between local communities and government or insurgent forces, after it recognised that there was a significant shortage of dialogue between those affected by civilian harm and those perpetrating it. Neither can victims reliably communicate their claims to junior soldiers – either at the time or subsequently – given that, per the American Army Tactical Publication on Protection of Civilians, fear of a "punitive approach provides incentives for subordinates to suppress information and cover up incidents" to protect themselves or their fellow soldiers.[94] The American military has addressed these issues by beginning to proactively engage with civilian communities and inquire about claims of harm – steps the NZDF does not appear to have taken.[95]

This lack of clarity about the proper recipient of allegations and how such allegations could be communicated obstructs victims' previously-discussed right to effective remedies. According to van Boven, the right to effective remedies has two dimensions: substantive (for example,

[91] Smith, above n 81, at Enclosure 2.
[92] Barber, above n 61, at 15.
[93] "Afghanistan: Community Engagement on Civilian Protection" (CIVIC, Washington DC, 2019) at 3.
[94] Barber, above n 61, at 25.
[95] At 21.

the making of reparations) and procedural ("unhindered and equal access to justice").[96] The lack of clarity and obstacles to communication inherent to the NZDF's current compensatory system may violate the right's procedural dimension by complicating attempts to achieve accountability, a challenge which will likely be disproportionately experienced by marginalised communities with fewer resources and connections with which to pursue claims.

C Independence of the Decision-Making Process

Even assuming that allegations do reach the SNO for consideration, the decision-making process may not be sufficiently independent to ensure effective decision-making. Insofar as the process of verifying claims and granting reparations is led by the SNO or their subordinates, comprehensive and honest testimony may be deterred, compromising the process's integrity.

To verify allegations of civilian harm, any decision-making process will require participation from NZDF personnel involved with the relevant operation. If the process is led by SNOs or their subordinates, such personnel may not feel able to speak freely on the basis that "those in positions of command may bear some responsibility for what has occurred or otherwise be part of the problem".[97] Moreover, as a recent Columbia Law School report observed, "an inherent tension and a potential conflict of interest" is created when military commanders both direct operations and are responsible for investigations about whether civilian harm was caused by those operations.[98] The SNO will be a relatively close superior of any personnel alleged to have caused civilian harm – a sufficiently direct connection as to raise questions of bias towards one party. The SNO also has a direct personal interest in minimising allegations given investigations could reveal (potentially career-limiting) "systemic issues with specific units or incriminate the command leadership, senior commanding officers, or their own troops".[99] It is for these reasons that the Operation Burnham Inquiry concluded that:[100]

[96] Van Boven, above n 34, at 22.
[97] Arnold and Palmer, above n 86, at [43].
[98] Khalfaoui, Mahanty, Moorehead and Motaparthy, above n 59, at 2.
[99] At 26.
[100] Arnold and Palmer, above n 86, at [44].

> In a relatively small defence force such as New Zealand's, we consider that the risk of bias or perceived bias is high, which points towards [the need for] a process independent of NZDF.

While the armed forces have a countervailing duty to address and suppress LOAC violations, this "potential conflict of interest" may reduce the perceived integrity of any investigation and decision by senior NZDF personnel regarding civilian harm allegations.[101] This is especially problematic since victims may choose not to come forward if they do not have confidence in the integrity of the process – which in itself jeopardises the process' integrity.

D Insufficient Compensation

The quantum of compensation which can be granted to victims through New Zealand's compensatory mechanism is insufficient. Under the Afghanistan approach, SNOs were only empowered to award *ex gratia* payments of up to $200 – insufficient to adequately compensate most physical injury and many forms of property damage.[102] The CDF and responsible Minister are empowered to authorise *ex gratia* of up to $30,000.[103] There have been no recent public examples of this occurring, which makes it difficult to predict the quantum of reparations which might be awarded for serious harm, but it is likely they would award a level of reparations similar to that allowed by security partners like the United States.[104]

As Figure 1.2 demonstrates, the New Zealand approach provides significantly lower *ex gratia* at first instance than the approaches of comparable states do.

Figure 1.2: **Quantum of**	*New Zealand*	*United States of America*	*United Kingdom*	*Australia*	*Canada*

[101] Brownlie and Crawford, above n 18, at 528; and Khalfaoui, Mahanty, Moorehead and Motaparthy, above n 59, at 2.
[102] Smith, above n 81, at Enclosure 2.
[103] At Enclosure 2.
[104] Walerstein, above n 49, at 338.

Support					
***Ex Gratia* Limit at First Instance**	NZD$200 (by SNOs in Afghanistan)	USD$2,500 (by senior officers)	£75,000 (by Area Claims Officers)	AUD$2,500 (by senior officers)	CAN$2,000 (by Canadian Legal Advisor in Afghanistan)

Accordingly, even if we accept the practice of the United States and other comparable security partners as sufficient, New Zealand's Afghanistan-specific financial delegation to SNOs of up to $200 in *ex gratia* is comparatively weak. However even the practice of other comparable states is likely insufficient, as Jonathan Tracy observed from his experience as a Judge Advocate in the United States Army, "[u]nder the FCA, officers… may only pay $2,500 for the death of a civilian killed in a firefight… This artificial limit leaves survivors bitter and frustrated".[105]

E Increased Difficulty in Preventing Future Harm

Finally, while there may be accountability for *individual* instances of civilian harm (such as the outcry over *Hit and Run*, which prompted the Operation Burnham Inquiry), the absence of a consistent system for providing reparations makes it more difficult for the NZDF to identify and learn from *trends* in civilian harm.[106] As the American Army Techniques Publication notes, "[c]ollection, analysis, and dissemination of civilian casualty information horizontally and vertically are critical for civilian casualty mitigation".[107] However the view of a SNO is limited to the small number of claims in their operational context; it is unlikely a SNO could observe a trend from this limited dataset (especially since that is not an explicit requirement of their role). Even if they do, that trend may be treated as solely relevant to that operational context. As the Columbia Law School and CIVIC report notes:[108]

[105] Tracy, above n 90, at 18.
[106] Arnold and Palmer, above n 86, at [8].
[107] Khalfaoui, Mahanty, Moorehead and Motaparthy, above n 59, at 56.
[108] At 57.

> Where lessons stemming from specific incidents are not integrated and fed back into the military – particularly when investigations have identified systemic issues, such as lack of understanding of existing procedures and ROEs or trainings – similar incidents may recur.

F Conclusions on New Zealand's Compensatory Mechanism

The problems this paper identifies with New Zealand's compensatory mechanism make it unsatisfactory in effectively aiding and supporting the victims of internationally wrongful acts. The obstacles to participation prevent victims from effectively lodging claims,[109] the bias and lack of independence inherent to New Zealand's system of investigating claims of civilian harm prevent effective investigation,[110] its inconsistency and low quantum of reparations do not satisfactorily support victims who have demonstrated significant harm,[111] and the inability to learn from trends makes it more difficult to prevent future civilian harm.[112] New Zealand's compensatory mechanism does not currently provide an effective remedy.

As Figure 1.1 illustrates, other compensatory mechanisms are also chronically unsatisfactory at practically supporting and aiding victims of internationally wrongful acts. But even from that comparative perspective, New Zealand's current "case by case" approach, with limited compensation available, is less satisfactory than the approaches of comparable states (though better than the UN and NATO).[113] New Zealand must reform and strengthen its compensatory mechanism to address these flaws and comparative weaknesses.

V A Spectrum of Reforms

Having established that New Zealand's compensatory mechanism is practically and comparatively unsatisfactory, this Part will consider three reform options of progressively

[109] Barber, above n 61, at 15.
[110] Arnold and Palmer, above n 86, at [43].
[111] Tracy, above n 90, at 18.
[112] Khalfaoui, Mahanty, Moorehead and Motaparthy, above n 59, at 57.
[113] Smith, above n 81.

increasing ambition – strengthening internal Defence procedures, empowering an IIGD to make reparations, and affirming state responsibility to make reparations to victims for internationally wrongful acts – which could make that mechanism satisfactory.

A A Defence Force Order (DFO) on Reparations for Wrongful Civilian Harm

The simplest method of improving New Zealand's compensatory mechanism would be for the NZDF to promulgate a DFO to NZDF officers and local populations establishing consistent processes and principles for making reparations for civilian harm caused by the NZDF. DFOs serve two purposes in the NZDF: advisory and regulatory – a DFO relating to civilian harm could guide the approach of senior officers and specify penalties for non-compliance.[114]

The American Department of Defence recently issued an interim regulation providing procedural guidance to commanders on how to standardise their approach to *ex gratia* payments and ensure transparency.[115] This provides an effective comparative model from which the NZDF could learn. In response to the Operation Burnham Inquiry, the NZDF is already set to promulgate a DFO establishing preliminary processes for responding to and addressing allegations of civilian harm.[116] A DFO concerning reparations would be a simple addition to this existing reform process.

Even without considering the content of such an order, it would reduce inconsistencies in the approach taken to reparations by NZDF personnel across operational contexts and provide greater transparency for victims of civilian harm by setting out the principles by which claims for reparations will be assessed. According to the Open Society Foundation, the introduction of analogous directives focused on standardising ISAF responses to allegations of civilian harm "was appreciated by those affected, and has been shown to mitigate the normal penalties in local support."[117] For simplicity, a DFO could extend the compensatory approach taken by the NZDF in Afghanistan – where the SNO is empowered to award reparations for civilian

[114] Defence Act 1990, s27; and Armed Forces Discipline Act 1971, s206.
[115] Shiel, above n 55.
[116] Katie Scotcher "Operation Burnham: Child killed, but death was justified, inquiry finds" (31 July 2009) Radio NZ <https://www.rnz.co.nz>.
[117] Kolenda, Reid, Rogers and Retzius, above n 42, at 33.

harm – to all operational contexts.[118] It could increase the upper threshold of reparations payable by the SNO to NZD$2,500, in line with the approach of security partners like the United States.[119]

A DFO of this nature, by keeping the compensatory function internal to NZDF, would not address the concerns of bias and lack of independence in New Zealand's current compensatory mechanism. Neither would it ensure that the NZDF could identify and learn from ongoing civilian harm trends. It could be argued that while strengthening internal NZDF procedures relating to compensation for civilian harm could help *regularise* those practices, it may not necessarily increase the *effectiveness* of those practices. As Gilbert observed in relation to the United States military, "economic accounting does not entail accountability. The bureaucratic nature of [*ex gratia*] payments impedes responsiveness to the victims and their specific needs."[120] However while regularising a process may not be sufficient in itself, it is an important first step to ensuring the consistency and predictability necessary for an effective system.

A DFO would address the inconsistency of approach inherent to the status quo approach. It could ameliorate concerns around the quantum of reparations available by increasing the upper threshold of reparations payable by the SNO to $2,500 (which is still arguably insufficient, but is at least consistent with New Zealand's security partners). It would reduce the obstacles victims face in accessing justice by providing a set of processes for them to follow and ensuring they are aware of the principles under which their claim will be assessed.[121] On that basis, a DFO regarding the payment of reparations for civilian harm caused by the NZDF would be a significant improvement on the status quo.

B An Independent Inspector-General of Defence (IIGD) with Compensatory Power

A more effective method of improving New Zealand's compensatory mechanism would be to specifically require an IIGD to investigate and make reparations for civilian harm. The

[118] Smith, above n 81, at Enclosure 2.
[119] Tracy, above n 90, at 18.
[120] Gilbert, above n 90, at 404.
[121] At 410.

creation of an IIGD was one of the Operation Burnham Inquiry's central recommendations, which the New Zealand Government accepted in principle.[122]

The Inquiry imagined the IIGD as an office independent from the NZDF, capable of initiating inquiries into any aspect of NZDF's activities which would supplement existing accountability mechanisms.[123] The IIGD should be staffed by advisers with extensive military experience in order to ensure it understands the nuance of the military operations, though the Inspector-General themselves need not be ex-military.[124] The Inquiry's report suggested that the IIGD should be able to engage in "one-off" investigations into allegations of civilian harm and make relevant recommendations.[125] There was no specific indication in the Operation Burnham Inquiry's report or the subsequent government response that the IIGD would have compensatory power, however it is logical that in addition to having an investigatory function the IIGD should have a remedial function, so civilian harm can be fairly addressed where it is proven.

The most analogous body in New Zealand – the Inspector-General for Intelligence and Security – can recommend "the payment of compensation" where appropriate.[126] These recommendations are consistently followed. A similar or strengthened power seems justified for the IIGD; specific recognition of an IIGD's compensatory power would allow the avoidance of inconsistencies by establishing central principles and guidelines for compensation. Given the likely expertise and stature of an IIGD, it also seems appropriate that they would have a compensatory power commensurate with that of the CDF, who can award *ex gratia* up to NZD$30,000.[127] Assuming a system similar to that of the Inspector-General for Intelligence and Security, appeals of the IIGD's recommendations would not be possible.

An IIGD with this compensatory power would address the concerns of bias and lack of independence regarding New Zealand's current compensatory mechanism. It would have no

[122] Scotcher, above n 116.
[123] Arnold and Palmer, above n 86, at [46].
[124] At [47].
[125] At [48].
[126] Intelligence and Security Act 2017, art 185(2).
[127] Smith, above n 81, at Enclosure 1.

career-based or personal incentive to dismiss allegations of civilian harm and could access more comprehensive evidence by assuring potential witnesses that they will not suffer consequences for providing testimony. As a singular, public-facing organisation it would reduce the difficulties victims have in ascertaining who to direct their allegations towards and communicating those allegations. By ensuring the same organisation investigates each allegation and assesses them according to the same organisational standard operating procedures, the current compensatory mechanism's inconsistency would be reduced. An IIGD with the ability to award (or recommend) reparations up to NZD$30,000 would also reduce concerns around the quantum of reparations available to victims.

It would also be better placed to identify and learn from trends in the allegations received and verified. Introducing an IIGD charged with investigating and compensating civilian harm would ensure that individual instances of civilian harm are compared across operational contexts. An analogy can be drawn to the Civilian Casualty Mitigation Team (CCMT) introduced by ISAF in Afghanistan in mid-2011. According to a senior ISAF leader, the value of the CCMT was that:[128]

> While every area may only have one or two civilian casualty incidents of a certain type, it's only when data was aggregated across the whole country [by the CCMT] that you [could] make a point to the commands that [the tactic in question] is an issue.

It could be argued that enhanced accountability would reduce the efficacy of the NZDF by holding it to an unachievable humanitarian standard and discouraging necessary aggression.[129] Assuming that an IIGD is staffed by advisers with significant military expertise who can understand the rigours of conflict and appreciate the difficult choices which are sometimes necessary, this seems unlikely. This conclusion is supported by analysis from the Open Society Foundation of enhanced civilian protection measures taken by ISAF in

[128] Jennifer Keene "Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan" (Center for Civilians in Conflict, Washington DC, 2014) at 9.
[129] Kolenda, Reid, Rogers and Retzius, above n 42, at 35.

Afghanistan which show they led to improved outcomes for civilians with no appreciable strategic cost.[130]

An IIGD is already set to be introduced.[131] Specifying that it should have compensatory power would be a simple and significant improvement in the manner in which New Zealand meets its duty to compensate victims of internationally wrongful acts in the context of LOAC.

C Affirmation of State Responsibility for Wrongful Civilian Harm

A third, significantly more unconventional, option for reform would be to strengthen international law in this area by pursuing a treaty under which states accepted responsibility for wrongful civilian harm. Such a treaty could reduce doubt by clarifying the meaning of wrongful civilian harm and introduce a mechanism to give effect to that responsibility, for example by allowing victims to pursue claims against states for effective reparations (namely, restitution or compensation) through an international tribunal charged with the task.

The best justification for such innovation is that conventional LOAC is insufficient to meet the moment's needs. As Ganesh Sitaraman has observed, there are significant "divergences between contemporary conflict and the conventional mode of war".[132] The non-state actors which drive modern conflict are woven into local societies (such that conventional military strategies are counterproductive, because they lead to collateral damage which strengthens the opponent's cause) and typically do not respect or reciprocate the rule of law".[133] In that context, it is arguable that counterinsurgents ought to develop a LOAC framework which holds them to a higher standard of civilian protection and restraint, no matter the behaviour of the forces they are fighting against, in order to demonstrate to the social system in which an insurgency is embedded that it is the counterinsurgent who is worthy of support.[134]

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[130] At 36.
[131] Scotcher, above n 116.
[132] Ganesh Sitaraman "Counterinsurgency, the War on Terror, and the Laws of War" (2009) 95 Virginia Law Review 1745 at 1757.
[133] At 1826.
[134] At 1824.

Sitaraman suggests that modern conflict may therefore necessitate that states "reject [combatant's] privilege, leaving the question of remedy [for civilian harm] open. Some might go further, arguing a remedy is required."[135] This would be a drastic departure from conventional LOAC's protection of combatant's privilege. A more moderate, though still unconventional, approach would be to clarify existing LOAC by pursuing a treaty under which states accept responsibility to restitute/compensate victims for wrongful civilian harm, establishes clear standards on what wrongful civilian harm is, and creates a mechanism by which states could be held accountable for that responsibility would demonstrate a strong exemplarist commitment to supporting civilian communities and addressing the consequences of conflict. While a duty to make reparations for internationally wrongful acts already exists in international law, such a treaty would be a significant innovation in international law and LOAC since it would concretise, clarify and expand the scope of that duty. Recognising and addressing responsibility for wrongful civilian harm would address many of the practical concerns raised previously: while the appointment of members to a hypothetical tribunal would likely be influenced by signatory states, giving rise to some issues around independence of decision-making, it would be a comparatively less biased decision-maker – with no *direct* personal incentives towards minimising allegations of harm – capable of awarding significant reparations in a transparent fashion.[136] The presence of a clear path for pursuing reparations would remove some existing obstacles to justice (only partially be offset by the costs of representation a victim may have to assume).[137]

However, even in the more moderate form set out above, such a treaty would significantly disrupt the existing LOAC framework and the practice of New Zealand's security partners; the United States, for example, specifically excluded responsibility for civilian harm except insofar as it can be pursued through the FCA, instead choosing to use *ex gratia* payments as a mechanism for winning hearts and minds without accepting responsibility.[138] The pursuit of such a treaty would require a significant shift in international approach and is therefore not an effective goal in the short-term.

[135] At 1795; Tracy, above n 90, at 4.
[136] Arnold and Palmer, above n 86, at [43].
[137] Barber, above n 61, at 15.
[138] Walerstein, above n 50, at 331.

VI Conclusion

The corollary of any violation of international law is an obligation to make reparations.[139] In the context of violations of LOAC, that often takes the form of restitution or compensation.[140] However complexity around who reparation should be made to and in what form has made the international legal system inadequate at effectively supporting victims. *Ex gratia* payments have been introduced to address the shortfall. This paper has demonstrated that New Zealand's compensatory mechanism for such circumstances is subject to critique (it is undermined by concerns of bias, lack of independence, obstacles to access and insufficient quantum of reparations) and inadequate in comparison to the approaches of its security partners.

I set out three potential reforms through which New Zealand could improve its compensatory mechanism:

a) The promulgation of a DFO on the processes and principles of making reparations;
b) The empowerment of the forthcoming Independent Inspector-General of Defence to make reparations where appropriate; and
c) Pursuit of a treaty recognising state responsibility for wrongful civilian harm.

The first is simple but retains many of the status quo's inadequacies. Further analysis of the third as a long-term goal of legal advocacy is merited, but it would be practically difficult in the short-term. The third option is the most effective. It would be a simple improvement, given an IIGD with investigatory power is already set to be introduced and that the Inspector-

[139] Brownlie and Crawford, above n 18, at 523.
[140] At 553.

General for Intelligence and Security already has analogous power, and would address each of the concerns this paper has identified regarding the current system.[141]

This paper began by noting the observation of Major-General Boswell that, "[c]ompensation for harm that can be linked to New Zealand would require very careful consideration across government."[142] Given an IIGD – an appropriate mechanism of providing such compensation – has been identified, it is time that such consideration took place.

Word Count: 8,075 Words

[141] Scotcher, above n 116; Intelligence and Security Act, art 185(2).
[142] Bingham and Paula Penfold, above n 2.

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