

# United States Military Compensation to Civilians in Armed Conflict

*May 2010*

## Executive Summary

The US military values distinguishing between civilians and combatants in a battlespace. Despite efforts to avoid and protect civilians, they are nonetheless harmed and deserve amends for deaths, injuries, and property losses. In Iraq and Afghanistan, the United States has found that monetary payments made to civilians harmed express sympathy, dignify losses, and track with US principles of humanity and compassion. Payments are a further recognized strategic tactic in a counterinsurgency.

In the absence of a standing claims system to address civilian harm occurring as a result of combat operations, the current US effort to provide “condolences”<sup>1</sup> was pieced together in 2003 in Iraq and in 2005 in Afghanistan. There have been improvements over the years in both theaters, but the overall effort remains ad hoc and inadequate, often increasing resentment among the local population rather than fostering goodwill.

This report discusses the history of US military claims for civilian harm and reviews existing efforts in Iraq and Afghanistan. The Center’s research for this briefing paper was conducted in Washington, Afghanistan, and Iraq from 2006–2010. Interviews include military personnel, humanitarian organizations, journalists covering civilian harm, and civilians suffering losses. Additional research includes the examination of 12,776 pages of claims documentation, released in 2007 and 2009, by the Department of Defense under the Freedom of Information Act request filed by the American Civil Liberties Union.

Our research has consistently found that condolences to civilians for combat harm are fraught with challenges despite good intentions of military personnel involved. Effectiveness—measured by consistency, equitable disbursement, and positive civilian perceptions—remains limited by the lack of uniform policies, inadequate information gathering about civilian harm, low and inconsistent valuation of life and limb, and a lack of training across all branches and rank on the importance, availability, and implementation of payments.

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<sup>1</sup> Unless otherwise indicated in the text, “condolences” will henceforth define condolence payments, solatia and battle damage payments.

The Center offers the following recommendations to the Department of Defense:

1. Draft and implement uniform procedures and guidelines for condolence payments. Civilian anger is often intensified by the current ad hoc claims system. Uniform guidelines are necessary on standards of proof, valuation, recordkeeping, and an appeals process.
2. Properly train commanders, Judge Advocates (JAs), and troops. The strategic and moral importance of properly handling civilian claims and the mechanism by which to offer condolences should be mandatory pre-deployment training for any military personnel that will come in contact with the civilian population, particularly commanders, JAs, and troops in the field.
3. Enable immediate implementation of a civilian claims procedure in new theaters. Past failures to address civilian harm have shown that without a standing system, claims services for civilians caught in war will always be haphazard and arbitrary. The United States needs a consistent, uniform system to provide claims adjudication for civilians harmed as a result of US combat actions.
4. Better document civilian harm and claims. Whether death and injury result from an accident, lawful engagement, wrongful acts, or negligent acts, the US military should keep a transparent, accurate account of civilian casualties. That accounting of civilian harm goes a long way toward dignifying losses and enables the military to gauge how well it keeps to civilian inviolability.
5. Create a high-level Pentagon position to track, monitor, and analyze the civilian impact of armed conflicts in which the United States is engaged. Despite consensus at the highest levels that civilians are the current center of gravity, the Pentagon lacks a senior official to oversee and coordinate policies, strategies, and tactics that focus on civilian harm, including claims.

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## Existing Civilian Claims Law

### *The Foreign Claims Act (FCA)*

Civilian claims became part of military operations when Congress passed legislation in 1918 allowing compensation for civilians harmed in France. Due to the geographical limitation of the 1918 Act, Congress passed the Foreign Claims Act (FCA) during World War II. The purpose of the FCA is to “promote and maintain friendly relations through the prompt settlement of meritorious claims.”<sup>2</sup> The War Department supported the legislation and, in fact, convinced Congress to amend the FCA when 1,000 USD per claim proved too small to fulfill the law’s purpose. The Acting Secretary of the Navy wrote a letter to Congress: “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.” In the same letter, the Secretary maintained that “reasonable sums” were required.<sup>3</sup>

The FCA created an excellent system for foreign claims commissioners to adjudicate claims of harm caused by non-combat, negligent, or wrongful acts. However, the law’s “combat exclusion” forbids compensation for harm resulting directly or indirectly from a combat act. This leaves a gap in the law, which is consistently cited as a major impediment in the military’s objective to gain support from the population. Judge Advocates at the Military Assistance Command, Vietnam (MACV) voiced complaints about the “combat exclusion.” The situation in current military operations is no different.

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<sup>2</sup> Military Claims Act, US Code 10 (2009), § 2734.

<sup>3</sup> Senate Committee on Foreign Relations, The Mutual Security Act of 1956, 84th Cong., 2d sess., 1956, S. Rep. 2273, 9 - 10.

The 2005 US Army JAG Corps Operational Law Handbook reads: “The combat-related claims exclusion often directly interferes with ... obtaining and maintaining the support of the local populace.”

The FCA is an effective tool, but with the combat exclusion in place, an extensive gap exists, leaving many civilians harmed within the legal boundaries of combat with little hope of proper recognition for their losses.

### ***Claims for Combat-related Civilian Losses***

International and national laws do not obligate the United States to pay compensation to civilians harmed in the midst of lawful combat operations. Yet since the Korean War (1950-1953), the US has maintained the ability to pay for combat damages suffered by civilians if deemed customary in the region. These payments are called “solatia” and are given to civilians harmed as an expression of sympathy. A single paragraph in each service branch’s claims regulation defines solatia. Army regulation 27-20, Paragraph 10-10, provides the authority for the use of these payments by the Army:

Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands. Such payments are not to be made from the Claims Expenditure Allowance. These payments are made from local operation and maintenance funds pursuant to directives established by the appropriate commander for the country concerned. This applies even where a command claims service is directed to administer the command’s solatia program.

The United States makes a decision about whether to pay solatia each time the nation goes to war. Despite having paid solatia most recently in the Balkans, CENTCOM decided that such payments were not customary for either Afghanistan or Iraq at the time of invasion. Thus, for the first four years in Afghanistan and first five months in Iraq, no claims system existed for civilians suffering losses due to US military operations. According to a GAO report, some units in Afghanistan (and possibly Iraq) paid small amounts of solatia despite no authorization to do so.<sup>4</sup>

In September 2003, the highest level of Command in Iraq (Combined Joint Task Force-7 or CJTF-7) authorized what it called “solatia-like” payments to be made out of the Commander’s Emergency Response Program (CERP). The system has since been slightly altered by the current high command in Iraq (Multi-National Corps-Iraq or MNC-I), but remains the only authorization for condolence payments to date for Iraq. In November 2005, condolence payments were approved for use in Afghanistan. Condolences, like the original concept of solatia, are considered a gesture of sympathy only, given to ease civilian suffering. They are in no way meant as formal reparation, legal compensation, or an admission of fault or negligence.

The CERP Standard Operating Procedure issued by MNC-I guiding the payment of condolences states: “CERP family of funds can be used to assist the Iraqi people [by providing] condolence payments to Iraqi civilians for the death or injury resulting from US, Coalition, and supporting military operations.”

The maximum payout in cases of death, serious injury, property losses, or damage in Iraq and Afghanistan is 2,500 USD. Through conversations with the Center for Law and Military Operation (CLAMO) within the US Army JAG Corps, the Center has found that

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<sup>4</sup> US General Accounting Office, Military Operations: The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan (2007), <http://www.gao.gov/products/GAO-07-699>.

payments may be authorized up to 10,000 USD if approved by a higher command. There is, however, little evidence that many successful claims surpass the 2,500 USD mark.

## Afghanistan

As noted, CENTCOM initially determined that civilian combat claims were not “culturally appropriate” in Afghanistan during the invasion of 2001. However, the Center gathered evidence that the Taliban—understanding the battle of perception being waged—sometimes responded immediately to a US bombing by providing civilians with food, aid, financial assistance, transport to hospitals, or help burying the dead. In 2005, the United States amended its position on condolences and authorized payments for civilian losses due to US military action in Afghanistan.

US military units now have three ways to provide ex-gratia payments in Afghanistan: solatia, condolence, and battle damage. Solatia are drawn from units’ operation and maintenance funds, whereas condolences and battle damages are drawn from the Commander’s Emergency Response Program (CERP). Though the formal purpose of these three payment mechanisms varies, there is little practical difference among the three. Many soldiers don’t know the difference between the mechanisms and any civilian filing a claim would not be able to draw a distinction.

Information regarding civilian losses is obtained through incident reports completed by combat units and battle damage assessments (BDAs), which must be conducted after any indirect fire incident. US commanders and Provincial Reconstruction Teams (PRTs) also depend on local elders or government officials for information. US forces report that engagement with local leaders is key to identifying civilian harm since they can provide information, verify credibility, and negotiate what amount—if any—will be paid. Supporting documentation is collected by field units, including testimonies, property records, and pictures of damage. Such proactive investigation is more typical in major incidents. Most claims relate to property damage. US forces often rely on claimants to approach bases, and submit claims and supporting documentation.

Amounts paid vary province-to-province and depend on circumstances, but the figures below are standard amounts, or “caps” on payments. Payments above 2,500 USD are rare, though amounts may be higher if multiple losses occur in a given incident.

Harm	Solatia	Condolence/ Battle Damage
Death	2,000 USD	2,500 USD
Serious Injury	400 USD	1,600 USD
Non-serious Injury	200 USD	600 USD
Serious Property Damage	--	2,200 USD
Non-serious Property Damage	200 USD	200 USD

Claims up to 2,500 USD may be approved by a Lieutenant Colonel. Payments between 2,500 USD and 5,000 USD may be approved by a Colonel and higher payments of up to 10,000 USD require the Deputy Commanding General’s approval. In cases of minor property damage, some commanders have reported using “fuel money”—or small petty cash amounts—to settle small claims on the spot.

Without guidelines on investigating and paying claims, payments can vary significantly. Payments are typically provided within several weeks after an incident; in previous years, claims could take many months or more to be approved. The more political sensitivity, public visibility, and civilian loss, the more likely higher levels of command will assume control over the case. Outcomes usually rest on company commanders—the high turnover of whom means practice varies even within the same locale.

### About the Center

Center for Civilians in Conflict works to make warring parties more responsible to civilians before, during, and after armed conflict. We are advocates who believe no civilian caught in conflict should be ignored, and advisors who provide practical solutions to prevent and respond to civilian harm.

The organization was founded as Campaign for Innocent Victims in Conflict (CIVIC) in 2003 by Marla Ruzicka, a courageous humanitarian killed by a suicide bomber in 2005 while advocating for Iraqi families.

## Iraq

The Center has been unable to conduct fieldwork in Iraq to assess civilian claims since 2006. This section will rely mainly on 12,776 pages of claims documentation. We do not purport that this documentation presents a full picture of the claims system in Iraq; however, some broad conclusions can be drawn.

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As noted, CENTCOM initially determined compensation was not “culturally appropriate” in Iraq and that civilians could not file claims for their losses. In September 2003, the United States amended that position and authorized condolence payments. These payments are drawn from the Commander’s Emergency Response Program (CERP) and can be paid out for death, injury, or property damage due to US combat operations.

In Iraq, commanders and Judge Advocates in the field exercise significant control and discretion over payments. According to our research, payments for death are generally capped at 2,500 USD and payments for injuries range from a few hundred dollars to 2,500 USD. Payments can be provided within several weeks after an incident, but can also take several months depending on the caseload and the ability of the JA to investigate the claim. Proactive investigation of civilian harm is a rarity rather than the norm. There is an over-reliance on the “SIGACT” database to confirm or disprove an event in question, to the exclusion of other credible evidence. Further, claimants are often expected to approach bases to file claims—impossible in insecure places.

Authority to disburse condolences formally rests with a brigade Judge Advocate. They oversee the gathering of supporting documents and information, interact with claimants, and assess the credibility of a claim. Their decision is often final as there is no mechanism under which to appeal a denial as there is with the FCA.

## Challenges to the Current System

The following challenges to the current system of condolences are based on the Center’s recent research in both combat theaters, though rely heavily on analysis of claims documents released by the Department of Defense. In 2007 and again in 2009, the DOD (under FOIA) released a portion of its civilian casualty claims filed by Iraqis and Afghans. Each claim details alleged civilian harm including death, injury, and property damage, and represents an Afghan or Iraqi looking for amends. It should be noted that while these claims were all filed under the FCA (which addresses only non-combat, negligent, or wrongful harm), the claimant is often instead seeking a “condolence” for combat losses.

These documents may or may not provide a full picture of the claims process; the public does not know how many claims exist nor whether those released represent a lion’s share or only a small sampling of existing claims. These documents can, however, be used to explore the challenges to the current system of civilian claims—both FCA and condolence. They are detailed below.

### ***Ad hoc Approvals, Denials, and Valuation***

It is clear that each brigade handled claims its own way, thus creating an ad hoc system theater-wide. Some brigades recognized the necessity of appropriately adjudicating each claim and systematically referred meritorious, yet non-compensable FCA claims to receive condolences, while others summarily denied any claim filed because of the FCA’s combat exclusion. It was quite common for different amounts to be paid for seemingly similar incidents without explanation.

At Bates 28286-28316, a claim was filed on November 8, 2007 by an Iraqi civilian under the Foreign Claims Act. The woman brought the claim on behalf of her husband, killed

in a car accident a year before when a US convoy struck his vehicle as he was coming home from work. She listed his death and damage to his vehicle from non-combat activities. The Army statement says the victim was not at fault and the wife's statement says the convoy was driving on the wrong side of the road. The military settled this claim in the amount of 10,000 USD. This seems an appropriate outcome.

Less than three months later, at Bates 28317-28353, an unrelated yet similar claim was filed by a civilian under the Foreign Claims Act. It was filed by the sister of an Iraqi man killed by a US vehicle in a car accident, with the US vehicle driving down the wrong side of the road. She requested 15,000 USD for his death and only received 5,000 USD.

The two incidents seem nearly identical, yet one victim was offered an amount double the other with no explanation listed for the inconsistency.

### ***Low Valuation of Life***

The upper limit of a condolence payment is 2,500 USD, though in exceptional instances payments can be higher. A General in Iraq, for example, can approve a payment of 10,000 USD for an individual death, though there is no evidence this has ever been done. While there is no upper limit on FCA payments, disbursements tend to be guided by the same cap on condolences except in cases where there is some liability assumed by the US military (e.g. negligence). This is evidence of poor training on and knowledge about the intent of the FCA. The valuation of life and limb under both the FCA and condolence should be examined by the relevant DOD authority, as payments seen as too low by civilians can be—and often have been—insulting and only serve to inflame anger.

At Bates 26448-26471, an Iraqi woman filed an FCA claim stating that she was traveling with her family (husband and daughter) to Jordan to seek medical treatment. Near Retba, US Forces shot at them. The claimant and her daughter were injured, and her husband died after surgery in a US military hospital. The claim mentions that the US military apologized to her and gave her documents that were used as evidence in her compensation claim. Compensation in the amount of 10,000 USD for the death of her husband (nothing mentioned for her, or her daughter's injuries, or the damage to their car) was granted under the Foreign Claims Act. This was one of the higher amounts paid out under the FCA, though one could still argue that 10,000 USD is low to dignify a breadwinner in Iraq.

At Bates 24871-24972, a claim under the FCA was filed by an Iraqi man. He alleged that on August 3, 2005, his father died of gunshot wounds when US forces fired on his car. He claimed 6,300 USD in damages for the death of his father and damages to his father's car. On December 15, 2005, an Army claims attorney found no compensable action due to lack of evidence of wrongful actions by US Forces. The decision was appealed on December 20, 2005 and the claim was referred to the condolence payment system under which 2,500 USD was approved in April 2006. Theoretically, under the current condolence rules, the man could immediately receive 2,500 USD for the death of his father and 2,500 USD for the damage to the car. Here, he was just given a single payment of 2,500 USD for the death of his father nearly a year later—another low sum to dignify a son's loss in Iraq.

As is the continuing theme in this briefing paper, some units have taken it upon themselves to improve the system while others have continued spotty implementation.

### ***Lack of Referral for Condolences***

When a claim filed under the FCA is denied for lack of evidence of negligence

or wrongful acts, or because of the combat exclusion, it should be referred for a condolence (or solatia or battle damage, depending on which mechanisms exist in that theater) and the claim should be considered for payment. Most of the cases we reviewed that were denied under the FCA combat exclusion were not referred for a condolence payment.

For example, at Bates 26264-26303, an Iraqi man filed a claim under the Foreign Claims Act. The claimant's nephew was driving himself and another man to the pharmacy to pick up medication for the claimant's father after the curfew. US forces were engaged in combat activities in the area; they shot at the vehicle, destroyed the truck, and killed the two young men (an Iraqi police officer and a student) inside the car. The specifics of the incident are "highly classified" but the JAG stated that the engagement was a "clean shoot." The man claimed damages of 66,000 USD. However, since the US Forces were engaged in a combat operation, compensation for human loss and property damage was denied under the Foreign Claims Act. The claim was then referred for a condolence payment (referred to as a "goodwill payment") and a payment was approved.

This is a good example of how the FCA and condolences should work together. Unfortunately, they more often work like this:

At Bates 24934-24956, an Iraqi civilian filed a claim under the Foreign Claims Act on behalf of his son. The son was returning from Jordan in his car when fired upon by US forces. The son was killed and the car destroyed. He requested 27,000 USD in compensation and was denied by an Army Captain who found that the claim arose from combat action. An Army witness notes in the claim that the incident "could be combat excluded" because it arose from an "escalation of force." No referral to condolence is mentioned and no payment was made.

### ***No Uniform Application: FCA vs. Condolences***

There appears to be no uniform understanding of what constitutes an FCA versus a condolence claim. Approach varies greatly between units. Some seem to be interpreting and executing policy in a manner intended to offer as much assistance as allowed to civilians mistakenly caught up in combat operations. This is a positive signal that some US troops understand the strategic and moral imperatives of providing condolences. Unfortunately, a number of units took the opposite stance and declined any assistance whatsoever, no matter the apparent validity of the claim.

At Bates 23928-23971, a group of men were driving in a car when they noticed a US military convoy behind them. The civilian car moved to the side of the road to let the convoy pass. The convoy began firing on the car and two brothers were killed. The convoy stopped and gave the other occupants in the car a claims card to seek compensation. A sister of the two victims submitted an FCA claim and sought 3,000 USD for the death of each of her brothers. The Army settled the entire claim for 5,000 USD under the FCA. The amount settled can be criticized, but this incident and claim were handled relatively well.

Most convoy cases, however, resulted in denials and when based on the "combat exception" were given no consideration for a condolence payment. That's true even if it is shown that the victims did not possess ill intent toward the convoy or US forces.

At Bates 24745-24766, an Iraqi female claimant alleged that her husband was killed by a Coalition convoy. SIGACT revealed that an EOF had occurred in the vicinity of the alleged incident. According to the US Army, the claimant's husband's vehicle approached from the rear of the convoy at high speed. One warning shot had no effect; a second warning shot traveled through the hood and struck the deceased in the

neck. The claim was denied because the incident occurred during a combat activity. A significant percentage of the cases in our database concern convoy shootings. It is clear that US forces regularly perceive threats on the road that turn out to be innocuous and civilians suffer the consequences. Deserving claimants are further disrespected when a unit arbitrarily decides to apply the FCA, condolence, or neither.

It appears that some units are more willing to award condolence payments. For example, at Bates 24791-24822, the claimant alleged that her son was injured and her husband was killed when they were caught in the crossfire between US and insurgent fighters. A 3,500 USD condolence payment was approved (2,500 USD for husband's death and 1,000 USD for son's injuries). Again, based on the overall number of claims files reviewed, not enough of the units are utilizing the condolence system when claims cannot be approved under the FCA. To gain a full understanding of how claims are processed, the military should conduct after action reviews of each brigade to assess their performance.

### ***Lack of Appellate Process for Condolence***

The FCA allows a claimant to appeal adverse decisions to a higher authority. Among these files only a few examples exist of units properly handling and processing appeals. At Bates 24879-24912, an Iraqi civilian's father was killed by gunshot wounds when US forces fired on his car. An Army lawyer first found no compensable action due to lack of evidence of wrongful actions by US forces, but the decision was appealed; compensation in the amount of 2,500 USD was later approved. This is the rare exception of proper appeal among the released claims documents.

At Bates 26141-26158, the claimant alleged that her husband was riding in a taxi that was shot during an EOF. The victim was killed and his body burned in the taxi. The claimant submitted a photograph, witness statements, and a death certificate. The Army denied the claim, stating that SIGACT revealed no such occurrence. The file also indicated that even if the claimant's husband had died during an EOF, the claim was non-compensable under the combat exclusion. Witness statements indicate that the taxi was stopped at a checkpoint and waved through; as it proceeded, troops opened fire. A handwritten note says this claim was related to another that was approved and paid. It appears that one claim was paid based on the totality of the evidence and one was denied solely because there was no mention of it in the error prone SIGACT database. In this case of obvious disagreement among military personnel handling the claim, a claimant should be offered a reasonable opportunity to appeal to a higher claims authority.

### ***Over-reliance on the Combat Exclusion***

DOD documents indicate that units overly rely on the combat exclusion to deny claims. For example, at Bates 24024-24058, an Iraqi woman submitted a claim that US forces fired on a car and killed her husband and two sons. She requested 3,000 USD for each of the three deaths and 1,500 USD for the damage to the vehicle. The unit failed to find a corroborating SIGACT and noted that a condolence may be an option. The claim however was denied with the letter: "Allow me to express my sympathy for the loss you have suffered, however, in accordance with the cited reference and the investigation into your claim, I find that your claim is not compensable . . . your claim was denied for the following reason: Combat Activity - The Proximate cause of the incident was combat activity by the US Forces." The easy answer for the claims adjudicator in most cases is to claim the "combat exclusion" and deny payment. Proper adjudication requires more detailed investigation and more analysis to the nature of the combat before just passing judgment.

At Bates 24176-24187, the Iraqi claimant said he and his brother were walking into their village when they were shot by Coalition Forces. The brother was killed. The

Memorandum of Opinion suggested denying the claim because there was a SIGACT entry that US forces were in the area looking for an IED cell member and the fact that the US Forces were on a mission made the incident combat exempt. That the soldiers were on a “mission” should not mean that all events are considered “combat” under the FCA. Further investigation is needed in such a case. Even if the ultimate decision was to deny the FCA claim, it should automatically be considered for a condolence payment if the claim is meritorious based on the evidence.

At Bates 24188-24236, an Iraqi claimed that while he and his cousin were riding in a car headed toward a gas station, a Coalition convoy approached and they ended up in the middle of it. The convoy began firing at them. The claimant’s cousin was killed, the claimant was injured and his car was damaged. His claim was denied because: “The evidence shows that the damage was caused during combat.” Without other analysis included, this appears too-easy an answer. Was the shooting negligent? Did the car show hostile intent? Did the soldiers engage in any other warning measures before shooting at the car?

The number of similar cases is high. Without proper training on the execution of both FCA and condolence evidence requirements (including the appropriate “benefit of the doubt” level), too many meritorious claimants will be turned down under a combat exclusion.

### ***Evidentiary Issues***

There appears to be an over-reliance on US military-produced evidence and disregard for the evidence submitted by the claimant. At Bates 26005-26013, the claimant alleged his brother was shot and killed by Coalition forces while picking fruit from a tree. The claimant provided pictures, a death certificate, and two witness statements. The Army denied the claim, asserting insufficient evidence. A condolence was paid. It is worth questioning why there was not enough evidence to provide payment under the FCA, but there was under condolence.

At Bates 26067-26085, the claimant alleged that an IED detonated on a Coalition convoy and that the Coalition forces began shooting indiscriminately, killing his two children. Witness statements and death certificates were provided to substantiate the claim. The claim was denied. SIGACT revealed that although two IED attacks had occurred in the area on the two days prior, no recorded IED attacks occurred on the day of this alleged incident. Some handwritten notes indicate the attorney who denied the appeal searched SIGACT and performed Google and al-Jazeera searches for news of an IED attack on the day in question. There is also a note directing the claimant to bring in a news clipping. Based on the evidence provided by the Iraqi it seems that perhaps someone simply had the date wrong.

At Bates 26103-26117, the claimant alleged that an IED detonated on a Coalition convoy and Coalition forces started shooting randomly, killing his son. The claimant supplied a death certificate and witness statements. The Army denied the claim for insufficient evidence because SIGACT revealed no such IED attacks or related incidents on the date. When denying these types of cases it appears that the Judge Advocate is relying entirely on the SIGACT without considering evidence provided by the claimant. Even if the claim was ultimately denied, the Judge Advocate has a duty to weigh all evidence presented and provide an explanation as to why claimant evidence is not credible.

At Bates 26118-26140, the claimant alleged that Coalition Forces shot his wife as they approached the Samarra General Hospital in their car. He provided a death certificate and witness statements to corroborate the claim. The Army denied the claim for insufficient evidence, finding no such activity on the specified date. The file includes

some photos of the claimant's car. Though known to contain gaps, SIGACT databases are continually given more credence than civilian produced evidence.

## **An Effective Condolence System: The Ideal**

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Ideally, condolences to civilians would operate in a manner very similar to the claims process outlined under the Foreign Claims Act. There would be, however, one major difference: commanders in the field would have control over the process. Foreign Claims are handled entirely through foreign claims commissioners operating under the authority of the Claims Service, and commanders do not have direct control or responsibility for the payment of foreign claims.

As mentioned previously, the FCA prohibits compensation for victims of combat operations and yet, offering the dignifying gesture of a condolence to such victims is within the strategic and moral necessity of the US military. Given the nature of the harm at issue, it is best if commanders on the ground—with proper input from their legal and cultural experts—make final determinations on condolences. There should be standard guidelines and pre-deployment training available to all commanders, JAs, and troops on the strategic necessity of the program as well as information appropriate to their position on implementation.

In most other respects, combat claims would be handled in much the same fashion as foreign claims. Judge advocates would be required to play an extensive role in the investigation and processing of the claims. Here we have suggested standard guidelines for improved condolences:

- Brigade commanders, or their equivalent, are the initial approving authority for combat claims. The Secretary of Defense, or his delegate, will determine the monetary amount each level of command has jurisdiction over. For example, a brigade commander may have authority to decide individual claims under 10,000 USD, a division commander individual claims under 50,000 USD, and a corps commander individual claims under 150,000 USD.
- The amount awarded to a proper claimant for any individual claim appropriately compensates the individual for the loss suffered based on local expectations and customs, which are evaluated by experts on the local culture before the military is engaged in combat.
- Like foreign claims, payment will be discretionary; however, it is policy to provide compensation to all proper claimants. A decision is made upon entry into warfare concerning the appropriate threshold for “benefit of doubt” based on the level of strategic imperative in providing compensation.
- Compensation is authorized to proper claimants for any physical injury, death, or damage to real or personal property that is directly caused by US service members, civilian employees, or contractors with the Department of Defense in the course of a combat operation or mission.
- Proper claimants have two years from the time of the incident to file a claim with the proper authority.
- Systems must be in place for claims to be processed by the brigade legal Judge Advocate.
- It is imperative that both commanders and Judge Advocates receive training on the combat claims process. Any personnel that will come in contact with the civilian population should know about the system and be able to properly refer cases, including PRT staff and foreign service officers serving with the military in theater.
- Serious consideration is given to how to best proactively identify eligible claimants and offer them a safe way to file a grievance.

- Proper claimants are those civilians harmed by US combat operations who are deemed to be friendly to US interests.
- A proper claimant is responsible for filing his/her claim with the proper authority; however, all US personnel are trained on how to forward claimants to the appropriate authority to file a claim.
- Uniform procedures are established by the Secretary of Defense.
- Funding for combat claims will come from the appropriations for the other military claims programs and are authorized as soon as combat operations begin.
- The following is the standard chain of events:
  - Once the Judge Advocate receives the initial claim and available evidence, the proper authority will be required to investigate the claim using whatever means possible to verify or disprove the claim.
  - The weight of all evidence is based on reliability. Evidence, whether provided by the claimant or sources within the military, will be weighed solely on the Judge Advocate's determination of whether the evidence is reliable.
  - When the Judge Advocate has determined that all existing evidence has been collected, the Judge Advocate will provide a written opinion to the approving authority for final determination.
  - The approving authority may approve the claim, approve the claim but offer a different amount than that sought by the claimant, deny the claim, or request further information or investigation.
  - A written decision will be provided to the claimant. The written decision will provide detailed analysis for the decision and a translated copy of the decision shall be included.
  - Should the claimant receive an adverse decision, the Judge Advocate will provide the claimant with the necessary information to file an appeal to the higher approving authority.
  - The claimant will have thirty days to file an appeal. The claimant only has the right to one appeal. The decision of the first appellate authority will be final for the claimant.
  - However, the approving authority or any higher approving authority may forward the claim to the Office of the Secretary of Defense for final determination should the situation require.
  - Once a decision is final and the appeal is exhausted, the entire file will be maintained by an office created by the Secretary of Defense. Proper classifications will apply.

## **Recommendations to the US Department of Defense**

Respect for humanity, justice, and the rule of law are important American values from which the United States should not stray in times of war. To ensure Iraqis and Afghans (and civilians in future US conflicts) see these values at work, the United States must improve civilian claims for unintentional harm. Beyond moral arguments are important strategic reasons for creating a viable means to address this issue, including the counterinsurgency linchpin of the civilian population as the center of gravity. Providing recognition and some amends for civilian losses also sets an example for other countries in times of armed conflict (in fact, the US system has been the model for ISAF nations in Afghanistan).

Offering recognition and monetary payments to dignify and recognize foreign civilians harmed by US military operations is an established practice in US history. Fair and just compensation must be provided both for combat related and non-combat related claims.

To improve the way it addresses civilian harm, the United States should:

### ***Draft and Implement Uniform Procedures and Guidelines for Claims***

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There remains great disparity in the application of condolences both from theater to theater, but also from brigade to brigade. Some units pay while others don't. As units rotate in and out, the system is often reinvented. The typical civilian filing a claim will not understand the intricate details of why some incidents are treated differently than others. Confusion or misunderstandings can easily result—and have resulted—in anger and resentment detrimental to the mission.

Uniform guidelines are necessary on standards of proof, valuation, recordkeeping, and an appeals process. Guidance will decrease the negativity on the ground, often intensified by the current ad hoc system. Uniform procedures and guidelines will:

- Ensure that each time the United States engages in armed conflict, a system is in place so that the United States is prepared to immediately mitigate the impact of combat actions on local populations. This will help ensure that from the very first moment of engagement we are winning the people instead of losing them.
- Ensure that all civilians are dignified with offers of assistance when they are unintentionally or mistakenly harmed as a course of US military actions—a widely agreed strategy and stated humanitarian value among US leaders.
- Ensure that every civilian—no matter where they reside in the battlespace or what group of soldiers harmed them—is treated fair and equitably.
- Ensure that at the start of a conflict, research and cultural information is gathered on appropriate sums for ex-gratia payments to ensure payments are sensitive and effective.
- Ensure the appropriate training for commanders, JAs, and troops deployed to the field so that every US representative with the potential to come in contact with harmed civilians understands not only the strategic necessity to the mission, but also their role in ensuring civilians are appropriately dignified, thus helping the stated mission of the counterinsurgency.

### ***Allow for Leeway in Valuation with Payment Guidelines***

Under the FCA, the full market value may be paid for a Toyota run over by a tank, but under the current condolence system only 2,500 USD (standard) may be paid for a breadwinner killed in Iraq or Afghanistan. Valuation of life, injury, or property should be decided with guidance from experts on local cultures and local leaders, and ultimately on a case-by-case basis with no arbitrary ceiling. The amount must demonstrate genuine regret for losses suffered and must not be so low as to add insult to injury.

Crucial to a fair and just system of claims is the valuation placed on civilian life lost. Though a condolence is a “token payment” with an artificial ceiling of 2,500 USD per life (in Iraq and, it appears, in Afghanistan), the FCA clearly states that valuation for life, injury, and property should be based on a calculus that includes economic loss and non-economic loss—calculus FCCs are apparently not utilizing. Of note is the small margin between the average payments under the two systems (FCA averages 4,200 USD and condolence averages 2,200 USD) revealed in the released documents. The military should closely examine their process of valuating life under the FCA to ensure that it is appropriately implemented. Any dollar limitation on condolences should also be examined to ensure it sends the appropriate message of sympathy.

The point is emphasized here that consultations and research must be undertaken at the beginning of a conflict to assess a culturally appropriate amount and these amounts

should be used as guidelines in adjudicating cases; to not do so is to risk the objective of providing condolences in the first place.

### ***Properly Train Commanders, Judge Advocates, and Soldiers***

Many commanders in the field understand the necessity of these programs. Even still, a formal training should be implemented for them to ensure that each commander is on the same page. Judge Advocates and unit claims officers must receive better training to ensure that their decisions are just, appropriate, and timely. This should be a compulsory component of the pre-deployment training. Training for soldiers in the field who have day-to-day interaction with the civilian population is perhaps most important. They should be educated as to the strategic necessity of the program as well as how to interact with civilians and refer cases to the appropriate officers for adjudication.

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### ***Enable Immediate Implementation of a Civilian Claims System in New Theaters***

The United States needs a consistent, uniform system to provide claims adjudication for civilians harmed as a result of US combat actions. A uniform system with the ability to be quickly implemented is important both for dignifying innocent civilians harmed and providing the military with a powerful tool to foster goodwill with the local population. In the past five years, the Pentagon has twice denied the application of solatia, which led to the creation of the current ad hoc system. There is currently no assured mechanism for the US military to adjudicate civilian combat claims if a new conflict were to begin. Without a permanent program, claims services for civilians caught in war will always be haphazard and arbitrary.

### ***Better Document Civilian Harm and Claims***

Whether death and injury result from an accident, lawful engagement, wrongful acts, or negligent acts, the US military should keep as transparent and accurate an account of civilian casualties as possible. That accounting of civilian harm goes a long way toward dignifying a family's loss and provides valuable information to the military itself. Maintaining data on civilian casualties enables the military to gauge how well it abides by the principle of civilian inviolability in armed conflict. Additionally the military should keep a database of all condolence claims just as they do for FCA claims.

### ***Create a High-level Pentagon Position on Civilian Harm***

Despite consensus at the highest levels that civilians in warfare are a top strategic priority, the Pentagon lacks a senior official to oversee and coordinate policies, strategies, and tactics that focus on civilian harm, including civilian claims efforts. A new high-level position would: unify, refine, and strengthen efforts to prevent harm and address casualties when they occur; study lessons learned; encourage procurement and deployment of new weapons and tactics designed to diminish harm; ensure proper civilian damage estimates and combat damage assessments; ensure proper investigative and statistical data on casualties; ensure culturally appropriate condolence measures are in place and effectively implemented.

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Center for Civilians in Conflict works to make warring parties more responsible to civilians before, during, and after armed conflict. We are advocates who believe no civilian caught in conflict should be ignored, and advisors who provide practical solutions to prevent and respond to civilian harm.

The organization was founded as Campaign for Innocent Victims in Conflict (CIVIC) in 2003 by Marla Ruzicka, a courageous humanitarian killed by a suicide bomber in 2005 while advocating for Iraqi families.

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