

The Handbook of the Law of Visiting Forces

Second Edition

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Claims

UNGA Res. 52/247 Third-party liability: temporal and financial limitations (17 July 1998),
<http://undocs.org/en/A/RES/52/247>

Art. VIII NATO SOFA

1. Each Contracting Party waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land, sea or air armed services, if such damage:
 - (i) was caused by a member or an employee of the armed services of the other Contracting Party in the execution of his duties in connection with the operation of the North Atlantic Treaty; or
 - (ii) arose from the use of any vehicle, vessel or aircraft owned by the other Contracting Party and used by its armed services, provided either that the vehicle, vessel or aircraft causing the damage was being used in connection with the operation of the North Atlantic Treaty, or that the damage was caused to property being so used.Claims for maritime salvage by one Contracting Party against any other Contracting Party shall be waived, provided that the vessel or cargo salvaged was owned by a Contracting Party and being used by its armed services in connection with the operation of the North Atlantic Treaty.
2. a. In the case of damage caused or arising as stated in paragraph 1 to other property owned by a Contracting Party and located in its territory, the issue of the liability of any other Contracting Party shall be determined and the amount of damage shall be assessed, unless the Contracting Parties concerned agree otherwise, by a sole arbitrator selected in accordance with sub-paragraph b. of this paragraph. The arbitrator shall also decide any counter-claims arising out of the same incident.
 - b. The arbitrator referred to in sub-paragraph a. above shall be selected by agreement between the Contracting Parties concerned from amongst the nationals of the receiving State who hold or have held high judicial office. If the Contracting Parties concerned are unable, within two months, to agree upon the arbitrator, either may request the Chairman of the North Atlantic Council Deputies to select a person with the aforesaid qualifications.
 - c. Any decision taken by the arbitrator shall be binding and conclusive upon the Contracting Parties.
 - d. The amount of any compensation awarded by the arbitrator shall be distributed in accordance with the provisions of paragraph 5 e. (i), (ii) and (iii) of this Article.
 - e. The compensation of the arbitrator shall be fixed by agreement between the Contracting Parties concerned and shall, together with the necessary expenses incidental to the performance of his duties, be defrayed in equal proportions by them.
 - f. Nevertheless, each Contracting Party waives its claim in any such case where the damage is less than:¹

¹ For the following States that acceded to NATO SOFA, the amounts were fixed as follows:

Bulgaria	BGN 1,457	Czech Republic:	Cr. 25,500	Croatia	HRK 3,951
Estonia	EEK 15,000	Germany:	DM 5,600	Greece	Dr. 42,000
Hungary:	HUF 176,300	Latvia	LVL 700	Lithuania	LTL 2,574
Poland:	Zl. 2,900	Spain:	Ptas 97,200	Turkey:	TL 12,600

Part II Typical SOFA Rules

Belgium:	B.fr. 70,000	Luxembourg:	L.fr. 70,000
Canada:	\$1,460	Netherlands:	Fl. 5,320
Denmark:	Kr. 9,670	Norway:	Kr. 10,000
France:	F.fr. 490,000 ²	Portugal:	Es. 40,250
Iceland:	Kr. 22,800	United Kingdom:	£500
Italy:	Li. 850,000	United States:	\$1,400

Any other Contracting Party whose property has been damaged in the same incident shall also waive its claim up to the above amount. In the case of considerable variation in the rates of exchange between these currencies the Contracting Parties shall agree on the appropriate adjustments of these amounts.

3. For the purposes of paragraphs 1 and 2 of this Article the expression 'owned by a Contracting Party' in the case of a vessel includes a vessel on bare boat charter to that Contracting Party or requisitioned by it on bare boat terms or seized by it in prize (except to the extent that the risk of loss or liability is borne by some person other than such Contracting Party).
4. Each Contracting Party waives all its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties.
5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:
 - a. Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.
 - b. The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.
 - c. Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.
 - d. Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs e. (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.
 - e. The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:
 - (i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25% chargeable to the receiving State and 75% chargeable to the sending State.

With the currency inflation that has occurred since the NATO SOFA went into effect, the value of this waiver in terms of simplifying claims administration by setting a waiver amount threshold has likely decreased. Further, Belgium, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, and Spain now all use the Euro as their currency, with exchanges rates fixed effective the dates of their respective entries into the Eurozone.

² FF 6,912 since 1963.

- (ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them: however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.
 - (iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.
 - (iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.
- f. In cases where the application of the provisions of sub-paragraphs b. and e. of this paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.
 - g. A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.
 - h. Except in so far as sub-paragraph e. of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.
6. Claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty shall be dealt with in the following manner:
- a. The authorities of the receiving State shall consider the claim and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.
 - b. The report shall be delivered to the authorities of the sending State, who shall then decide without delay whether they will offer an *ex gratia* payment, and if so, of what amount.
 - c. If an offer of *ex gratia* payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sending State shall make the payment themselves and inform the authorities of the receiving State of their decision and of the sum paid.
 - d. Nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force or of a civilian component unless and until there has been payment in full satisfaction of the claim.
7. Claims arising out of the unauthorized use of any vehicle of the armed services of a sending State shall be dealt with in accordance with paragraph 6 of this Article, except in so far as the force or civilian component is legally responsible.
8. If a dispute arises as to whether a tortious act or omission of a member of a force or civilian component was done in the performance of official duty or as to whether the use of any vehicle of the armed services of a sending State was unauthorized, the question shall be submitted to an arbitrator appointed in accordance with paragraph 2 b. of this Article, whose decision on this point shall be final and conclusive.
9. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil

jurisdiction of the courts of the receiving State except to the extent provided in paragraph 5 g. of this Article.

10. The authorities of the sending State and of the receiving State shall co-operate in the procurement of evidence for a fair hearing and disposal of claims in regard to which the Contracting Parties are concerned.

I. Introduction

During any deployment or stationing of foreign armed forces into or within another State, injuries to personnel or damage to property of the foreign forces, or to the other State, its inhabitants or their property, may occur. Historically, if these losses occurred because the foreign armed forces were present as a result of international armed conflict between the two States, or as an occupation force in the defeated State after such a conflict, the State of the foreign forces has not been held liable for these losses under international law.³ The impacts of wartime damages upon the population of an enemy State, regardless of the size of the attacking force, are commonly severe, and defeated States often found themselves bearing the financial burden of any occupation.⁴ This burden also includes paying for claims against the occupying force.⁵ Since the early 20th century, however, the international security environment has been marked by armed conflicts in which Sending States' armed forces are present in Receiving States by agreement as allied forces, either to defend against external threats, or to assist the Receiving States in establishing security within their borders. In these situations, the goodwill generated among the populations of the Receiving States by the prompt resolution of meritorious damage claims can be a key factor in maintaining a continuing Sending State's or international organization's military presence.⁶

This chapter posits that the three essential features of an ideal damage claims programme are transparency, consistency, and accountability. It provides a historical review of different claims programmes beginning with World War I and concludes with recent operations in Afghanistan, assessing them against these three criteria. Because of the length of time over which they have been conducted, the vast scope of operations in which they have occurred, and their generally successful performance, this chapter focuses on claims operations in the North Atlantic Treaty Organization (NATO) context, both

³ For example, after World War II, 'war damage compensation' was seen as the 'reparation of losses sustained in a country at war (or in a neutral country which was subjected to such losses inadvertently by the belligerents) by acts of war, enemy occupation, or their consequences'. N Robinson, 'War Damage Compensation and Restitution in Foreign Countries', 16 *Law and Contemporary Problems* (1951) 347. These reparations to individuals were made under domestic law. *Ibid.* 348–55. If they were victors in armed conflict, nations might require their defeated enemies to pay reparations to them for losses suffered by their citizens, but the citizens themselves would not have claims against the defeated States. Q. Wright, 'War Claims: What of the Future?' 16 *Law and Contemporary Problems* (1951), 543, 546.

⁴ Combat damages are non-compensable, and occupation 'costs' are ordinarily borne by the occupied. M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961) 822–3; see H. Grotius, *The Law of War and Peace* (New York: Roslyn, 1949) 308, 330–1; see also *US v. Rice*, 17 US 246, 254 (1819).

⁵ For example, in interpreting the requirement of the Versailles Treaty that the costs of the Rhineland occupation were to be charged to the German government, the US government concluded that the 'cost of the occupation included far more than the pay of troops, for the cost of food, clothing, supplies, billets and requisitions ... The Army of Occupation was certain to need many millions of marks, not only for the troops, but also for the payment of requisitions, claims, etc.' The Judge Advocate General's School, *Law of Belligerent Occupation, J.A.G.S. Text No. 11* (US Army: Ann Arbor, 1944) 180.

⁶ S. Lazareff, *Status of Military Forces under Current International Law* (Leyden: Sijthoff, 1971) 268.

under the NATO and Partnership for Peace (PfP) status-of-forces agreements (SOFAs) and in military operations outside the NATO SOFA area in the Former Yugoslavia and Central Asia. This chapter also briefly reviews the EU, UN, and former Warsaw Treaty Organization, commonly known as the Warsaw Pact, claims programmes, with particular regard to their relationships with NATO claims programmes.

The legal authorities that allow for the payment of claims resulting from military operations vary from State to State, and from organization to organization, as do the specific regulations and policies that govern the adjudication of such claims. One cannot, therefore, meaningfully discuss claims operations without focusing upon particular national claims programmes. Given the large numbers of US service members deployed abroad since World War I, and the worldwide scope of their deployments, and the US experience as both a NATO Sending and Receiving State, this chapter primarily uses the US claims experiences in the NATO and NATO-led context to illustrate the details and complexities of settling claims resulting from military activities.

Further, the nature of the conflicts in which NATO has been involved since the end of the Cold War are markedly different than the battles it had anticipated against the forces of the Warsaw Pact. Particularly in Afghanistan, NATO forces have found themselves involved in what General Sir Rupert Smith has termed ‘war amongst the people’: civilian-centric operations where the use of force must be calibrated and justified in achieving military objectives, and where the attitudes and behaviours of the civilians amongst whom these conflicts are fought have now become perhaps the most crucial mission objectives.⁷ Traditionally, Sending States have not generally paid claims for damages caused during combat operations in Receiving States—but such payments, regardless of how they are actually defined, may in fact be very important in helping to bring such conflicts to an end. Therefore, this chapter also discusses the importance of gratuitous combat-damage payment mechanisms that complement traditional non-combat claims procedures.

II. Historical Background

1. Prior to 1914

As a general principle of traditional international law, sovereign States are immune to suit in each other’s courts, unless they voluntarily submitted to the jurisdiction of those courts.⁸ Nationals of one State who had themselves been injured or had suffered property damage at the hands of a foreign State were therefore forced to enlist their government’s support, so that their government could then attempt to seek redress through diplomatic means.⁹ When a government decided to pursue a particular claimant’s demand, however, the claim became in effect the government’s own. The claimant’s government was therefore free to handle the claim as it wished, and could settle, compromise or even surrender the claim with little input from the claimant.¹⁰ Predictably, such claims, regardless of their particular merits, were not often settled quickly; and if they were finally settled, the results were often unsatisfactory to the individual claimants.¹¹ Prior to World War I, the peacetime

⁷ See T. Pfanner, ‘Interview with General Sir Rupert Smith’ 88 *IRRC* (December 2006) 719, 718–27.

⁸ Lazareff, (n. 6) 271; *The Schooner Exchange v. M’Faddon*, 11 US 116, 137 (1812).

⁹ Lazareff, (n. 6) 271; *US v. Diekelman*, 92 US 520, 524 (1876). ¹⁰ Lazareff, (n. 6) 270.

¹¹ E. Turlington, ‘A New Technique in International Reclamation’ 37 *AJIL* (1943) 291, 292.

stationing of military forces on the soil of foreign countries was uncommon.¹² Further, the relatively low level of weapons and equipment technology up until the time of World War I ensured that the peacetime damages that could be caused by the small numbers of service members stationed abroad were relatively minor in scope.¹³ Consequently, the Sending States' forces' impacts upon the Receiving States' local populations were quite small.

2. World War I

As a result of World War I, however, large numbers of Allied service members were stationed in various Receiving States across the world. France, in particular, found itself hosting tremendous numbers of soldiers first from the British Empire, and then from the US. The British forces established claims commissions soon after their arrival in France. These claims commissions dealt directly with the French claimants, and French authorities were only occasionally involved in the settling of particular claims.¹⁴ Given the traditional immunity of the Sending State, however, dissatisfied claimants found they had no recourse to French courts.¹⁵ In 1915, a bilateral agreement between Britain and France provided for the substitution of France for Britain in such claims.¹⁶ Claimants then had the opportunity to bring their cases before French courts as if French forces had caused the damages.¹⁷ French authorities paid adverse judgments, and the British agreed to handle the issue of reimbursement through diplomatic means at the end of the conflict.¹⁸

US forces arrived in France without an administrative mechanism to pay claims.¹⁹ In response to political pressure from French authorities, the US passed domestic legislation in 1918 allowing for the administrative settlement of claims by US military officers. Claims were adjudicated and paid on the same bases of liability by which the Receiving States' militaries were held liable on claims by their nationals.²⁰ Between 1 August 1918 and 1 December 1919, US military authorities received 51,745 claims, of which 38,299 were paid.²¹ In 1919, the US and France concluded an agreement, similar to that between Britain and France, which provided for the substitution of France for the US in claims which went before French courts for adjudication.²²

3. World War II

For US forces in particular, World War II presented similar claims issues, albeit on a far greater scale. Conscious of the impact that the deployment and presence of US forces across the globe would have upon public opinion in receiving states, in 1942 the US Congress passed the Foreign Claims Act.²³ With the stated goal of promoting and maintaining friendly relations with Receiving States, the Foreign Claims Act allowed for the expeditious administrative settling of claims by US military commissions, for damages caused both within the scope of duty and outside the line of duty by the private wrongful acts of US service members.²⁴ While administrative settlement of claims under the Foreign Claims Act was an improvement over the traditional handling of claims by US forces in Receiving States, it was by no means perfect. Many claimants were dismayed by having their claims which arose in their own States decided upon by foreigners, using

¹² Lazareff, (n. 6) 268.

¹³ Lazareff, (n. 6) 268–69.

¹⁴ Lazareff, (n. 6) 272.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ W. R. Mullins, 'The International Responsibility of a State for Torts of its Armed Forces' 34 *Military L Rev* (October 1966) 59, 63.

²⁰ Ibid. 63.

²¹ Ibid. 63, fn 21.

²² Lazareff, (n. 6) 272.

²³ Title 10 United States Code (USC) § 2734 (1942).

²⁴ 10 USC § 2734 (a) (1942).

often poorly understood procedures; and by having no recourse against the decisions of the US claims commissions.²⁵

Eventually, as in World War I, the US and France concluded a series of bilateral agreements to consolidate and expedite the settling of claims. In 1945, the two nations agreed to substitute France for the US in court actions involving vehicular accident claims.²⁶ In 1946, under the Blum-Byrnes Agreement, France agreed to pay all outstanding claims against the US resulting from damages which occurred before 1 July 1946.²⁷ This time-limit caused significant problems for French claimants, however, for US Forces continued to base service members in France and transit France to supply and maintain their forces in Germany long after 1 July 1946.²⁸ Accordingly, for damages caused after that date, French claimants no longer had recourse to French courts, and instead had to accept the decisions of US military claims commissioners under the Foreign Claims Act.²⁹

4. Post World War II

In 1949, Britain, France, Belgium, the Netherlands, and Luxembourg concluded the Treaty of Brussels,³⁰ a multilateral collective security arrangement which was the precursor to the Western European Union. Under the status-of-forces agreement to the treaty,³¹ the signatories each agreed to pay claims arising in their own countries from the stationing of any contracting State's forces there.³² Further, the Parties agreed to split the total cost of such claims amongst themselves on a specified *pro rata* basis.³³ Contractual claims were excluded,³⁴ as were claims generated by a signing State's military in its own territory for which it was exclusively responsible.³⁵ Damages to military personnel and property were waived,³⁶ and third-party non-official duty claims fell under the jurisdiction of the Receiving State unless the specific Sending State of the personnel who had caused the damages chose to make an *ex gratia* payment.³⁷ Further, whenever there was an issue as to whether the damages had been caused during the course of official duties, an arbitrator would be nominated to settle the issue.³⁸

The claims regime contemplated by the Brussels Treaty SOFA contained several novel provisions. The claims provisions addressed many issues pertinent to the long-term stationing of friendly States' forces in Receiving States under a collective security agreement. Victims' interests in consistent, expeditious settlements of their claims by adjudicative bodies in which they had confidence were met by substituting the receiving states for the Sending States.³⁹ The States' interests in an efficient and harmonious working

²⁵ Mullins, (n. 19) 63; Lazareff, (n. 6) 274. As Lazareff notes: "The victim of an accident can not understand that a friendly state should refuse to pay a claim; if the foreign state does not pay, the tendency is to consider him as an "occupant"?" Lazareff, (n. 6) 271.

²⁶ Lazareff, (n. 6) 273. ²⁷ Ibid. ²⁸ Ibid. 274. ²⁹ Ibid.

³⁰ Treaty for Collaboration in Economic, Social, and Cultural Matters and for Collective Self-Defence, 17 March 1948, 304 UNTS 53 (1948).

³¹ Agreement on the Status of Members of the Armed Forces of the Brussels Treaty Powers, 21 December 1949, Belgian House of Representatives, Parliamentary Documents, Session of 1950–1951, Report No. 157 (10 January 1951) [hereinafter Brussels Treaty SOFA].

³² Brussels Treaty SOFA, Art. 8, para. 1.

³³ Great Britain was to pay 50% of the total cost, France 25%, and the Benelux 25%, Brussels Treaty SOFA, Art. 8, para. 3.

³⁴ Brussels Treaty SOFA, Art. 8, para. 7. ³⁵ Brussels Treaty SOFA, Art. 8, para. 4.

³⁶ Brussels Treaty SOFA, Art. 8, para. 2(b).

³⁷ Brussels Treaty SOFA, Art. 9, paras. 2, 3. The Receiving State was to collect such claims, investigate them, and forward a report with recommendations as to payment to the Sending State. Whether the Sending State then paid the claims was within its discretion.

³⁸ Brussels Treaty SOFA, Art. 10. ³⁹ Lazareff (n. 6) 276.

relationship with each other within the alliance were met by the waiver of intergovernmental and contractual claims, among others. Finally, the distribution of the total costs among the parties not only emphasized the sharing of the common defence burden, it also served as a confidence-building measure that claims were being adjudicated fairly and consistently by all parties.⁴⁰

5. Summary

The traditional immunity of sovereign States for claims against them that result from the activities of their armed forces in Receiving States became simply untenable in World War I as the nature and scope of damages rose exponentially as militaries increasingly mechanized. The ad hoc arrangements developed between the Allies in both world wars went some distance in making the presence of Sending States' forces acceptable to the people of the Receiving States, but they were not completely successful in assuring Receiving State populations of their transparency, consistency and accountability. After World War II, however, the Brussels SOFA marked a novel departure from the earlier claims arrangements through its use of cost sharing provisions to address these concerns, and make the peacetime stationing of Sending State forces in Receiving States politically and economically acceptable on an indefinite basis.

III. The NATO SOFA Claims Regime

The need for the Brussels Treaty SOFA was obviated by the development of the NATO SOFA, and it never entered into force.⁴¹ Nevertheless, the Brussels Treaty SOFA served as one of the primary bases for negotiation between the parties to the North Atlantic Treaty in devising a NATO claims regime.⁴² The lessons learned by the Allies during the course of two world wars, particularly as encapsulated in the Brussels Treaty SOFA claims arrangement, served as a backdrop to the consideration of what sort of claims regime would best serve the interests of this unprecedented peacetime alliance. The negotiations which resulted in Art. VIII of the NATO SOFA are well documented elsewhere,⁴³ and are beyond the scope of this chapter. The enduring success of the Alliance is no doubt due in large part to the soundness of Art. VIII as negotiated and implemented by the NATO members.

1. Article VIII

Art. VIII, NATO SOFA, concerns itself with three different sorts of claims: intergovernmental;⁴⁴ third-party claims arising from acts or omissions done in the course of official duty;⁴⁵ and third-party claims arising from private wrongful acts or omissions done outside the course of official duty.⁴⁶

⁴⁰ Ibid. 361.

⁴¹ Memorandum from A. Melot, Counsellor, Belgian Ministry of Foreign Affairs, Foreign Commerce, and Development, to M. Vrydag, Judge Advocate Division, SHAPE (31 March 1998).

⁴² Lazareff, (n. 6) 361. ⁴³ Ibid. 268–362.

⁴⁴ NATO SOFA, Art. VIII, para. 1. ⁴⁵ NATO SOFA, Art. VIII, para. 5.

⁴⁶ NATO SOFA, Art. VIII, para. 6. Damages resulting from the unauthorized use of official vehicles are ordinarily dealt with as *ex gratia* claims, unless the sending state was found to be legally responsible for the damages under receiving state law. NATO SOFA, Art. VIII, para. 7. The term 'legally responsible' is 'defined by

(a) Intergovernmental claims

With regard to intergovernmental claims, claims for damages to ‘military property’, that is, ‘any property owned by [the injured State] and used by its land, sea, or air armed services’, ‘are waived’ ... ‘if such damage⁴⁷ occurred in the course of official duty.⁴⁸ Similarly, maritime salvage claims⁴⁹ and claims for injuries or death of service members are also waived,⁵⁰ provided the damages occurred in the course of official duty. As to non-military property owned by a party to the NATO SOFA ‘and located in its territory’,⁵¹ claims for damages are waived if the claimed amount is less than \$1,400 and occurred during the course of official duty.⁵² Unresolved issues of liability are settled by an arbitrator selected from among current or former Receiving State high judicial officials by agreement between the parties.⁵³

The waiver of damages provisions reflects a very pragmatic and balanced approach to dealing with the foreseeable and inevitable losses and damages which occur as large numbers of military personnel exercise with and operate complex and dangerous modern military equipment.⁵⁴ The NATO forces all have their own maintenance facilities to repair damaged equipment, as well as medical and social programmes to take care of injured or even deceased personnel and their dependents. Further, military exercises and operations would come to a standstill if every damage incident which occurred between forces of different NATO partners had to be investigated and adjudicated like third-party claims. The need for such waiver provisions is even more pronounced in a NATO out-of-area deployment, given the likely lack of clerical and investigatory infrastructure, as well as the heightened operational tempo.

(b) Official duty third-party claims

Official duty claims of third parties are addressed in Art. VIII, NATO SOFA, para. 5. The Receiving State substitutes itself for the Sending State and processes such claims either administratively or judicially according to the laws and regulations governing the activities of its own armed forces.⁵⁵ Allowable claims include those ‘arising out of acts or omissions of members of a force or civilian component done in the performance of official duty’, or an ‘act, omission, or occurrence for which a force or civilian component is legally responsible’.⁵⁶ Contractual claims are expressly excluded.⁵⁷ The payment of a claim, whether according to administrative settlement or Receiving State court adjudication, is deemed ‘binding and conclusive’ upon the parties involved.⁵⁸ Ordinarily, when just one Sending State is liable, the Receiving State pays the claim and submits a request for reimbursement to that Sending State for 75% of the award amount.⁵⁹ ‘When more than one sending State is liable, the amount awarded or adjudged shall be distributed equally

local law and custom rather than by [sending state] notions of tort liability, possibly including such concepts as strict liability under receiving state law’. US Department of the Army Pam. 27-162, *Legal Services—Claims Procedures*, para. 7-2b(2) (21 March 2008) [hereinafter DA Pam. 27-162]. See also Lazareff, (n. 6) 304.

⁴⁷ NATO SOFA, Art. VIII, para. 1.

⁴⁸ NATO SOFA, Art. VIII, para. 1(i), (ii).

⁴⁹ NATO SOFA, Art. VIII, para. 1(ii).

⁵⁰ NATO SOFA, Art. VIII, para. 4.

⁵¹ NATO SOFA, Art. VIII, para. 2(a).

⁵² NATO SOFA, Art. VIII, para. 2(f).

⁵³ NATO SOFA, Art. VIII, para. 2(a), (b).

⁵⁴ See Lazareff, (n. 6) 288 (the purpose of waiver of damages to non-military property below the predetermined monetary thresholds is to avoid lengthy settlement procedures for minor damages).

⁵⁵ NATO SOFA, Art. VIII, para. 5(a).

⁵⁶ NATO SOFA, Art. VIII, para. 5.

⁵⁷ NATO SOFA, Art. VIII, para. 5. War damage claims are also excluded under Art. XV, para. 1.

⁵⁸ NATO SOFA, Art. VIII, para. 5(c).

⁵⁹ NATO SOFA, Art. VIII, para. 5(e)(i).

among them.⁶⁰ If the Receiving State is not one of the liable parties, however, 'its contribution shall be half that of each of the sending States'.⁶¹ Similarly, when damages are caused by different NATO forces but responsibility cannot be ascertained, the adjudged amounts are distributed among them equally.⁶² In the event the parties cannot agree on whether an incident occurred within or outside the scope of duty, an arbitrator is appointed to resolve the issue.⁶³

(c) *Ex gratia claims*

Non-official duty third-party claims are investigated and reviewed by the Receiving State,⁶⁴ and a recommendation is made to the Sending State of the tortfeasor as to an appropriate compensation for the claimant.⁶⁵ If the Sending State decides to offer an *ex gratia* payment, and the claimant accepts the offer 'in full satisfaction of his claim', the Sending State pays the claimant and then informs the appropriate Receiving State authorities of the settlement of the claim and the amount accepted.⁶⁶ Until the claim has been paid, Receiving State courts may still entertain suits against the tortfeasor.⁶⁷

Art. VIII, NATO SOFA, para. 5, offers in principle pragmatic and efficient solutions as far as compensation for damages caused to third parties is concerned. Third parties have a clear interest in having their damages regulated by the Receiving State so that cumbersome and often inconsistent claims procedures in foreign countries can be avoided. However, depending upon economic and cultural factors, it may not be readily acceptable to all Contracting Parties as Receiving States to contribute 25% of the amount awarded, as provided for under Art. VIII, para. 5(e)(i). In the interest of reciprocity, however, this provision deserves to be implemented without exception.

Pursuant to the Paris Protocol, Allied Command Operations (or SHAPE as it is often still known), Allied Command Transformation and their subordinate Allied headquarters are largely treated as if they were NATO SOFA Contracting Parties with regard to claims.⁶⁸ Allied headquarters themselves are responsible for handling official duty damage claims caused by the acts of their personnel. They are likewise obligated to waive claims against NATO contracting parties for damages to headquarters military property,⁶⁹ and to cooperate with the Receiving States in the procurement of evidence required to dispose of claims fairly.⁷⁰ Further, personnel attached to an Allied headquarters are not subject to civil process in Receiving State courts for acts or omissions done in the performance of their official duties.⁷¹ For acts and omissions outside the scope of official duties or caused due to unauthorized use of service vehicles, however, the State to whose armed service the military person belongs is responsible for handling any NATO SOFA *ex gratia* claims.⁷²

⁶⁰ NATO SOFA, Art. VIII, para. 5(e)(ii).

⁶¹ NATO SOFA, Art. VIII, para. 5(e)(ii).

⁶² NATO SOFA, Art. VIII, para. 5(e)(iii). The receiving state pays only one-half the apportioned amount.

⁶³ NATO SOFA, Art. VIII, para. 8. The arbitrator is appointed and conducts the arbitration in accordance with NATO SOFA, Art. VIII, para. 2.

⁶⁴ NATO SOFA, Art. VIII, para. 6(a).

⁶⁵ NATO SOFA, Art. VIII, para. 6(b).

⁶⁶ NATO SOFA, Art. VIII, para. 6(c).

⁶⁷ NATO SOFA, Art. VIII, para. 6(d).

⁶⁸ Protocol on the Status of International Military Headquarters set Up pursuant to the North Atlantic Treaty [hereinafter Paris Protocol] (28 August 1952) 340 UNTS 200.

⁶⁹ Paris Protocol, Art. VI, s 2.

⁷⁰ Paris Protocol, Art. IV, para. (b). This obligation continues to apply to the Sending State to whose armed force the actor in question belongs.

⁷¹ Paris Protocol, Art. IV, para. (b).

⁷² Paris Protocol, Art. IV, para. (d). The details of headquarters' claims operations are detailed in Chapter 37, 'NATO Military Headquarters'.

2. US claims operations in Germany

(a) Legal and executive authorities

The US Department of Defense has assigned to the US Army ‘single-service claims responsibility’ for a majority of the NATO countries, including the Germany and the new NATO members in Eastern Europe.⁷³ Claims against the US forces arising from non-combat operation-related damages in Germany are ordinarily settled under two different statutory grants of authority: the International Agreements Claims Act⁷⁴ and the most recent version of the Foreign Claims Act.⁷⁵ The International Agreements Claims Act allows the US forces to settle meritorious claims against the US pursuant to US obligations under international law.⁷⁶ A SOFA is the most common form of agreement into which the US enters with other nations that triggers application of the International Agreements Claims Act. Under Art. VIII, NATO SOFA, and the Supplementary⁷⁷ and Administrative Agreements⁷⁸ subsequently negotiated thereto, the former Defence Costs Offices located throughout Germany until 2005, and now the three Damage Control Offices of the Federal Ministry of Finance have the responsibility for receiving, investigating, adjudicating, and settling or denying official duty claims against the US forces,⁷⁹ in accordance with German law.

The US Army’s worldwide claims system is managed by the US Army Claims Service, headquartered at Fort Meade, Maryland.⁸⁰ It is the Receiving State office for claims generated by NATO allies operating or stationed in the US under Art. VIII, NATO SOFA,⁸¹ and it designates command claims services for major overseas theatres.⁸² One such command claims service is US Army Claims Service Europe, originally stationed in Mannheim, and now stationed in Wiesbaden, Germany.⁸³

(b) Claims processing

Official Duty Claims. After conducting a preliminary investigation into a particular claim, the responsible Damage Control Office provides the US Army Claims Service Europe with the information regarding the claim along with a request for a ‘scope certificate’.⁸⁴

⁷³ Office of the General Counsel, Department of Defense, Department of Defense Instruction 5515.08, ‘Assignment of Claims Responsibility’ (30 August 2016) 5 [hereinafter DODI 5515.08].

⁷⁴ 10 USC § 2734a (2006). ‘When a claimant has filed a claim with a receiving State and received payment, or the claim has been denied on the merits, such action will be the claimant’s final and exclusive remedy and will bar any further claims against the United States.’ US Department of the Army Regulation 27-20, *Claims*, para. 7-13e (8 February 2008) [hereinafter AR 27-20].

⁷⁵ 10 USC §2734 (2006).

⁷⁶ Statutory authority to reimburse the receiving state is only granted when the US is actually a party to the agreement, and the agreement contains cost-sharing provisions; 10 USC § 2734a(a) (2006).

⁷⁷ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany of August 3, 1959, 14 *UST* 531; *TIAS* No. 5351; 481 *UNTS* 262, revised as of 18 March 1993 [hereinafter Supplementary Agreement].

⁷⁸ Administrative Agreement concerning the Procedure for the Settlement of Damage Claims (except Requisition Damage Claims) pursuant to Article VIII of the [NATO SOFA], dated 19 June 1951, in conjunction with Article 41 of the Supplementary Agreement to that Agreement (1985 Update) [hereinafter Administrative Agreement].

⁷⁹ Administrative Agreement, Part A, paras. 3, 5, 15; *Schadensregulierungsstellen des Bundes*, Ministry of Finance webpage, <http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Bundesvermoegen/Bundesanstalt_fuer_Immobilienaufgaben/Schadensregulierungsstellen/schadensregulierungsstellen-des-bundes.html>. These offices are located in Koblenz, Nürnberg, and Erfurt. Statement by Ms. Natalie Papaspyrou, *Bundesanstalt für Immobilienaufgaben, Anstalt des Öffentlichen Rechts* (personal correspondence 9 January 2017).

⁸⁰ DA Pam. 27-162 (n. 46), para. 1-9.

⁸¹ *Ibid.* para. 2-15b(2)(c).

⁸² *Ibid.* para. 1-5. A command claims service processes claims of US personnel stationed in receiving states as well as receiving state claims.

⁸³ *Ibid.* para. 2-15c(2).

⁸⁴ Administrative Agreement, Part B, paras. 7, 8, 9.

The scope certificate is not an admission of liability; rather, it is the means by which the Sending State certifies whether its forces were involved in the incident which gave rise to the claim, and if so, whether such involvement was official or outside the scope of official duty.⁸⁵ The scope certificate process is very important for both the Sending State and the Damage Control Office. It provides the Sending State with an opportunity to conduct its own investigation into the circumstances of the claim; and without the scope certificate, the Damage Control Office has no authority to settle the claim.⁸⁶ After receipt of a positive scope certificate and any additional information discovered during the US Army Claims Service Europe's scope certificate investigation, the Damage Control Office adjudicates the claim, pays the claimant, and eventually submits a schedule for reimbursement to the US Army Claims Service Europe.⁸⁷

A variation on the ordinary positive scope certificate, the 'scope exceptional' certificate, has proven very useful in the processing of claims in which liability is uncertain, or the size of the potential payments is quite large.⁸⁸ The scope exceptional procedure allows the US Army Claims Service Europe, 'to review and comment on the entire Damage Control Office's file and adjudication decision prior to final payment on the claim'.⁸⁹ Currently, the various Damage Control Offices and the US Army Claims Service Europe use the scope exceptional mechanism as a management tool in the remediation of groundwater pollution claims. Groundwater pollution is extremely expensive to remediate, and remediation projects are long-lived. When a project contractor has finished a phase of work and has submitted bills to the Damage Control Office, working groups of German and US environmental and claims officials gather to review the progress of the project. The work to date is reviewed, and further remediative steps are agreed upon after reviewing the respective costs. The continuing involvement of the bill payers ensures the project proceeds as economically and efficiently as possible.⁹⁰

To put damage claims operations in Germany in context, it is useful to take a historical perspective. Until the mid-1970s, claims reimbursements for damages were fairly low. Between 1975 and 1979, however, the number of US military personnel stationed in Germany increased from about 188,000 to almost 240,000, with the majority of these personnel serving in new Army combat units.⁹¹ Over this time period, manoeuvre damage claims accounted for 72% of the damage payments, and tort claims, 'usually traffic accidents involving military vehicles', accounted for the remainder of in-scope claims.⁹² In 1975, damage claims reimbursements to the German authorities were \$5.5 million—by 1979 they had increased to \$38.7 million.⁹³ By 1979, US Army Claims Service Europe was

⁸⁵ Administrative Agreement, Part B, para. 10.

⁸⁶ See Administrative Agreement, Part B, para. 11; DJ Fletcher, 'The Lifecycle of a NATO SOFA Claim' (1996) *The Army Lawyer* (September) 44, 46. 'The authorities of the sending state and of the receiving state shall cooperate in the procurement of evidence for a fair hearing and disposal of claims'. See also NATO SOFA, Art. VIII, para. 10.

⁸⁷ Administrative Agreement, Part B, paras. 19, 21, 26–30.

⁸⁸ Administrative Agreement, Part B, para. 9; Fletcher (n. 86) 47. Examples of situations in which the use of the scope exceptional certificate is appropriate include cases involving long-term medical care and cases in which multiple possible liable parties exist.

⁸⁹ Administrative Agreement, Part B, para. 9; Fletcher (n. 86) 47.

⁹⁰ J. M. Prescott, 'Die Rolle des amerikanischen Schadenersatzamts bei der Umweltsanierung' in A. Brandt and others (eds.), *Rüstungsalasten: Untersuchung, Probenahme, und Sanierung* (Berlin: Springer, 1997) 235–8.

⁹¹ US General Accounting Office, 'Military Damage Claims in Germany—A Growing Burden' (report) (9 October 1980), <<https://www.gao.gov/assets/140/130794.pdf>>, p. 7 [hereinafter 'Military Damage Claims'].

⁹² *Ibid.* 4.

⁹³ *Ibid.* i. In contrast, US units in the UK were primarily US Air Force. Reimbursement costs there rose from \$17,000 in 1975 to \$284,000 in 1979. *Ibid.* 2. In the early 1990s, claims against US forces averaged between 400

handling almost 50,000 damage claims a year under its portion of the Article VIII claims process.⁹⁴

Although a significant part of the increase in damage payments was attributable to the 'adverse impacts of inflation and the devaluation of the US dollar' during this time period, the 'extent and nature of military exercises conducted' was responsible for the majority of the increase.⁹⁵ For example, the annual 'Return of Forces to Germany (REFORGER)' exercise conducted in 1978 'involved 323,000 American, German, British, Belgian, Dutch, Norwegian, Danish, and other allied ground and air troops with more than 5,000 tanks, 1,500 aircraft, and vast columns of tracked and wheeled vehicles'.⁹⁶ During the time that these large-scale exercises occurred, 70 to 80% of the manoeuvre damage costs were related to damage to German roads.⁹⁷ Between 1980 and 1987, the US paid a total of more than \$230 million.⁹⁸ Understandably, the German public grew increasingly irritated with the impacts of large-scale exercises on fields, forests and wildlife.⁹⁹

Between 1988 and 1998, US Army Claims Service Europe processed 46,739 meritorious claims for damages resulting from tortious acts or omissions by the US forces and their civilian components. The US share for these damages over this time period totalled \$131,730,909.¹⁰⁰ Although the number of US service members stationed in Germany had dropped sharply from the levels sustained during the height of the Cold War, the amounts reimbursed to the various German Defence Costs Offices at this time remained high during this time period. For example, the US reimbursed \$20,532,267 on 12,585 claims in 1988,¹⁰¹ yet it paid \$14,879,435 on only 1,246 claims in 1997.¹⁰² The extra cost, beyond that attributable to inflation, largely resulted from financing environmental remediation projects. Claimants unsatisfied with Damage Control Office awards can challenge them in court, and in the mid-1980s, there were about 375 cases litigated each year.¹⁰³

Because manoeuvre damage claims were so prominent during the late Cold War as a result of combined exercises across the countryside of the Federal Republic of Germany, and because liability is premised on concepts of German legal responsibility other than traditional negligence, US Army Claims Service Europe still accounted for manoeuvre damage claims separately during this time period. Between 1988 and 1998, the US Army Claims Service Europe processed 115,558 meritorious manoeuvre damage claims, with a resulting US share of \$127,252,864. From a high of 46,603 claims in 1988, for a US share of \$50,357,406, manoeuvre damage claims sank to a low of 207 claims in 1997, for a US share of only \$155,935.¹⁰⁴

This decline was mainly attributable to the discontinuation of massive exercises on the scale of the REFORGER exercises. Also, the sharply reduced number of US soldiers stationed in Germany were using more wheeled vehicles than tracked, and were using them primarily inside the US Army's training areas in Germany. Further, US Army training doctrine moved away from the use of real world exercises towards greater use

and 450 a year, almost all of which resulted from vehicular accidents. J. Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law* 229 (Nijhoff: Dordrecht, 1992).

⁹⁴ *Ibid.* 5.

⁹⁵ *Ibid.* i. ⁹⁶ *Ibid.* 11, fn 1.

⁹⁷ US General Accounting Office, 'Maneuver Damage: DOD Needs to Strengthen US Verification of Claims in Germany' (report) (August 1988) 19 [hereinafter 'Maneuver Damage'].

⁹⁸ *Ibid.* 24. ⁹⁹ *Ibid.* 13–14.

¹⁰⁰ Memorandum from Major William Kern, Chief, Operational Claims, US Army Claims Service, Europe (13 January 1998) [hereinafter Kern Memorandum (January 1998)].

¹⁰¹ 'Maneuver Damage' (n. 97) 13–14.

¹⁰² Kern Memorandum (January 1998) (n. 100).

¹⁰³ 'Maneuver Damage' (n. 97) 15.

¹⁰⁴ Kern Memorandum (January 1998) (n. 100).

of simulation-based training due in part to environmental damage caused by manoeuvre training, as well as the greater availability of adequate simulation technologies.¹⁰⁵

To expedite the processing of manoeuvre damage claims, US Army Claims Service Europe had historically issued blanket scope certificates to the different Defence Costs Offices for claims that arose from large multinational exercises. Pursuant to a NATO post-manoeuve protocol, the different exercise participants were assigned claims responsibility for certain geographical areas, and in doing so the different nations waived the ordinary requirement for individual notification of damage claims from the Defence Costs Offices for less serious claims, as well as verification of claims up to a certain monetary threshold.¹⁰⁶ This was pragmatic, because it was often impossible to attribute manoeuvre damage to a particular nation when an area had been used by different forces. In 1987, 6,727, or 26% of US damage claims, were processed in this manner.¹⁰⁷ Beginning in 1988, however, US Army Claims Service Europe ceased issuing the blanket scope certificates as one measure to increase scrutiny of claims and reduce costs.¹⁰⁸ As another stewardship measure, US Army Claims Service Europe began to take advantage of the Administrative Agreement's provision that allowed review of Defence Costs Office case files on an 'exceptional' basis to verify manoeuvre damage and other, generally high-value, claims.¹⁰⁹

(c) *Claims processing: Ex gratia (non-official duty) claims*

Pursuant to Art. VIII, para. 6, certified *ex gratia* claims are investigated and reviewed by the Damage Control Offices.¹¹⁰ The Damage Control Offices then make recommendations for payment to the US Army Claims Service Europe.¹¹¹ Claims adjudicators at US Army Claims Service Europe make independent judgments under German law and US claims policy as to the merits of the claims and the proper amounts to be awarded. Foreign claims commissions at US Army Claims Service Europe then consider the claims *de novo*, and settle or deny the claims under the Foreign Claims Act, or forward them to US Army Claims Service at Fort Meade, Maryland, for appropriate disposition.¹¹²

The lowest level of foreign claims commission, the one-member foreign claims commission, can settle or deny claims for under \$15,000.¹¹³ A three-member commission can settle claims for under \$50,000, or deny claims for any amount.¹¹⁴ Claims between \$50,000 and \$100,000 can be settled by the Commander, US Army Claims Service.¹¹⁵ Claims above \$100,000 must be settled by the Secretary of the Army, the Army General Counsel, or other person designated by the Secretary.¹¹⁶ Because US claims policy, as set out in the applicable US statutes and the separate US military services' regulations, has

¹⁰⁵ J. W. Dunlap, Jr, 'The Economic Efficiency of the Army's Maneuver Damage Claims Program: Coase, But No Cigar' 190/191 *Military L Rev* (2006/2007) 1, 35–6.

¹⁰⁶ A. Philipp-Nolan, 'Update on Maneuver Damage Verification Procedures' (1990) *The Army Lawyer* (October) 56, 57 fn 11.

¹⁰⁷ 'Maneuver Damage' (n. 97) 3.

¹⁰⁸ Philipp-Nolan (n. 106) 57.

¹⁰⁹ *Ibid.* 58.

¹¹⁰ Administrative Agreement, paras. 63, 64. In the mid-1980s, Defence Costs Offices' operating costs were approximately \$18 million per year. The German Ministry of Finance paid half of the costs, and the German Federal States paid the other half. 'Military Damage Claims' (n. 91) 15–16.

¹¹¹ Administrative Agreement, para. 64.

¹¹² AR 27-20 (n. 74), paras. 1-5*d*, 10-6.

¹¹³ *Ibid.* para. 10-9*c*. A non-lawyer foreign claims commissioner can only settle claims for \$5,000 or less. *Ibid.* para. 10-9*c*.

¹¹⁴ *Ibid.* para. 10-9*d*(1), (2).

¹¹⁵ *Ibid.* para. 10-9*e*. The Judge Advocate General and the Assistant Judge Advocate General, US Army, also have this settlement authority. *Ibid.* para. 10-9*e*.

¹¹⁶ *Ibid.* para. 10-9*f*.

an impact on the *ex gratia* claims process, it is useful to go into some depth in reviewing how claims adjudication under the Foreign Claims Act is conducted.¹¹⁷ The Foreign Claims Act applies outside the US, its territories, and possessions.¹¹⁸ The inhabitants of Receiving States¹¹⁹ and all levels of the Receiving States' local and national governments are proper claimants.¹²⁰ Enemy or 'unfriendly' nationals or governments, insurers and other subrogees,¹²¹ US inhabitants, and US military and civilian component personnel, if in the Receiving State incident to service, are not proper claimants.¹²²

AR 27-20 specifically lists fourteen different sorts of claims which may not be allowed. These include claims for losses resulting from contractual disputes and domestic obligations, or claims which would not be in the best interests of the US to pay.¹²³ Claims must ordinarily be presented in writing to a US or other authorized official within two years of accrual of the claim.¹²⁴ Verbal claims may be accepted, but they must be reduced to writing within three years of accrual.¹²⁵ Written claims must state the time, place, and nature of the incident; the nature and extent of damage, loss, or injury; and the amount claimed.¹²⁶ To be allowable, a claim must result from either a negligent or wrongful act or omission,¹²⁷ or a so-called 'noncombat activity'.¹²⁸ AR 27-20 defines 'non-combat activities' as those which are 'essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims'.¹²⁹ Examples include manoeuvres, heavy convoys, and test firings of weapons.¹³⁰ Claims which result from 'combat' or 'combat-related' activities are not allowed.¹³¹ As a US district court has held with regard to the US government's lack of liability for damages caused by combat actions, the:

exception applies whether US military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be 'smart' or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other words, it simply does not matter for purposes of the 'time of war' exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts.¹³²

¹¹⁷ 10 USC § 939 (2010) (Art 139, Uniform Code of Military Justice), provides an alternative to paying claims under the Foreign Claims Act, but it is rarely used in the modern NATO context by US forces. In the event American soldiers commit criminal acts that result in the loss or damage to real or personal property, this statute provides a mechanism that provides for restitution to victims from the soldiers' pay rather than official US funds. DA Pam. 27-162 (n. 46) paras. 9-1-9-10.

¹¹⁸ 10 USC § 2734(a) (2006).

¹¹⁹ Whether one is an 'inhabitant of a foreign country' for purposes of the Foreign Claims Act is not dependent upon citizenship. The test is 'whether the claimant dwells in and has assumed a definite place in the economic and social life of the foreign country'. DA Pam 27-162 (n. 46) para. 10-2a(1).

¹²⁰ 10 USC § 2734(a) (2006).

¹²¹ 10 USC § 2734(a), (b) (2006).

¹²² DA Pam. 27-162 (n. 46) para. 10-2a(1).

¹²³ AR 27-20 (n. 74) para. 10-4a-o.

¹²⁴ 10 USC § 2734(b) (1) (2006); AR 27-20 (n. 74), para. 2-7.

¹²⁵ DA Pam. 27-162 (n. 46) para. 2-5.

¹²⁶ *Ibid.*

¹²⁷ 'Tortfeasors need not be acting within the scope of their employment for their negligent conduct to cause actionable loss, damage or injury.' *Ibid.* para. 10-3c(1). Interestingly, the current US Air Force regulation which governs the way in which US Air Force foreign claims commissioners investigate and adjudicate cases does not require a finding of negligence for a 'non-combat activities' claim to be valid. US Department of the Air Force Instruction 51-501, *Tort Claims* (29 June 2006) para. 3.9.2.

¹²⁸ DA Pam. 27-162 (n. 46), para. 10-3a.

¹²⁹ AR 27-20 (n. 74), Glossary § II 108.

¹³⁰ *Ibid.*

¹³¹ These terms are defined as follows: 'Activities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in, or in immediate preparation for impending armed conflict.' *Ibid.* 107.

¹³² *Koohi v. US*, 976 F.2d 1328, 1336 (9th Cir. 1992).

Claims are investigated, adjudicated, and settled or denied by military or civilian attorneys acting as foreign claims commissioners.¹³³ Although foreign claims commissioners apply local law to determine both liability and the amount of any award,¹³⁴ their decisions on claims are final.¹³⁵ Such claims are paid with 100% US funds, but ordinarily in the local currency.¹³⁶ Foreign claims commissions are required by regulation to make '[e]very reasonable effort' to 'negotiate a mutually agreeable settlement on meritorious claims'.¹³⁷ If a foreign claims commission intends 'to deny a claim or award less than the amount claimed', it must notify the claimant of the intended action so the claimant has an opportunity to any submit additional information it wishes to have considered before the final decision.¹³⁸ Once the foreign claims commission issues its final decision, and the claimant signs a claims settlement form, the claim is then certified to the local US Defence Finance and Accounting Office for payment in local currency.

In Germany, under the Administrative Agreement, the US Army Claims Service Europe then informs the appropriate Damage Control Office of its decision in the case and the amount paid to the claimant, if any.¹³⁹ Based upon the independent adjudications conducted at US Army Claims Service Europe, some claimants are paid more than the respective Damage Control Offices recommended. From a historical perspective, during fiscal year 1996, eighty-one German *ex gratia* claims were received and processed at US Army Claims Service Europe. Fifty-nine claimants accepted the *ex gratia* awards offered to them, for a total amount of \$143,885.¹⁴⁰ Experience has shown that *ex gratia* payments should be made without delay to avoid difficulties for the claimants as well as possible negative media reports.

Today, the three primary types of claims that US Army Claims Service Europe handles are, in order of importance, environmental claims, claims resulting from traffic accidents, and those caused by manoeuvre damage.¹⁴¹ Under German law, environmental claims must be filed within three months of the claimant becoming aware that the damage occurred, and US Army Claims Service Europe has developed a program to notify all potential claimants when facilities used by the US are closed and returned to the Federal Republic. Further, US Army Claims Service Europe sends its engineer to locations where US forces intend to conduct exercises in eastern NATO member countries to document any pre-existing damage, and to conduct post-exercise assessments to document any damage caused by US forces.¹⁴²

3. The US as a Receiving State

The US Department of Defense has also assigned the US Army the responsibility for serving as the NATO SOFA Receiving State Office for claims generated by NATO activities in the US¹⁴³ Claims 'arising from activities of member of NATO, Partnership for Peace, Singaporean, or Australian forces in the United States are processed in the same manner

¹³³ AR 27-20 (n. 74) para. 10-8. 'In exigent circumstances, a qualified non-lawyer employee of the Armed Forces may be appointed to a foreign claims commission ...'.

¹³⁴ Ibid. paras. 10-3a, 10-6g.

¹³⁵ Ibid. para. 10-6f(3).

¹³⁶ Ibid. para. 10-9b.

¹³⁷ Ibid. para. 10-6f(5).

¹³⁸ Ibid. para. 10-6f.

¹³⁹ Administrative Agreement, Part B, para. 65.

¹⁴⁰ Memorandum from Major William Kern, Chief, Operational Claims Branch, US Army Claims Service, Europe (17 September 1997) [hereinafter Kern Memorandum (September 1997)]. The remainder were denied.

¹⁴¹ Personal communication from Mr. D. Dribben, Chief, International Claims, US Army Claims Service (21 November 2016) [hereinafter Dribben Letter].

¹⁴² Ibid.

¹⁴³ DODI 5515.08 (n. 73) 5.

as those arising from activities of US government personnel'.¹⁴⁴ In the event US claimants decide to litigate their in-scope claims in US federal courts, operation of the Westfall Act¹⁴⁵ results in the US Department of Justice intervening in the suit on behalf of the Sending States and substituting itself for them in the proceedings. Sometimes US litigants unfamiliar with the NATO SOFA will sue Sending States in US State courts. The Department of Justice will then intervene and on the basis of federal pre-emption will have the case moved to Federal Court.¹⁴⁶

As a Receiving State, the three most common types of claims the US processes are, in order of frequency, traffic accidents, simple assaults (such as accidental collision with pedestrians by NATO personnel who are exercising), and aggravated assaults, which are criminal acts and therefore out of scope and dealt with through the *ex gratia* process.¹⁴⁷

There are a number of military programmes conducted in the US that involve military personnel from NATO and PfP members which have damage claims programmes that operate outside the provisions of Art. VIII. One example is the Euro-NATO Joint Jet Pilot Training Program (ENJJPTP), a multinational flight instruction programme conducted under the auspices of the US Air Force at Sheppard Air Force Base in Texas. ENJJTP claims are handled internally by the programme, based on pro rata responsibility for the damage and contribution by the sending state involved to the programme. When NATO or PfP personnel are not operating as part of the ENJJTP mission, claims against their Sending States are handled in accordance with the NATO SOFA.¹⁴⁸ Another example is the Foreign Military Sales (FMS) programme, under which NATO and PfP personnel might receive training and operate equipment purchased from US vendors in the United States. These claims are handled under contractual arrangements between the parties, which will ordinarily require the purchasing country to assume complete responsibility for adjudicating and paying any claims.¹⁴⁹ Between 2001 and 2003 the US allowed claims arising from support provided to NATO countries by the US under the FMS programme during the course of combined exercises to be handled under the NATO SOFA, but since then the US has required that this sort of support be through acquisition and cross-servicing agreements (ACSAs) instead, which have been traditionally understood to fall under Art. VIII.¹⁵⁰

4. Summary

Since 1950, NATO SOFA Art. VIII has served remarkably well in keeping the presence of significant Sending State forces in different Receiving States politically and economically acceptable to Receiving State governments and populations. In terms of transparency, the investigation and adjudication of damage claims by Receiving State Officials under Receiving

¹⁴⁴ AR-27-20 (n. 74) para. 7-11. ¹⁴⁵ 28 USC § 2679 (2008).

¹⁴⁶ Interview with Mr. D. Dribben, Chief, International Claims, US Army Claims Service (Woodstock, 4 October 2016).

¹⁴⁷ Dribben Letter (n. 141).

¹⁴⁸ 'Euro-NATO Joint Jet Pilot Training Program (ENJJPTP)', Sheppard Air Force Base website (17 October 2012), <<http://www.sheppard.af.mil/Library/FactSheets/Display/tabid/3418/Article/367537/euro-nato-joint-jet-pilot-training-program-enjjpt.aspx>>.

¹⁴⁹ Chapter 8, 'Foreign Military Sales Contractual Agreements' 8-10, in *The Management of Security Cooperation* (Ed. 1.0) (Institute of Security Cooperation Studies, Dayton 2016), available at <http://www.iscs.dsc.mil/documents/greenbook/08_Chapter.pdf>.

¹⁵⁰ See Department of Defense, Department of Defense Directive 2010.9, 'Acquisition and Cross-Servicing Agreements' (30 September 2016); *Security Assistance Management Manual*, Defense Security Cooperation Agency (3 October 2003) 378-79; DSCA 01-02, Memorandum from Lieutenant General Tome Walters, Director, Defense Security Cooperation Agency (19 January 2001).

State law makes the Art. VIII process obvious to third-party claimants in the Receiving State. In fact, it likely appears to local nationals to be largely just another Receiving State function. From the perspective of consistency, these same factors likely assure third-party claimants that their claims will be handled fairly under standards to which they are accustomed.

Accountability under Art. VIII plays out in two important ways. *First*, the Sending State has a strong incentive to reduce the damages its forces cause because it is generally responsible for 75% of the damage costs. *Second*, the Sending State is comfortable surrendering its ordinary immunity to claims by Receiving State third-parties because the Receiving State has a strong incentive to keep its claims programme economical given that it must absorb 25% of the damage costs as well as the costs of its investigatory and adjudicative overhead. These qualities of NATO SOFA Art. VIII proved to be very important after the end of the Cold War when former Warsaw Pact nations began to establish defence relationships with NATO.

IV. Claims Operations in Eastern Europe

1. Claims operations in Hungary before 1990

(a) Soviet-era claims operations

After World War II, several of the new People's Republics in Eastern Europe entered into bilateral mutual security treaties with each other and with the Soviet Union.¹⁵¹ In particular, Hungary and the Soviet Union entered into such a treaty in 1948.¹⁵² These treaties were supplemented in 1955 by an overarching multilateral mutual security treaty between most of the Eastern European nations (including Hungary) and the Soviet Union.¹⁵³ Neither the bilateral treaty between Hungary and the Soviet Union nor the Warsaw Treaty contained any provisions with regard to the status of Soviet or other Warsaw Treaty Organization (WTO) nations' forces on each other's soil.¹⁵⁴ In reality, given the overwhelming influence of the Soviet Union upon the political, legal, and military affairs of the Eastern European Receiving States at this time, a formal SOFA was considered unnecessary. The Receiving States did not attempt to exercise jurisdiction over Soviet forces on their territory, and the Soviet forces simply applied Soviet law to their personnel.¹⁵⁵

In the wake of Soviet Premier Nikita Khrushchev's denunciation of Stalin's policies, 1956 was marked by increasing unrest within the Soviet Union's Warsaw Pact allies, particularly Poland and Hungary, regarding the degree of control the Soviet Union sought to exert over their governments. Beginning with demonstrations by steelworkers in the industrial centre of Poznan that were brutally repressed in June 1956, hard-line Polish communist leaders faced increasing civil dissatisfaction with their regime. By the autumn of 1956, the Polish government brought in more moderate leadership and struck a more conciliatory tone in dealing with the demonstrators' concerns, but this then led to grave concerns on the part of Soviet authorities that Poland was becoming too independent of the Soviet Union.¹⁵⁶

¹⁵¹ G. Prugh, 'The Soviet Status of Forces Agreements: Legal Limitations or Political Devices?' 20 *Military Law Review* (Spring 1963) 1, 2.

¹⁵² Treaty of Friendship, Co-Operation and Mutual Assistance between Hungary and USSR (18 February 1948), 48 *UNTS* 163.

¹⁵³ Treaty of Friendship, Co-Operation and Mutual Assistance (14 May 1955), 219 *UNTS* 3 [hereinafter Warsaw Pact]. For a detailed discussion of the events leading up to the signing of the Warsaw Pact, see R. Remington, *The Warsaw Pact: Case Studies in Communist Conflict Resolution* (Cambridge: MIT Press, 1971), 10–27.

¹⁵⁴ Prugh, (n. 151) 2.

¹⁵⁵ *Ibid.*

¹⁵⁶ T. Cox, *Challenging Communism in Eastern Europe: 1956 and Its Legacy* (London and New York: Routledge, 2008), 104–6.

As a high-level Soviet delegation (including Khrushchev) flew to Warsaw to negotiate with the Polish government in October 1956, Red Army armoured and mechanized divisions began ‘manoeuvring’, and moving in the direction of Warsaw.¹⁵⁷ The tense negotiations eventually resulted in the Soviet government being reassured that Poland did not intend to abandon communism or its agreements with the Soviet Union, and granting certain concessions to the Polish government to conduct its internal affairs more autonomously.¹⁵⁸ By this time, however, Polish authorities later assessed that the Red Army deployments had caused a significant infrastructure damage. The cost of necessary repairs to roads and bridges was estimated to be 36.8 million zlotys, and damages to private and state-owned properties were estimated to total 15.3 million zlotys.¹⁵⁹

Later that month in Hungary, emboldened perhaps by the Soviet concessions to Poland, growing public demands for less Soviet interference in Hungarian affairs led to an uprising.¹⁶⁰ The revolt was crushed by Soviet forces, and a government more amenable to Soviet policy was reinstated.¹⁶¹ In the aftermath of the Hungarian Uprising, the Soviet Union apparently re-evaluated the legal bases governing the stationing of its troops in Eastern Europe.¹⁶² As a result, between late 1956 and the spring of 1957, the Soviet Union concluded SOFAs with Poland,¹⁶³ the German Democratic Republic,¹⁶⁴ Romania,¹⁶⁵ and Hungary.¹⁶⁶ These SOFAs were not reciprocal—they would not have applied to these nation’s forces in the Soviet Union.¹⁶⁷

As to their claims provisions, these agreements were broadly similar, although there were some small differences in how claims would be handled.¹⁶⁸ For example, although each of the treaties provided for a Joint Commission of Receiving State and Soviet officials to handle damages ‘on the basis of submitted claims and in conformity with the norms of local legislation’, the German Democratic Republic-Soviet SOFA allowed submission to the Joint Commission only if the interested parties were unable to settle the claim themselves.¹⁶⁹ The SOFAs also differed in a very practical aspect—the backlog of claims that

¹⁵⁷ Ibid. 106.

¹⁵⁸ Ibid. 106–8.

¹⁵⁹ Ibid. 106 fn 20. Using the value of the zloty fixed by Polish law in 1950 as being equivalent to .222116 gram of gold (459 *Ustawa o zmianie system pienieznego*, Art. 1.1 (1950)) and the closing price of pure gold in the US in 1957 being \$35.25 per troy ounce (‘Historical Gold Prices’ Only Gold website, <<http://onlygold.com/Info/Historical-Gold-Prices.asp>>, this yields an estimated functional exchange rate of \$0.25 per zloty in 1957. One 1957 dollar would be worth approximately \$8.57 today, meaning that in 2016 dollars, the total amount of the road and bridge damages would be in excess of \$78 million. This estimate is perhaps high, but it must also be noted that these armoured and mechanized divisions were apparently moving on their own power across Poland, rather than being transported.

¹⁶⁰ Remington, (n. 153) 32–6.

¹⁶¹ N. Barber, *Seven Days of Freedom: The Hungarian Uprising, 1956* (New York: Madison Books, 1974), 178–93.

¹⁶² Remington, (n. 153) 38.

¹⁶³ Treaty Between the Government of the Union of Soviet Socialist Republics and the Government of the Polish People’s Republic Concerning the Status of Soviet Forces Temporarily Stationed in Poland (17 December 1956), 266 *UNTS* 194.

¹⁶⁴ Agreement Between the Government of the Union of Soviet Socialist Republics and the Government of the German Democratic Republic on Questions Relating to the Temporary Presence of Soviet Forces in the Territory of the German Democratic Republic (12 March 1957), 285 *UNTS* 120.

¹⁶⁵ Agreement Between the Government of the Union of Soviet Socialist Republics and the Government of the Romanian People’s Republic Concerning the Legal Status of Soviet Forces Temporarily Stationed in the Territory of the Romanian People’s Republic (15 April 1957), 274 *UNTS* 158. Soviet forces withdrew from Romania in July 1958. G. Ginsburgs, *The Soviet Union and International Cooperation in Legal Matters* (Martinus Nijhoff Publishers: Dordrecht, 1992), 107–8.

¹⁶⁶ Ibid.

¹⁶⁷ Z. Ziles and others, *The Soviet Legal System and Arms Inspection* 95 (Praeger Publishers: New York, 1972).

¹⁶⁸ Ginsburgs (n. 165) 104–15. A Czechoslovak-Soviet SOFA was not concluded until 16 October 1968 after the Warsaw Pact invasion of that year to suppress the so-called ‘Prague Spring’. Ibid. 113–14.

¹⁶⁹ Ibid. 105.

could be handled under them. For example, only German claims that had arisen after the signing of the Warsaw Pact in 1955 could be indemnified, whilst all outstanding Polish claims in existence at the time of the SOFA's signing could be handled.¹⁷⁰

Looking particularly to the settlement of claims under the Hungarian–Soviet SOFA, the Soviet Union agreed to indemnify Hungary for official duty damages to the Hungarian state or private individuals, including ‘citizens of third states’ in Hungary.¹⁷¹ Claims adjudication was to be conducted by a Hungarian–Soviet Joint Commission,¹⁷² ‘taking into consideration the provisions of Hungarian legislation’.¹⁷³ In contrast to the NATO SOFA, contractual claims were apparently to be handled in the same fashion.¹⁷⁴ In the event the Joint Commission was unable to resolve a claim, the issue would be turned over to the respective governments for diplomatic resolution.¹⁷⁵ The Joint Commission was authorized to establish its own rules of operation.¹⁷⁶

Claims arising from private tortious activities of Soviet personnel or family members were to be decided by Hungarian courts.¹⁷⁷ The Soviet Union agreed ‘to indemnify Hungary to the extent established by competent Hungarian courts’.¹⁷⁸ The Soviet Union was allowed to assert affirmative claims on its behalf under the same conditions that Hungarian official duty and non-official duty claims were settled.¹⁷⁹ Claimants were supposed to be reimbursed within three months of either Hungarian court or Joint Commission decisions.¹⁸⁰ The Hungary-Soviet SOFA was proclaimed part of Hungarian law by Decree with the Force of Law No. 54 of 1957.¹⁸¹ Specifically, this decree provided that in ‘all cases, the extent of indemnification shall be determined by the Joint Commission ...’ and ‘such determinations shall be based on claims filed, in due regard to provisions of Hungarian law’.¹⁸²

Although little is known about the exact manner in which claims adjudication by the Joint Commission occurred, available information suggests that Hungarian claimants found it to be unsatisfactory. *First*, the Soviets rarely, if ever, actually appear to have paid claims. Instead, the Soviets preferred to have the responsible units or individuals repair the damages themselves, when possible.¹⁸³ *Second*, Hungarian claimants appear to have had significant issues with the transparency and accountability of the Joint Commission.

This is shown in a 1990 Hungarian Constitutional Court case in which a number of complaints which challenged the Joint Commission's operations. Although the

¹⁷⁰ Ibid. 106.

¹⁷¹ Agreement on the Legal Status of the Soviet Forces Temporarily Present on the Territory of the Hungarian People's Republic (27 May 1957), Art. 9 (1) (reprinted in ‘Official Documents’ (1958) 52 *AJIL* 215) [hereinafter Hungarian-Soviet SOFA].

¹⁷² Hungarian-Soviet SOFA, Art. 17. The Joint Commission had both a three-member Hungarian branch and a three-member Soviet branch.

¹⁷³ Hungarian-Soviet SOFA, Art. 9 (1). ¹⁷⁴ Ibid.

¹⁷⁵ Ibid. Art. 17. Under the NATO SOFA, however, unresolved disputes by the parties are to be referred to an arbitrator for resolution. NATO SOFA, Art. VIII, paras. 2, 8. As a practical matter, at least between Germany and the US, this option has apparently never been used, for the representatives of the two nations have always been able to come to an agreement.

¹⁷⁶ Ibid. Art. 17. ¹⁷⁷ Ibid. Art. 9 (2). ¹⁷⁸ Ibid. Art. 9 (2). ¹⁷⁹ Ibid. Art. 10.

¹⁸⁰ Ibid. Art. 11 (1).

¹⁸¹ Federal Broadcast Information Service, *JPRS Report—East Europe, 91-044* (5 April 1991) 5 (translating and quoting Constitutional Court ruling No. 30/1990, Constitutional Court Case No. 266/B/1990 (15 December 1990), published in *Magyar Kozlony* 2440–4) [hereinafter *Joint Commission Case*].

¹⁸² Ibid. 7.

¹⁸³ Telephonic interview with Lieutenant Colonel F. Pribble, US Army, former Chief, US Army Claims Service Europe (15 January 1998) [hereinafter Pribble Interview]. With regard to manoeuvre damage, for example, Soviet and other WTO troops would often distribute leaflets to farmers in areas in which training was occurring asking them ‘not to be unhappy at the ruined realty because the tanks operated there, but to think instead of the need for such a maneuver against the West’. Prugh, (n. 151) 11 fn 25.

Constitutional Court did not find the governmental decree that proclaimed the Hungarian-Soviet SOFA effective in the Hungarian People's Republic to be unconstitutional, it did find that the minister of defence did not perform the legislative duties authorized by the decree. This caused the laws applied on the basis of the SOFA and domestic Hungarian law to become 'mutually inconsistent', which violated the Hungarian constitution's requirements for due process.¹⁸⁴

In 1958, a Ministry of Justice decree allowed the Joint Commission to request Hungarian courts to conduct evidentiary proceedings on claims, and once concluded, the courts' summary opinions on the cases were to become part of the Joint Commission's proceedings.¹⁸⁵ The Ministry of Justice decree did not, however, address whether these summary opinions were binding on the Joint Commission, or whether any legal action could be had against the decisions of the Joint Commission if it did not follow the summary opinions.¹⁸⁶ The Constitutional Court noted that the Joint Commission's proceedings were non-judicial in character, and that no legal recourse was 'available to challenge the decisions of this organisation',¹⁸⁷

As set out in the Joint Commission's Operating Rules, the 'determinations of the committee are final. Such determinations shall not be subject to appeal, and shall not be the subjects of petitions filed in courts'.¹⁸⁸ Further, the Constitutional Court noted that although the Operating Rules stated that the Joint Commission 'must not render determinations contrary to the manner in which laws are applied by Hungarian courts', other provisions in the Operating Rules 'significantly deviated from Hungarian procedural rules'.¹⁸⁹ In particular, the Constitutional Court observed that claims under 100,000 forints could be disposed of by the chairmen of the two Joint Commission branches without having to convene the Joint Commission.¹⁹⁰ Further, its members were not judges and were not required to have legal training, and when the Joint Commission did meet its sessions were closed.

In the complainants' cases, Hungarian civil courts had conducted the evidentiary proceedings into the validity of their damage claims at the Joint Commission's request. One complainant, for example, had been injured in an accident involving a Soviet vehicle. He suffered permanent damage, and sought annuity indemnification, compensation for damages and for loss of income, and non-monetary damages. The Budapest City Court had found in favour of his claim and recommended that he receive the full amount of damages he had sought. The Joint Commission, however, did not fully honour the city court's summary opinion, and neither awarded him non-monetary damages nor provided any explanation for its decision.¹⁹¹ Although the Constitutional Court did not dispute the Joint Commission's explanation that its actions were consistent with the Operating Rules, it found that the Joint Commission's rules were not clearly Hungarian in nature, nor were they law. Because the Constitutional Court was without jurisdiction to annul the Operating Rules itself, it directed the Minister of Defence remedy the situation in a manner consistent with the Hungarian Constitution.¹⁹²

Soviet forces had already started leaving Hungary in 1990, and they began the process of transferring military facilities to the Hungarian military that year.¹⁹³ Soviet forces completed their withdrawal in June 1991, and the Soviet Union presented Hungary with a

¹⁸⁴ *Joint Commission Case* (n. 181) 5. ¹⁸⁵ *Ibid.* ¹⁸⁶ *Ibid.* 7. ¹⁸⁷ *Ibid.* 5.

¹⁸⁸ *Ibid.* 6. ¹⁸⁹ *Ibid.* 7. ¹⁹⁰ *Ibid.* 7.

¹⁹¹ *Ibid.* 6, 8. ¹⁹² *Ibid.* 8.

¹⁹³ Federal Broadcast Information Service, *JPRS Report—East Europe, 91-044* (5 April 1991) 'Soviet Military Property Transfer Status' 21.

bill for \$1.2 billion for the returned facilities. Hungary responded with a claim for environmental and other damages caused by the Soviet forces in the amount of \$850 million. In November 1992, Hungary and the new Russian Federation both agreed essentially to waive their claims, and Hungary agreed to provide pharmaceuticals and possibly assist with the construction of housing for withdrawn soldiers in Russia.¹⁹⁴

(b) US claims operations under the Partnership for Peace (PfP) SOFA

In 1995, four years after Soviet forces had departed Hungarian territory, Hungary ratified the PfP SOFA,¹⁹⁵ paving the way for greater military contacts with NATO. The first of those contacts came quite quickly, for in December 1995 the US began moving over 20,000 soldiers and massive amounts of equipment in and through Hungary in support of the IFOR deployment into the Former Yugoslavia. A transit agreement was concluded between Hungary and NATO allowing the movement of these forces, and it provided that the provisions of the PfP SOFA would apply to NATO operations in Hungary.¹⁹⁶ Negotiations began immediately between Hungarian officials and US forces representatives concerning the status of US forces, including claims matters.¹⁹⁷

On 27 March 1996, representatives of US Army Europe, and the Hungarian Ministry of Defence entered into an agreement with regard to the settlement of claims, commonly known as the Administrative Arrangement.¹⁹⁸ The terms of the Administrative Agreement were based primarily upon the German–US Administrative Agreement, but they also reflected the Hungarian experience under the Hungarian–Soviet SOFA.¹⁹⁹ Under Art. II (Intergovernmental Claims) the Parties agreed to waive all damages to their non-military property less than or equal to either HUF 182,000 or \$1,400, respectively.²⁰⁰ Third-party official duty claims were handled differently depending upon whether they were vehicular or non-vehicular. Vehicular claims, in accordance with an agreement between the Hungarian Ministry of Defence and the Association of Hungarian Insurance Companies (Association),²⁰¹ were investigated, adjudicated, and settled in accordance with Hungarian law and Association policy and procedure.²⁰²

After completion of its initial investigation, the Association requested scope certificates of the US forces before it adjudicated and settled claims.²⁰³ Once claims were settled, the

¹⁹⁴ ‘Yeltsin Gives Hungary Soviet Files on Revolt, *New York Times* (12 November 1992) <<http://www.nytimes.com/1992/11/12/world/yeltsin-gives-hungary-soviet-files-on-revolt.html>>. Poland too raised environmental damage concerns with the Soviets, and was very concerned with the damages that would occur to its transportation infrastructure as a result of Soviet forces redeploying from their bases in eastern Germany through Poland back to the Soviet Union. J. Woodliffe (n. 93) 311–12. In an arrangement similar to the one between Hungary and the Soviet Union, on 22 May 1992, ‘Poland dropped claims for ecological damages and Russia agreed to hand over its military installations on Polish soil free of charge’—H. Kubiak, ‘Poland: National Security in a Changing Environment’, in R. Cowen Karp (ed.), *Central and Eastern Europe: The Challenge of Transition* 80 (OUP, 1993).

¹⁹⁵ Hungary ratified the PfP SOFA on 28 November 1995.

¹⁹⁶ Agreement between the North Atlantic Treaty Organization and the Government of the Republic of Hungary Regarding the Transit and Temporary Stationing of IFOR, 6 December 1995.

¹⁹⁷ Pribble Interview (n. 183).

¹⁹⁸ Administrative Arrangement Concerning Procedures For The Operation Of The Joint Claims Oversight Commission And The Settlement Of Claims Arising From The Activities Of US Forces In Connection With The Peace Implementation Force (27 March 1996) [hereinafter Administrative Arrangement].

¹⁹⁹ Pribble Interview (n. 183). ²⁰⁰ Administrative Arrangement, Art. 2.2.

²⁰¹ Ibid. Art. 3.1. ²⁰² Ibid. Art. 3.2.

²⁰³ Ibid. Art. 3.2. An amendment to the claims arrangement provided for the issuance of scope exceptional certificates in appropriate cases. Amendment to the Administrative Arrangement Concerning Procedures For The Operation Of The Joint Claims Oversight Commission And The Settlement Of Claims Arising From The Activities Of US Forces In Connection With The Peace Implementation Force (14 May 1997), Article 3.2.

Association then submitted requests for reimbursement to the Hungarian Ministry of Defence for amounts paid in settlement, or, 'in the event settlement cannot be reached, the amount awarded the claimant by a Hungarian court'.²⁰⁴ Once it approved the Association's requests, the Hungarian Ministry of Defence then reimbursed the Association,²⁰⁵ and in turn sought reimbursement from the US forces on a quarterly basis.²⁰⁶

Non-vehicular claims, however, were handled in a fashion intended to reflect more directly the workings of the decentralized former German Defence Costs Offices system. Such claims were submitted directly to the local mayor's office, which forwarded them through the local county administrative office to the Department of Law and Administration of the Hungarian Ministry of Defence.²⁰⁷ The Hungarian Ministry of Defence (or its authorized representative) conducted its own investigation, and then requested a scope certificate from the US forces.²⁰⁸ After receipt of the certificate, the Hungarian Ministry of Defence then adjudicated and settled the claim, if possible.²⁰⁹ As with vehicular claims, the Hungarian Ministry of Defence then requested reimbursement on a quarterly basis from the US forces.²¹⁰

Ex gratia claims were handled in the same fashion as non-vehicular claims, but, as in Germany, the Hungarian Ministry of Defence only made recommendations as to compensation to the US forces.²¹¹ The US forces claims agency then handled the case under its *ex gratia* procedures.²¹² Until the claimant accepted payment in satisfaction of his claim, Hungarian courts retained jurisdiction of such cases, were the claimant to bring a private action.²¹³

Similar to claims operations under the Hungarian–Soviet SOFA, a Joint Claims Oversight Commission oversaw the processing of claims. The commission was composed of Hungarian Ministry of Defence and US forces representatives, and the US representative is required to 'be a claims Judge Advocate or an individual with extensive claims experience specifically designated by the US Forces'.²¹⁴ In the event disputes cannot be resolved, claims issues 'will be submitted to a committee consisting of the Permanent Under-Secretary of the Hungarian Ministry of Defence and the representative of the highest ranking commander' of the US forces in Hungary.²¹⁵ Disputes not resolved at this level were to be referred to the governments for diplomatic resolution.²¹⁶

On 14 May 1997, Hungarian and US representatives signed a supplement to the PfP SOFA, commonly known as the Omnibus Agreement.²¹⁷ Under the Omnibus Agreement: 'All claims arising from activities of the United States Forces shall be settled in accordance with the PfP SOFA (Article VIII of the NATO SOFA)'.²¹⁸ By its terms, the Omnibus Agreement affirmed the validity of the existing claims technical arrangements, and provided for amendment of those arrangements as necessary going forward.²¹⁹

²⁰⁴ Ibid. Art. 3.4. ²⁰⁵ Ibid. Art. 3.6. ²⁰⁶ Ibid. Art. 3.7. ²⁰⁷ Ibid. Art. 4.1.

²⁰⁸ Ibid. Art. 4.2. ²⁰⁹ Ibid. Art. 4.2.

²¹⁰ Ibid. Art. 4.3. US forces are allowed to bring affirmative claims directly against third parties or insurers for damages caused to US personnel or property. Ibid. Arts. 6.1, 6.2.

²¹¹ Ibid. Art. 5.1. ²¹² Ibid. Art. 5.2.

²¹³ Ibid. Art. 5.2. In large part due to the limited contacts allowed between the US service members in Hungary and the local civilians, as well as a general prohibition on the consumption of alcohol by US service members deployed in support of the SFOR mission in most circumstances, no *ex gratia* claims had been paid as of 1 May 1998. Memorandum from Major William Kern, Chief, Operational Claims, US Army Claims Service Europe (1 May 1998) [hereinafter Kern Memorandum (May 1998)].

²¹⁴ Ibid. Art. 1.3. ²¹⁵ Ibid. Art. 7. ²¹⁶ Ibid. Art. 7.

²¹⁷ Agreement between the Government of the United States of America and the Government of the Republic of Hungary Concerning the Activities of United States Forces in the Territory of the Republic of Hungary (14 May 1997) [hereinafter Omnibus Agreement]. It was referred to as the Omnibus Agreement because it covered many different aspects of the relationship between Hungary and the US regarding US forces present in that country.

²¹⁸ Art. 6, Omnibus Agreement. ²¹⁹ Art. 6, Omnibus Agreement.

From the time US forces first entered Hungary in December 1995, up until 1 November 1998, 1,086 claims had been filed for damages. Of these, 120 were for vehicular damages, while 966 were for property damage, resulting primarily from the use of the Hungarian road network by the US logistical units. Of these claims, 399 had already been processed and paid by the Hungarian agencies, for a total of \$103,300. The US reimbursement to the Hungarian agencies at that point totalled \$77,500. Interestingly, although the US forces did not issue scope certificates in 67 cases, the Hungarian agencies had only denied nine claims as of 1 November 1998.²²⁰ The Joint Commission continued to meet regularly on issues concerning the processing of claims.

Consistent with the experiences of NATO, the Hungarian experience showed that, at a minimum, an effective claims operation requires four functional components: (1) a detailed claims arrangement which sets out the adjudicative process; (2) a specific agency which has authority to receive, investigate, adjudicate, and pay claims; (3) staffing for such an agency which includes attorneys, trained adjudicators, and military liaisons, either in-house or by contract; and (4) a high level of knowledge among the claims personnel about the Sending and Receiving State obligations. By incorporating its experiences under the Hungarian–Soviet SOFA, Hungary created a model for other former Warsaw Pact nations, in either the context of NATO or the Partnership for Peace, to develop their own Art. VIII-style claims regimes. On 12 March 1999, Hungary, along with Poland and Czech Republic, officially joined NATO.²²¹

2. Claims operations in the new NATO Member States

Eventually, as the size and scope of the US contribution to SFOR decreased, the requirements for temporary bases and transit arrangements with the PfP members in Eastern Europe decreased. The three new 1999 NATO members were followed by Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia in 2004. Unlike the long-term presence US military forces had had in the Western European countries and Turkey, US activities in these new NATO members was either limited to particular operations, or to specific training exercises with host nation forces in large part.²²²

The US need for more permanent claims arrangements began in 2008, when the US and the Czech Republic, and the US and Poland agreed to place portions of a NATO anti-missile system in those two new NATO members.²²³ Eventually, Czech Republic decided not to proceed with the portion of the system on its territory,²²⁴ and the US began working with Romania instead. Romania and the US had already agreed to a supplement of the PfP SOFA in 2001, but it provide little in the way of additional provisions beyond NATO SOFA, Art. VIII, other than to confirm that for purposes of this agreement, the

²²⁰ Kern Memorandum (May 1998) (n. 213).

²²¹ *The NATO Handbook Chronology* (Brussels: NATO, 2000) 96, <http://archives.nato.int/uploads/r/null/1/4/145751/0056_NATO_Handbook_Chronology_50th_anniversary_1999_ENG.pdf>.

²²² See Lieutenant Colonel E. E. Baime and A. Friedel, 'A Pre-Deployment Guide to Ensuring a Successful Claims Operation in an Eastern European Country' *The Army Lawyer* (March 2006) 15–17; C. Walmsley, US Army Claims Service Europe, General Engineer, 'Baseline/Closure Surveys for Operations, Exercises, and Transformation Related Activities', Joint Staff-OSD Workshop (25–27 July 2006) (presentation) <<http://www.denix.osd.mil/international/archives/osdactivities/militaryoperationsandglobalbasing/baseline-closure-surveys-for-operations-exercises-and-transformation-related-activities/>>.

²²³ AP, 'US, Czech Republic sign missile agreement' *NBC* (8 July 2008) <http://www.nbcnews.com/id/25585462/ns/us_news-security/t/us-czech-republic-sign-missile-agreement/#.WDJOqYWcF9A>; 'Poland, US sign missile shield deal' *CNN* (15 August 2008) <<http://edition.cnn.com/2008/WORLD/europe/08/15/poland.us.shield/index.html>>.

²²⁴ AP, 'Czech Republic Pulls Out of US Missile Defense Plans' *Foxnews* (15 June 2011) <<http://www.foxnews.com/world/2011/06/15/czech-republic-pulls-out-us-missile-defense-plans.html>>.

term ‘civilian component’ did not include employees of contractors and non-commercial organizations.²²⁵ In 2011, Romania and the US entered into an agreement specifically focused on the basing of part of the missile defence system on Romanian territory.²²⁶ The Parties agreed that the number of US personnel stationed at the base would not exceed 500, and would ordinarily be around 150.²²⁷ As to claims, this agreement restated the applicability of the 2001 supplemental SOFA and NATO SOFA Article VIII, and noted that Romania disavowed any liability for claims for damages occurring outside of Romania through operation of the missile defence system, ‘assuming such damage is not the result of actions or negligence by Romania’.²²⁸ The Romanian-based portion of the system came on line in May 2016.²²⁹

Similarly, in 2008 Poland and the US had signed an agreement focused on the basing of a portion of the missile defence system in Poland.²³⁰ Recognizing the ongoing negotiations between Poland and the US on a supplementary SOFA, it also contained claims provisions specifically related to the operations of the Polish portion of the missile defence system. The US agreed to take ‘legal responsibility for damage or loss resulting from the operation’ of the system if it determined ‘given the circumstances, that it should bear responsibility for such damage or loss, and it will settle claims for such damage or loss in accordance with US law’.²³¹ Poland, on the other hand, would only accept responsibility for such loss or damages if it determined that they ‘were the result of actions or negligence of Poland’.²³² In the event claims were made against Poland for damages occurring outside Polish territory, the agreed to ‘provide appropriate assistance and legal support to the Republic of Poland with respect to any such claim, including any litigation arising therefrom’.²³³ Further in the event that a final judgment was issued against Poland on such a claim, the US agreed to ‘give sympathetic consideration to a request from the Republic of Poland for reimbursement . . .’.²³⁴

In 2009, the US and Poland signed the supplemental SOFA which further defined ‘the status of, and terms and conditions governing the presence of’ US personnel in Poland, but which by its terms is of much broader applicability than the Poland-US Missile Defence Agreement.²³⁵ Under this agreement, the parties reemphasized that claims were to ‘be filed, considered, and settled or adjudicated in accordance with Article VIII of the NATO SOFA’.²³⁶ Accordingly, claims arising from acts or omissions by US personnel in the scope of their official duty were to be handled ‘in accordance with law and regulations of the Republic of Poland with respect to claims arising from the activities of the Armed Forces of the Republic of Poland’.²³⁷

²²⁵ Agreement between the United States of America and Romania regarding the Status of United States Forces in Romania (30 October 2001), *TIAS* 13170, Art. IX.

²²⁶ Agreement between the United States of America and Romania on the Deployment of the United States Ballistic Missile Defense System in Romania (13 September 2011) [hereinafter Romania-US Missile Defence Agreement].

²²⁷ Romania-US Missile Defence Agreement, Art. IV.9.

²²⁸ Romania-US Missile Defence Agreement, Art. X.2.

²²⁹ R. Emmot, ‘US activates Romanian missile defense site, angering Russia’ *Reuters* (12 May 2016) <<http://www.reuters.com/article/us-nato-shield-idUSKCN0Y30JX>>.

²³⁰ Agreement between the Government of the United States of America and the Government of the Republic of Poland concerning the Deployment of Ground-Based Ballistic Missile Defense Interceptors in the Territory of the Republic of Poland (20 August 2008) [hereinafter Poland-US Missile Defence Agreement].

²³¹ Poland-US Missile Defence Agreement, Art. XIV.2.

²³² *Ibid.* Art. XIV.3.

²³³ *Ibid.* Art. XIV.4.

²³⁴ *Ibid.*

²³⁵ Agreement Between the Government of the United States of America and the Government of the Republic of Poland on the Status of the Armed Forces of the United States of America in the Territory of the Republic of Poland (11 December 2009), *TIAS* 10-331 [hereinafter Poland-US Supplemental SOFA].

²³⁶ Poland-US Supplemental SOFA, Art. 17.1

²³⁷ *Ibid.* Art. 17.3.

The agreement contains certain practical measures not found in the NATO SOFA. In the event that Polish authorities question the scope certificate issued by the US, the parties agreed to consult immediately and exchange information 'bearing on the validity of the official duty certificate' and the United States authorities shall take full account of all information provided by the Polish authorities. Importantly, Polish authorities 'may request confirmation of the certificate from the next higher appropriate United States military authority'.²³⁸ Further, when Polish law 'requires that compensation for damages be paid as a pension, this pension will be subject to capitalization in accordance with the terms in force in' Poland, and the US was given 12 weeks to make such payment.²³⁹

The Poland-US Supplemental SOFA is now particularly pertinent in light of NATO's decision to station battalions from different Troop Contributing Nations (TCNs) in the eastern members of the partnership. At the time of this writing, the US intends to deploy an armoured brigade to Poland.²⁴⁰

3. Summary

Although it was not necessarily the natural result of the dissolution of the Warsaw Pact and the Soviet Union, the accession of the former Warsaw Pact nations to NATO was ironically a consequence of the demise of those factors which had in fact led to NATO's creation to begin with. The SOFAs negotiated between the Soviet Union and its satellites after 12 years of an un-regularized Soviet military presence within those countries were a reaction to political discord and dissatisfaction with Soviet control. However, it is not clear that popular unhappiness with Soviet resolution of third-party damage claims was ever the primary driver of this discontent within the Eastern European nations.

Even today, little information about the operation of the Warsaw Pact claims regimes is publically available. That which is known suggests that despite the use of Receiving State courts and law to adjudicate claims, the transparency and consistency that was gained by this was undermined by the lack of accountability on the part of the Joint Commissions. Further, once Soviet forces withdrew from Eastern Europe, they left behind very significant environmental damages for which their responsibility was largely waived.

In contrast, even though the Warsaw Pact SOFAs were in large measure reflective of many of the features of the NATO SOFA, the experiences of the new NATO partners with the resolution of third-party claims under NATO SOFA Art. VIII appear to have been largely favourable. Admittedly, none of these new NATO Receiving States has to date hosted large numbers of Sending State forces like Germany has. As NATO reinforces its eastern flank against hybrid threats, however, and as the US-led effort to establish an anti-missile defence system for the NATO area continues to come on-line in Poland and Romania, the eastern NATO partners may see an increase in damage claims. The confidence-building measures of Art. VIII have shown themselves to be flexible and adaptable in the face of fluctuations in Sending State force levels and Receiving State public opinion regarding Sending State military activities. Thus, it is highly likely that Art. VIII will continue to be viewed by the populations of these countries as favourably in terms of transparency, consistency and accountability.

²³⁸ Ibid. Art. 17.4.

²³⁹ Ibid. Art. 17.8.

²⁴⁰ M. Tan, 'Army to send even more troops, tanks to Europe' *Army Times* (5 January 2015) <<https://www.armytimes.com/story/military/careers/army/2015/01/05/army-to-send-even-more-troops-tanks-to-europe/21064945/>>.

V. Claims Operations in the EU

Many of the Member States of the EU are also NATO partners, and it is therefore not surprising that as the EU developed its capability to deploy military forces, it chose in 2003 to mirror in large part the NATO SOFA for those activities and operations within EU borders.²⁴¹ Regarding claims for example, as in NATO SOFA, Art. VIII, EU members waive claims against each other for damage to official property being used in EU missions,²⁴² and the Receiving State will ordinarily bear 25% of the cost of settling claims, and the Sending State pays the remainder.²⁴³ Further, for claims resulting from tortious acts or omissions by Sending State personnel who were not acting in the performance of official duty, the Receiving State ‘shall consider the claim and assess compensation’, and provide a report on the claim to the Sending State, which will then decide whether it will pay an *ex gratia* claim, and if so, for what amount.²⁴⁴

In 2005, the EU promulgated a draft model SOFA for operations occurring outside the border of the EU.²⁴⁵ Under the Draft Model SOFA, ‘EUFOR and EUFOR personnel shall not be liable for any damage to or loss of civilian or government property which are related to operational necessities or caused by activities in connection with civil disturbances or protection of EUFOR.’²⁴⁶ Claims for damages to other civilian or governmental property caused by EUFOR, as well as for death or injury, are to be submitted to the Host Nation, which will then submit them to EUFOR. EUFOR may submit claims for damage to its property to the Host Nation.²⁴⁷ If claims cannot be settled amicably, they are submitted to a joint claims commission, which operates on the basis of consensus.²⁴⁸ If consensus is not possible, and the claim is for no more than €40,000, it will ‘be settled by diplomatic means between the Host State and EU representatives’,²⁴⁹ Disputed claims above this amount are submitted to binding arbitration before a three-member tribunal.²⁵⁰

Operationally, the claims terms of the Draft EU Model SOFA are not always fully implemented when an actual EU mission SOFA is concluded. For example, in the SOFA between the EU and the Somali Republic for Operation Atalanta,²⁵¹ third-party claims and EUNAVFOR claims for property damage were all to be settled diplomatically—there was no joint claims commission established, nor was there any arbitration tribunal.²⁵² However, if third parties were to bring suit against EUNAVFOR, Somalia agreed to stand in EUNAVFOR’s place in the proceedings. Somalia would have to pay any compensation awarded to the plaintiffs, and if ‘such compensation is attributable to EUNAVFOR, the amount of compensation shall be totally or partially refunded by EUNAVFOR’.²⁵³

²⁴¹ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (2003/C 321/02) [hereinafter EU SOFA].

²⁴² EU SOFA, Art. 18.1.

²⁴³ EU SOFA, Art. 18.5(e)(i).

²⁴⁴ EU SOFA, Art. 18.6.

²⁴⁵ Council of the European Union, Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, 8720/05 (18 May 2005) [hereinafter Draft Model Agreement].

²⁴⁶ Draft Model Agreement, Art. 15.1.

²⁴⁷ Ibid. Art. 15.2.

²⁴⁸ Ibid. Art. 15.3.

²⁴⁹ Ibid. Art. 15.4(a).

²⁵⁰ Ibid. Art. 15.4(b), 15.5.

²⁵¹ Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta (15 January 2009), *Official Journal of the European Union* L10/29-10/34 [hereinafter EU-Somali Republic SOFA].

²⁵² EU-Somali Republic SOFA, Art. 13.2.

²⁵³ EU-Somali Republic SOFA, Art. 13.3.

In time, if current initiatives to generate a more robust EU force structure are successful, there might be a need for more fully developed EU claims processes. To date, however, there is little information publically available about the settlement of EU damage claims under either the EU SOFA or the Draft Model SOFA. In light of the NATO Art. VIII claims experience though, it is likely that the EU SOFA claims regime will be successful. Operational claims under the Draft Model SOFA, however, require the establishment of a Joint Claims Commission. The UN Model SOFA, upon which portions of the Draft Model SOFA appear to have been based, contemplates the use of a similar adjudicative body. To better appreciate the possible efficacy of the Draft Model SOFA's claims arrangements, it is useful to examine the UN claims experience in some detail.

VI. UN Claims Operations

Although the UN from its founding was granted absolute immunity from suit,²⁵⁴ it was also to provide appropriate means of settling 'disputes of private law character' to which it was a party.²⁵⁵ Before the beginning of its peacekeeping operations in the Former Yugoslavia in 1992, 'the number and value of third-party claims remained relatively low, the administrative and financial burden of settling them was shouldered by the Organization with relative ease', and the UN's procedures for claims settlement appear to have generally functioned satisfactorily.²⁵⁶

1. Para. 51 UN Model SOFA

Since 1990, the UN has used a Model SOFA as a template for the conduct of its operations on all missions.²⁵⁷ Para. 51 of the Model SOFA provides for a standing claims commission to settle third-party claims.²⁵⁸ The standing claims commission consists of three members: one appointed by the UN Secretary-General, the second by the Receiving State, and the third is to be agreed upon jointly by the Secretary-General and the Receiving State.²⁵⁹ Two members can constitute a quorum, and '[a]ll decisions shall require the approval of any two members'.²⁶⁰ Decisions are considered binding, unless the UN Secretary-General and the Receiving State government agree to allow an appeal to an arbitration tribunal.²⁶¹ The arbitration tribunal is to consist of three members, and its decisions are final and binding.²⁶² The claims commission remains standing 'until all claims have been settled that arose prior to the termination of the [SOFA] and were submitted' three months prior to termination.²⁶³

In practice, however, even though the provisions regarding the standing claims commission are dutifully included in the SOFAs the UN negotiates with Receiving States on the basis of the template, such a commission has never been used.²⁶⁴ This does not mean that the UN does

²⁵⁴ UN Charter Art. 105; General Assembly Resolution 22 A (I), Convention on the Privileges and Immunities of the United Nations, Arts. II, V, and VI (13 February 1946) [hereinafter CPIUN].

²⁵⁵ CPIUN, Art. VIII, s. 29.

²⁵⁶ D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (April 2000) 94 *AJIL* 406, 409.

²⁵⁷ UNGA, Report of the Secretary-General, 'Comprehensive Review Of The Whole Question Of Peace-Keeping Operations In All Their Aspects: Model Status Of Forces Agreement For Peacekeeping Operations', UN Doc A/45/594 (1990).

²⁵⁸ *Ibid.* para. 51. See Chapter 30.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.* para. 53. ²⁶³ *Ibid.* para. 60 (b).

²⁶⁴ UNGA, Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations: Financing of the United Nations Peacekeeping Operations' (1997) UN Doc A/51/903, para. 8 [hereinafter Report of the Secretary-General (1997)].

not settle third-party claims against it—from the beginning of UN peacekeeping operations the UN has always ‘assumed liability for damage caused by members of its force in the performance of their duties’.²⁶⁵ What then are these internal procedures?

2. Local claims review boards in the Former Yugoslavia

Rather than use a standing claims commission, UN missions ordinarily establish local claims review boards to investigate, adjudicate, and settle third-party claims under delegated authority by the controller.²⁶⁶ The local claims review boards are delegated very limited financial authority to settle claims.²⁶⁷ Those claims outside their authority are reviewed and forwarded with recommendations back to UN Headquarters in New York for approval.²⁶⁸ The practice in UN peacekeeping operations has been to base local claims review board decisions ‘on the types of injury and loss compensable under local law and the prevailing practice in the mission area, in particular, as well as on the past practice of the Organization’.²⁶⁹ While this ad hoc, mission-based approach may have worked adequately prior to the UN missions in the Former Yugoslavia,²⁷⁰ the UN Protection Force (UNPROFOR) deployments into that splintered country revealed serious shortcomings in this sort of claims operation.

The scope of the UN operations in the former Yugoslavia and their duration led to a large number of damage incidents between the UN forces and local nationals.²⁷¹ The lack of information as to where potential claimants could file their claims and how they would be processed was apparently a problem for local nationals injured by UN forces.²⁷² Many of these claims were for very high amounts, leading to great potential liability for the UN, and required a significant devotion of scarce personnel resources to investigate them properly.²⁷³ Although many of the claims received were frivolous, they still required appropriate processing and investigation.²⁷⁴ This greatly increased claims workload led to a pronounced claims backlog for the claims review boards.²⁷⁵ Which resulted in dissatisfaction by both

²⁶⁵ UNGA, Report of the Secretary-General, ‘Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations’ (1996) UN Doc A/51/389, para. 7 [hereinafter Report of the Secretary-General (1996)]. Until the 1980s, however, this assumption of liability was often handled through the purchase of insurance coverage rather than through self-insurance. K. E. Boon, ‘The United Nations as Good Samaritan: Immunity and Responsibility’ 16 *Chicago Journal of International Law* (2016), 341, 372–3.

²⁶⁶ Report of the Secretary-General (1996) (n. 265) para. 22. Vehicular, non-official duty and contractual claims are not handled by the local claims review boards, see Report of the Secretary-General (1997) (n. 263) 11 fn 3. Vehicular claims are settled under the UN’s worldwide insurance policy, see Report of the Secretary-General (1996) (n. 265) 12–13 fn 1. *Ex gratia* claims are ordinarily the responsibility of the contingent to whom the tortfeasor belongs; contractual claims result from the legal relationship established in the contract, and are handled accordingly. *Ibid.*

²⁶⁷ Report of the Secretary-General (1996) (n. 265) paras. 23, 24. In the Former Yugoslavia, the UN local claims review board in Zagreb, for example, could only settle claims for \$1,500 or less. Memorandum from Captain M. Charbula, Task Force 212th MASH Legal Advisor, to Staff Judge Advocate, US V Corps (13 January 1993).

²⁶⁸ Report of the Secretary-General (1996) (n. 265) para. 24.

²⁶⁹ Report of the Secretary-General (1997) (n. 264) para. 24.

²⁷⁰ Report of the Secretary-General (1997) (n. 264) para. 24.

²⁷¹ Report of the Secretary-General (1996) (n. 265) para. 26.

²⁷² UNGA, Report of the Advisory Committee, ‘Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations; Financing of the United Nations Peacekeeping Operations’ (1997) UN Doc A/52/410 4 [hereinafter Advisory Committee Report (1997)].

²⁷³ Report of the Secretary-General (1996) (n. 265) paras. 26–8. ²⁷⁴ *Ibid.* para. 26.

²⁷⁵ In Bosnia-Herzegovina, for example, meritorious claims were rarely paid within a year. Statement by Lieutenant Colonel Jan Koet, Royal Netherlands Army, former UNPROFOR legal adviser (personal correspondence 17 November 1998) [hereinafter Koet Letter].

the Receiving State nationals and the Receiving States themselves with the UN claims operation.²⁷⁶

Claimant dissatisfaction became so pronounced that the local population began to take matters into their own hands, particularly in the Serb-controlled parts of Bosnia-Herzegovina. Impatient claimants often stole UN vehicles, and local police even arrested and incarcerated UN drivers.²⁷⁷ The problem was magnified by the boards' limited financial authority to settle claims and the lack of clear guidance on the scope of UN liability.²⁷⁸ Problems outside the UN's control also exacerbated claims processing. For example the confusing nature of property ownership in the former Yugoslavia often left unclear whether a local authority or a private party was entitled to compensation.²⁷⁹

3. UN claims reform efforts

The problems experienced by UN claims officials in the former Yugoslavia triggered action within the UN to review and restructure its claims operations.²⁸⁰ The Secretary-General recommended keeping the mission claims review boards, but increasing both their staffing and their financial authority to settle claims locally.²⁸¹ The Secretary-General also recommended setting a global standard for claims compensation in all UN peacekeeping missions,²⁸² and setting a more definite time period in which claimants must file their claims.²⁸³ Conceptually, the most intriguing of the Secretary-General's proposals was the suggestion formally to exclude claims resulting from acts of 'operational necessity'²⁸⁴ through a change in the language of the Model SOFA, para. 51. In practice, UN claims review boards already excluded those claims which result from damages caused during ordinary operations by 'necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates',²⁸⁵ 'Operational necessity', as defined by the Secretary General, was significantly broader than the concept of 'military necessity' as applied by UN local claims review boards,²⁸⁶ which was akin to the concept of excluded combat-related damages in US claims terminology.²⁸⁷

The UN General Assembly endorsed the Secretary General's recommendations. To be considered claims had to be submitted to the UN within six months of the underlying loss or its discovery, and in any event within one year of the termination of the mission's mandate. As to third-party claims for personal injury, illness or death resulting from peacekeeping operations, the UN would only be liable for economic losses, such as medical and rehabilitation expenses, and no compensation would be payable for non-economic losses such as pain and suffering. Further, no compensation would be paid for 'home-maker services and other such damages that, in the sole opinion of the Secretary General,

²⁷⁶ Report of the Secretary-General (1996) (n. 265) para. 26. ²⁷⁷ Koet Letter (n. 275).

²⁷⁸ Report of the Secretary-General (1996) (n. 265) para. 27. At the time of the Secretary-General's report, 151 claims for \$ 28.8 million remained outstanding. It was estimated that the total cost of liquidating claims resulting the UN missions in the former Yugoslavia might reach \$15.5 million. Many of the remaining claims, particularly real estate claims, appear to have been highly exaggerated. *Ibid.* para. 52.

²⁷⁹ *Ibid.* 13 fn 7.

²⁸⁰ Report of the Secretary-General (1997) (n. 264) para. 1. ²⁸¹ *Ibid.* para. 9.

²⁸² *Ibid.* para. 24. For example, a maximum ceiling amount of \$50,000 would be imposed for personal injury damages, the exact amount to 'be determined in accordance with local compensation standards'. *Ibid.* Damages for pain and suffering, punitive or moral damages, and legal costs would continue to be excluded. *Ibid.* paras. 12, 26; fns 9, 12.

²⁸³ *Ibid.* para. 20. Claimants would have six months to file from the date injury occurred, or one year after termination of the mandate if the claimant did not or could not have reasonably known of the damage. *Ibid.*

²⁸⁴ *Ibid.* para. 14. ²⁸⁵ *Ibid.* 5. ²⁸⁶ *Ibid.* 9. ²⁸⁷ See nn. 128–32.

are impossible to verify or are not directly related to the injury or loss itself'.²⁸⁸ Except in 'exceptional circumstances', regardless of the extent of the loss, the payment for any claim would not exceed \$50,000, and would be assessed using local compensation standards.²⁸⁹

The General Assembly agreed that acts of 'operational necessity' was excluded.²⁹⁰ This means, therefore, that mass claims resulting from UN operations are 'not receivable,' because they then are in the nature of public claims.²⁹¹ The General Assembly also approved limitations on third-party claims for real property loss or damage, and that compensation for damage to personal property would be limited to 'the reasonable costs of repair or replacement'. Finally, no compensation would be paid for claims that were impossible to verify or were 'not directly related to the loss of or damage to the personal property'.²⁹²

4. The treatment of claims arising from UN operations in Haiti

Two very different cases arising from the operations of the United Nations Stabilization Mission in Haiti (MINUSTAH) illustrate the breadth of UN claims operations, and some of the challenges that they face since the claims reforms of 1998. UN forces redeployed there in June 2004 as a result of the political turmoil and violence that drove the Haitian president from power.²⁹³ The MINUSTAH SOFA provides that third-party claims 'for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH', as long as they were not the result of operational necessity, would first be considered under UN internal procedures.²⁹⁴ Claims are required to be submitted within six months of the injury or damage or when the claimants reasonably should have known of the injury or damage, 'but in any event not later than one year after the termination of the mandate of MINUSTAH'. Compensation would be limited to the amounts set out in UNGA Resolution 52/247, and in the event the claims cannot be settled in this fashion,²⁹⁵ they would be submitted to a standing claims commission.²⁹⁶ Under the MINUSTAH SOFA, the UN also agreed to cooperate with the Haitian government with respect to sanitary services, and they agreed to 'extend to each other the fullest cooperation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions'.²⁹⁷

The first case arose from a firefight between Brazilian peacekeepers and opposing gang members in 2006. UN forces found themselves fighting alongside Haitian police to suppress criminal violence and gangs, actions likely justified operationally, but which had a negative effect on the perception of the UN forces among segments of the local population in part because of the number of civilians who were caught in the crossfires and injured or killed. A Haitian national had been wounded by gun fire during the engagement, and she filed a claim for her injuries. Although MINUSTAH did not convene a board of inquiry to look into the incident, it was investigated by the Military Force Provost Marshall and the Special Investigation Unit, which both concluded that

²⁸⁸ UNGA Res. 52/247, Third-party liability: temporal and financial limitations (17 July 1998), operative para. 2.

²⁸⁹ *Ibid.* paras. 2–3. ²⁹⁰ *Ibid.* para. 2. ²⁹¹ Boon (n. 265) 346.

²⁹² UNGA Res. 52/247 (n. 288) 2.

²⁹³ J. A. Koops and others (eds.) *The Oxford Handbook of United Nations Peacekeeping Operations* (OUP, 2015) 721.

²⁹⁴ Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti, Port-au-Prince (9 July 2004) Art. 54 [hereinafter MINUSTAH SOFA].

²⁹⁵ MINUSTAH SOFA, Art. 54.

²⁹⁶ MINUSTAH SOFA, Art. 55.

²⁹⁷ MINUSTAH SOFA, Art. 22.

although there was no proof that the UN forces were responsible, the possibility that they could have fired the round that injured the civilian could not be ruled out. In 2008, the Local Claims Review Board (LCRB) referred the claim to the MINUSTAH Legal Office for an assessment of UN liability, which opined that liability could not be clearly established. The LCRB then decided that because ‘of the sensitive political visibility’ of the matter, it recommended paying the claim as being ‘in the best interest of the Organisation’ on an *ex gratia* basis.²⁹⁸

This recommendation was approved by the MINUSTAH Chief of Mission Support, and eventually forwarded to the UN Controller.²⁹⁹ Under UN financial regulations, *ex gratia* payments may be made when ‘although there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organisation’.³⁰⁰ All *ex gratia* payments, however, require the approval of the Under-Secretary General for Management.³⁰¹ The UN Controller then referred the recommendation to the UN Office of Legal Affairs, which clarified that its role was only to make determinations as to legal liability, and recommended that the controller take the decision on whether payment was in the organization’s best interest.³⁰² This example suggests that the extensive bureaucracy of *ex gratia* claims decision-making in the UN, while perhaps justified on the basis on UN members wanting to ensure that UN funds were used appropriately in such claims, is perhaps too slow to make a meaningful difference in a theatre of operations.

The second case resulted from the massive cholera outbreak that started in Haiti in October 2010, and resulted in the deaths of more than 8,000 people.³⁰³ A few months after the outbreak, the Secretary General convened the Independent Panel of Experts on the Cholera in Haiti to determine the source of the outbreak.³⁰⁴ The panel was unable to establish the precise source, but it did conclude that the bacterium responsible for the outbreak was not indigenous to Haiti and was very similar to a current South Asian strain. The panel also concluded that the sanitation conditions at one UN troop compound located upstream along a river used by many Haitians as a water source were not sufficient to prevent human faecal contamination of the river.³⁰⁵ Other reports assessed the available evidence as being more definitive, and squarely laid the blame on the conditions at the upstream UN compound.³⁰⁶ Although the Secretary-General would eventually admit that the UN bore some responsibility for the outbreak, the UN did not accept financial responsibility for the losses caused by the outbreak.³⁰⁷

Victims of the outbreak filed a claim for compensation with the UN, but it was rejected because it was ‘not receivable’ under CPIUN Section 29.³⁰⁸ They then requested that

²⁹⁸ *UN Juridical Ybk* (New York, UN 2009) 429.

²⁹⁹ *Ibid.* 430.

³⁰⁰ UN, Financial Regulations and Rules of the United Nations (9 May 2003) (ST/SGB/2003/7) Regulation 5.11, Rule 105.12.

³⁰¹ *Ibid.*

³⁰² *UN Juridical Ybk* (n. 298) 430.

³⁰³ J. A. Koops (n. 293) 725.

³⁰⁴ Daniele Lantagne and others, ‘The Cholera Outbreak in Haiti: Where and How Did It Begin?’ (22 May 2013) 379 *Current Topics in Microbiology and Immunology* 146, 150.

³⁰⁵ *Ibid.* 151–6.

³⁰⁶ J. M. Katz, ‘US Court Upholds United Nations’ Immunity in Cholera Suit’ *New York Times* (New York 18 August 2016); <<http://www.nytimes.com/2016/08/19/world/americas/united-nations-cholera-haiti.html?action=click&contentCollection=Americas&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>>; J. M. Katz, ‘U.N. Admits Role in Cholera Epidemic in Haiti’ *New York Times* (New York 17 August 2016), <http://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html?_r=0>.

³⁰⁷ *Ibid.*

³⁰⁸ UN Secretary-General, ‘Haiti Cholera Victims’ Compensation Claims ‘Not Receivable’ under Immunities and Privileges Convention, United Nations Tells Their Representatives’, UN Press Release SG/SM/14828 (21 February 2013) <<http://www.un.org/press/en/2013/sgsm14828.doc.htm>>.

the UN establish a standing claims commission, but the UN declined because ‘there is no basis for such engagement in connection with claims that are not receivable’,³⁰⁹ The victims then brought suit against the UN in a US federal court in New York. At trial, the plaintiffs alleged that the UN had breached the CPIUN by failing to establish a claims commission as required by the UN-Haiti SOFA, and therefore had breached its obligation under CPIUN Section 29 to offer appropriate modes of settlement for third party private law claims.³¹⁰ Citing case law that had established that any failure on the part of the UN to establish a claims procedure was irrelevant unless the UN expressly waived its immunity to legal process, and noting that the UN had not waived its immunity, the court held it lacked jurisdiction to hear the case.³¹¹

On appeal, the plaintiffs’ argument was threefold: first, they argued that the UN was required to provide an appropriate dispute resolution mechanisms under CPIUN Section 29 as a condition precedent to it being able to invoke its immunity, second, that the UN had materially breached the CPUIN by failing to provide such mechanisms, and third, the invocation of the UN’s immunity to legal process denied them their right of access to court under the US Constitution.³¹² The appeals court rejected all of these arguments, finding that the plaintiffs had no standing to raise any issue of breach of the CPIUN because they were not sovereigns, and it dismissed the case for lack of jurisdiction on the basis of the UN’s immunity.³¹³

5. Summary

The UN claims experience in Bosnia-Herzegovina and Croatia significantly informed its efforts in the late 1990s to reform its claims processes. In its missions in these two countries encountered profound dissatisfaction with the UN claims system’s lack of timeliness and transparency, and led to the spectre of enormous financial liability for infrastructure damages resulting from conducting its operations without there having been any negligence on its part. Despite the UN’s reform efforts, a comparison of the Haitian firefight case and *Georges v. UN* suggests for small claims; the UN decision-making process is perhaps too centralized and too cumbersome to achieve immediate tactical effects in terms of positively influencing the local population in all but the smallest claims. Further, for large-scale environmental claims, the ‘operational necessity’ exception to liability is perhaps too broad to achieve enduring positive strategic effects. Counterbalanced against these considerations, of course, are concerns whether the UN would be exposed to ‘damage

³⁰⁹ D. Hovell, ‘Due Process in the United Nations’ 110 *AJIL* (2016) *1, *31 (quoting from Letter from Patricia O’Brien, Under Secretary-General for Legal Affairs, to Brian Concannon, Director, Institute for Justice and Democracy in Haiti 1 (5 July 2013)).

³¹⁰ *Georges v. UN*, 84 F. Supp. 3d 246, 247–8 (S.D.N.Y. 2015).

³¹¹ *Georges v. UN*, 84 F. Supp. 3d 248–50.

³¹² *Georges v. UN*, 834 F.3d 88 (2d Cir. 2016).

³¹³ *Georges v. UN*, 834 F.3d 95–8. The courts of a number of nations have had suits against the UN brought before them. In nearly all instances the UN’s immunity has been found to be absolute. J. Wouters and P. Schmitt, ‘Challenging Acts of Other United Nations’ Organs, Subsidiary Organs and Officials’ (April 2010) Working Paper No. 49, *Leuven Centre for Global Governance Studies* 6–8. Although the Supreme Court of the Netherlands found the UN to be immune from suit regarding the mass deaths of Bosniaks at the hands of the Bosnian-Serb military after the fall of the so-called UN safe area in Srebrenica in 1995, *Mothers of Srebrenica v. UN and The Netherlands*, Case No. 10/04437 EV/AS (13 April 2012), a Dutch court in the Hague later did find the Netherlands liable for the deaths of several hundred Bosnian men who had sought protection in the Dutch battalion compound and who were turned over to the Bosnian-Serbs. *Mothers of Srebrenica v. the State*, ECLI:NL:RBDHA:2014:8748 (16 July 2014) C/09/295247/HA ZA 07-2973. 4.339.

awards that could bankrupt the organisation', and whether Troop Contributing Countries would be willing to provide sufficient military units to conduct important operations if these countries had to factor unwarranted monetary liability into their decisions whether to participate.³¹⁴

VII. NATO-Led Claims Operations in the Former Yugoslavia

Until the NATO-commanded Implementation Force (IFOR) deployed into Bosnia-Herzegovina and Croatia pursuant to the Dayton Accords in 1995, the UN claims settlement regime did not share operational space with claims operations conducted by NATO. The UN conducted peacekeeping operations largely in Africa, Asia and the Middle East, and NATO as a collective self-defence organization was focused primarily on Europe and North America.³¹⁵ In conducting the IFOR mission, however, not only did NATO handle third-party claims in the same area of operations as the UN, its claims operations were heavily influenced by UN claims settlement principles, concepts, and practices.

1. IFOR/SFOR and EUFOR claims operations: The legal bases for claims activities in Bosnia-Herzegovina and Croatia

It is important to examine in detail the way in which IFOR/SFOR claims were handled in Bosnia-Herzegovina and Croatia, because as with the UN, NATO's experiences in this operation were to have a significant impact on the handling of claims in later NATO missions. Claims issues were discussed during the negotiations leading up to the Dayton SOFAs,³¹⁶ the Paris peace accords (the General Framework Agreement for Peace, commonly known as the GFAP),³¹⁷ and during the development of the agreements and procedures necessary to implement the Dayton SOFAs and the GFAP. The representatives of Bosnia-Herzegovina and Croatia expressed serious concern with the manner in which claims had been handled during the UN operations. They further expressed their desire for a rigorous, jointly-administered claims arrangement in order to avoid the problems experienced with the UN claims system. The claims processes actually used by the IFOR/SFOR troop contributing nations reflected an accommodation of these Receiving States' concerns with the primary responsibility of the Troop Contributing Nations to settle claims against them using their own claims processes and funds.³¹⁸

Interestingly, the processes to be used in settling claims continued to evolve as the subsequent implementation agreements were negotiated. Initially, the parties appear to have tried to implement the UN Model SOFA, Art. 51, claims commission provision, which,

³¹⁴ J. E. Alvarez, 'International Organisations and the Rule of Law', 14 *NZJ Public and Intl L* *3, *37 (Westlaw June 2016); see J. M. Katz (n. 306) (potential liability for cholera claims could dwarf annual peacekeeping budget).

³¹⁵ J. A. Koops (n. 293) 189–96. There were two notable exceptions, however, the UN Force in Cyprus beginning in 1964, and the small UN observer mission dispatched to the Dominican Republic in 1965. *Ibid.* 191–2.

³¹⁶ Agreement between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization (NATO) concerning the Status of NATO and its Personnel, 21 and 23 November 1995, Annex D; Agreement between the Republic of Croatia and the North Atlantic Treaty Organization (NATO) concerning the Status of NATO and its Personnel (21 and 23 November 1995), 35 *ILM* 75 (1996) [hereinafter Dayton SOFAs].

³¹⁷ General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995), 35 *ILM* 89 (1996) [hereinafter GFAP].

³¹⁸ IFOR Claims Office Sarajevo Standard Operating Instructions (1st Revision) (21 July 1996) [hereinafter IFOR Claims Office Sarajevo SOI], Attachment A, The Legal Bases for the IFOR Claims Operation in Bosnia-Herzegovina, at 1 [hereinafter Legal Bases Memo].

as previously noted, had never been used. Experience gained during the course of the operation revealed that the Model SOFA, Art. 51 claims commission mechanism was unsuitable for a claims operation of this nature and magnitude, and so the manner in which claims were actually processed in Bosnia-Herzegovina and Croatia was quite different than the parties to the Dayton SOFAs originally contemplated.

(a) *The Dayton SOFAs and the Balanzino Letter*

The Dayton SOFAs provided that '[c]laims for damage or injury to Government personnel or property, or to private personnel or property of the [Receiving State] shall be submitted through governmental authorities of the [Receiving State] to the designated NATO Representatives'.³¹⁹ The actual process to be followed in settling claims in Bosnia-Herzegovina, for example, was addressed in correspondence between the NATO Secretary General and the Minister of Foreign Affairs for Bosnia-Herzegovina. If civil suits were brought against NATO personnel for actions performed in their official capacity, the Commander, IFOR, could issue a certificate to that effect and remove the case to the 'standing Claims Commission to be established for that purpose'.³²⁰

The Balanzino Letter also explicitly mentioned the process to be used by the Claims Commission and a Tribunal:

[A]ny appeal that both of the Parties agree to allow from the award of the Claims Commission shall, unless otherwise agreed by the parties, be submitted to a Tribunal of three arbitrators. The provisions relating to the establishment and procedures of the Claims Commission, shall apply, *mutatis mutandis*, to the establishment and procedures of the Tribunal. The decisions of the Tribunal shall be final and binding on both parties.³²¹

(b) *The technical arrangements*

Military representatives of IFOR entered into Technical Arrangements³²² with the Receiving States of Bosnia-Herzegovina and Croatia which implemented the various aspects of the Dayton SOFAs and the GFAP. The Claims Commission and Tribunal processes were described in greater detail in Claims Annexes to these Technical Arrangements.³²³ As described in the Claims Annexes, the Claims Commission would consist of four members, two IFOR representatives and two receiving state representatives, all of whom must be

³¹⁹ Dayton SOFAs, Art. 15.

³²⁰ Letter from Sergio Balanzino, NATO Acting Secretary-General, to Muhamed Sacirbey, Minister of Foreign Affairs, Republic of Bosnia and Herzegovina, para. 4(a) (23 November 1995). In civil suits involving the private tortious acts of NATO personnel, the IFOR Commander was given the authority to issue a certificate, at the defendant's request, to the local court to have the proceedings delayed until such time as the NATO soldier could appear to defend himself before the court. *Ibid.* para. 4 (b).

³²¹ *Ibid.* para. 5. A copy of this letter, and identical versions addressed to the Croatian and Yugoslavian Foreign Ministers, were sent to the members of the NATO Political Committee. Memorandum from Allen L. Keiswetter, Acting Chairman, to the members of the Political Committee (24 November 1995).

³²² See Technical Arrangement Between the Government of the Republic Of Bosnia and Herzegovina and the Implementation Force (23 December 1995), on file with US Army Claims Service, Europe [hereinafter Technical Arrangement]. The Technical Arrangements, at least with respect to claims matters, are practically identical. For simplicity, this article will therefore only reference the Technical Arrangement with the Republic of Bosnia and Herzegovina. Comments made by certain Sending States' representatives at the April 1997 NATO Sending States Claims Conference in Paris suggest that if their respective members on the NATO Political Committee were made aware of the claims procedures under the Technical Arrangements, this information had not been communicated to the respective claims representatives.

³²³ Claims Annex to the Technical Arrangement [later known as Annex 17, hereinafter Claims Annex].

legally qualified.³²⁴ The Claims Commission was authorized to decide questions of liability and quantum, and to order payment in accordance with its decisions.³²⁵

Payment orders were to be paid with either NATO (IFOR) or Troop Contributing Nations' funds, as appropriate.³²⁶ According to the Claims Annexes, claims were to be submitted ordinarily no later than 90 days from the date of discovery of the damage, and payment was to be made to injured parties (receiving state or IFOR) no later than 90 days after the claim had been settled.³²⁷ If IFOR or a Troop Contributing Nation did not comply with a payment order, the Claims Annexes envisioned sending the payment order to NATO Headquarters in Brussels for payment.³²⁸ The receiving states were required to pay claims of IFOR or the Troop Contributing Nations against nationals of the receiving states.³²⁹ The receiving states could then recoup these costs themselves from the responsible local national parties.³³⁰

The Claims Annexes also anticipated that a receiving state governmental agency would serve as the primary office to accept, investigate and adjudicate claims, much like the Damage Control Offices do in the Federal Republic of Germany.³³¹ According to the Claims Annexes, the Claims Commission would then resolve disagreements between IFOR (and the Troop Contributing Nations) and the receiving state agency tasked with handling claims.³³² If the parties to the claim still disagreed after the Claims Commission decision, then the matter would be referred to the Arbitration Tribunal.³³³ According to the Claims Annexes, Arbitration Tribunal 'decisions shall be final and binding on both parties'.³³⁴

(c) The claims appendices

The claims processes were further refined and modified in the Claims Appendices to the Claims Annexes agreed between IFOR military representatives and the Receiving States. Under these agreements, decisions of the Claims Commissions were required to be unanimous.³³⁵ Cases in which there was no unanimous decision were referred to the Arbitration Tribunal for final determination.³³⁶ Claimants dissatisfied with the Claims Commission decisions could appeal to the Arbitration Tribunal under the procedures set forth in the Claims Appendices.³³⁷

(d) The Bosnian Protocols and the Zagreb IFOR claims procedures

The IFOR Legal Advisor recognized the administrative difficulties inherent in having the nascent and under-resourced government agencies of Bosnia-Herzegovina and Croatia serve as the primary bodies to conduct claims intake, investigation and adjudication.³³⁸ In the spring of 1996, additional implementing arrangements were agreed between IFOR and the receiving states which streamlined the claims processes. Separate agreements

³²⁴ Claims Annex, para. 3. ³²⁵ Ibid. ³²⁶ Claims Annex, para. 4. ³²⁷ Ibid.

³²⁸ Ibid. ³²⁹ Ibid.

³³⁰ Ibid. In practice, the Troop Contributing Nations have made little successful use of these provisions in either Croatia or Bosnia. French forces in Bosnia during the IFOR/SFOR missions had an aggressive affirmative claims programme, but it was premised upon direct dealings with local insurance companies and not the central government. Regardless, the impoverished state of the governments at all levels and the local populace in Bosnia-Herzegovina prevented significant affirmative claims recoveries.

³³¹ Claims Annex, para. 6; see (nn. 79–90). ³³² Ibid. para. 7. ³³³ Ibid. para. 8.

³³⁴ Ibid. para. 5.

³³⁵ Appendix to Annex 17, Claims Commission Procedures, para. 5 (on file with US Army Claims Service Europe) [hereinafter Claims Appendix].

³³⁶ Claims Appendix, para. 5. ³³⁷ Ibid. para. 6. ³³⁸ Legal Bases Memo (n. 318) 4.

were negotiated between the IFOR Legal Advisor and the Ministry of Justice, Federation of Bosnia-Herzegovina, and the Ministry of Justice, Republika Srpska, which placed the primary responsibility for claims intake, investigation and adjudication upon the Troop Contributing Nations.³³⁹ In case of unresolved disputes, the Sarajevo IFOR Claims Office would attempt to mediate a solution.³⁴⁰ The Claims Commission was reserved to ‘hear appeals from either the claimant or the national contingent claims officer when a claims dispute cannot be resolved between the claimant and the unit responsible for the loss or damage’.³⁴¹

Similarly, arrangements were made with the Croatian government so that the Troop Contributing Nations were given the primary responsibility for resolving claims against them.³⁴² The Zagreb IFOR Claims Office would attempt to mediate disputes between the ‘claimant[s] and the national contingent claims officer’.³⁴³ ‘Claims that [could] not be otherwise settled [would] be sent to the Claims Commission for resolution’.³⁴⁴ Claimants were allowed ‘three months after the redeployment out of Croatia of the national contingent force alleged to have caused any injury or damage’ to file their claims.³⁴⁵

2. IFOR/SFOR and EUFOR/NATO claims operations:

The claims offices and activities

The IFOR/SFOR claims offices in Sarajevo and Zagreb became operational in March 1996. Headed by military attorneys with claims experience, the claims offices were also staffed by local attorneys and legal clerks. Although thinly staffed, the IFOR/SFOR claims offices served many diverse roles. First, the claims offices investigated and adjudicated claims caused by the acts or omissions of the IFOR/SFOR headquarters personnel. The Troop Contributing Nations were responsible for processing claims against them as a national responsibility. Second, the offices served as a central point of contact between claimants and the widely spread Troop Contributing Nations’ forces. Third, each office was responsible for conducting the claims commission and arbitration tribunal hearings in each respective nation or entity. Fourth, the claims offices provided claims guidance and information to the various Troop Contributing Nations, including advisory legal opinions and translations upon request. Finally, the claims offices maintained claims oversight throughout the Bosnian theatre, maintained a theatre-wide claims log, and provided statistical reports.³⁴⁶

Maintaining effective claims oversight in the Bosnian theatre was extremely challenging. For example, many claimants were unable to identify the vehicles of the forces which caused their damages more specifically than ‘SFOR’. Even if the proper Troop Contributing Nation was identified, many claimants were mystified as to how their claims

³³⁹ Protocol Made on 4 April 1996 Between the Ministry of Justice of the Republic of Srpska and the IFOR Claims Officer (4 April 1996), para. 3 (on file with US Army Claims Service, Europe) [hereinafter *Srpska Protocol*]. The terms of the *Srpska Protocol* and the Federation of Bosnia-Herzegovina Protocol are identical.

³⁴⁰ *Srpska Protocol*, para. 3. Resolution of claims need not involve the transfer of funds to the claimant. For example, French forces in Bosnia were successful in forestalling claims against them through the use of military assets to repair road, encampment and environmental damages. (Author’s notes.)

³⁴¹ *Srpska Protocol*, para. 4. Interestingly, this paragraph appears to interpret the term ‘claimant’ found in *Claims Appendix*, para. 6, as not including a Troop Contributing Nation.

³⁴² Zagreb IFOR Claims Procedures, para. 2A–C (1996) [hereinafter *Zagreb Procedures*].

³⁴³ *Ibid.* para. 2C. ³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.* para. 2D. Under the *Claims Annex*, para. 4, as reaffirmed in the *Srpska Protocol* and the Federation of Bosnia-Herzegovina Protocol, para. 1, claimants in the Republic of Bosnia and Herzegovina are ordinarily required to submit claims ‘within 90 days of the date of discovery’ of damage.

³⁴⁶ IFOR Claims Office Sarajevo SOI (n. 317) 1–2.

would be handled by the Troop Contributing Nations, and why each Troop Contributing Nation had a different claims settlement operation in place. Communication throughout the theatre to the various Troop Contributing Nations' claims representatives remained problematic for an extended period of time, because of communications systems incompatibility. Further, given the frequent rotation of Troop Contributing Nations' personnel and records out of theatre, it was often difficult to track down witnesses or reliable reports. Finally, the lack of country studies focusing upon the tort and property law of Bosnia and Croatia made it difficult in the early part of the operation for the IFOR/SFOR claims offices and the Troop Contributing Nations properly and consistently to adjudicate claims presented to them. This deficiency was compounded by the definitional differences in claims terminology between the Troop Contributing Nations.³⁴⁷

Despite the obstacles to efficient claims processing, of the 6,507 claims filed against the IFOR/SFOR and the Troop Contributing Nations from the beginning of Operation Joint Endeavour until 11 December 1998, 3,292 were paid for a total amount of approximately \$11,626,143: 1,571 claims were denied. Of the 1,012 claims filed against IFOR/SFOR headquarters, the claims offices paid 470 for an approximate total of \$465,983 with 147 denied during this time period.³⁴⁸ The SFOR mission was concluded in December 2004, and the EU assumed primary peacekeeping responsibilities.³⁴⁹

As the mission in Bosnia-Herzegovina evolved,³⁵⁰ the role of the new European Union Force (EUFOR)/NATO Headquarters Sarajevo claims offices remained essentially the same as it was under IFOR/SFOR. They still supported the Claims Commission and Arbitration Tribunal processes and hearings, and in the event the responsible Troop Contributing Nation could not be found to settle a meritorious claim, the claims offices might settle the claim using EU or NATO funds.³⁵¹ Helpfully, the offices' procedures set out the responsibilities of Troop Contributing Nations' claims offices,³⁵² and set out in detail the tasks of the headquarters claims offices.

One task which was different since the time of the first IFOR claims offices was the assertion of affirmative claims on behalf of the headquarters against those who damage its property.³⁵³ The procedures provided a detailed and clear description of the claims process,³⁵⁴ which served not only as a model to Troop Contributing Nations on how to process their claims, but also provided transparency to the claimant. The procedures noted two kinds of claims that are specifically non-cognizable: those arising from 'Combat and Combat Related Activities' and from acts of 'Operational Necessity'. 'Combat and Combat Related Activities' include those things that involve protection of the force, such as firing weapons and manoeuvring in combat, the movement of military vehicles, and the occupancy of

³⁴⁷ Author's notes.

³⁴⁸ Memorandum from Major William Kern, Chief, Operational Claims, US Army Claims Service, Europe (15 December 1998) [hereinafter Kern Memorandum (December 1998)]. According to the SFOR statistics, the Federal Republic of Germany had paid over \$5,727,692 on claims. The US paid the second greatest amount on claims, \$1,839,522.

³⁴⁹ 'NATO ends SFOR mission' (2 December 2004), *NATO Update*, <<http://www.nato.int/docu/update/2004/12-december/e1202a.htm>>.

³⁵⁰ See Brigadier General P. Goebel, 'The EUFOR-Operation Althea: A Truly Multinational Force' (2006) 2 *Truppendienst International*, available at Austrian Armed Forces webpage, <http://www.bundesheer.at/english/td_international/artikel.php?id=37>.

³⁵¹ HQ EUFOR/NHQ Sa SOP 3401, § 1, para. 2; § II, para. 1 (17 March 2005) [hereinafter HQ EUFOR/NHQ Sa SOP 3401].

³⁵² *Ibid.* § II, para. 2.d.

³⁵³ *Ibid.* § 2, para. 3.c. 'This process has been very successful and this HQ recovers approximately 90% of the damages inflicted on NATO HQ Sarajevo property.' Memorandum from LTC Barry Stephens, NHQ Sa Chief Legal Advisor (16 April 2007) [hereinafter Stephens Memorandum].

³⁵⁴ HQ EUFOR/NHQ Sa SOP 3401 (n. 351) § II, para. 5; Annexes A-1.

real estate.³⁵⁵ The concept of 'Operational Necessity' excludes 'claims for damages that may arise as a direct and foreseeable consequence of lawful detention of persons, riot control activities, and force protection activities ... conducted in furtherance of the mandates'.³⁵⁶ Importantly, the procedures noted that there might be situations in which TCNs are able and choose to make an *ex gratia* or solatium payment on claims barred for these reasons, but that in such cases the settlements were not subject to the claims appeals process.³⁵⁷

3. IFOR/SFOR claims issues

(a) *The efficacy and competence of the Claims Commissions and Arbitration Tribunals*

Under the Technical Arrangements and the subsequent agreements negotiated thereto, the decisions of the Claims Commissions³⁵⁸ and Arbitration Tribunals were supposed to be final and binding. At the Mons NATO Sending States Claims Conference in October 1996, the SHAPE Legal Advisor concurred with the French delegation's proposal that the Troop Contributing Nation against whom the claim was brought be allowed to appoint one of the SFOR Claims Commissioners. Because Claims Commissions' decisions were required to be unanimous, this had the practical effect of insuring that no decision could be taken which was not agreeable to the Troop Contributing Nations involved. At the Paris NATO Sending States Claims Conference in April 1997 the delegations all agreed that the decisions of the Arbitration Tribunal could not be final and binding against them on claims disputes.³⁵⁹ As a first step to resolving this problem, the SHAPE Legal Advisor agreed that the Troop Contributing Nation against whom the claim was brought would also be allowed to appoint the SFOR member on the Arbitration Tribunal.³⁶⁰

In its first case before the Croatian Arbitration Tribunal, the US informed the tribunal that it did not accept the final and binding nature of any decision the tribunal might reach, but that it wished to participate in the Arbitration Tribunal process in good faith to find a pragmatic resolution to the case before the tribunal.³⁶¹ The US position was that these agreements were not binding upon the US because the US is not a party to these agreements, and because compliance therewith would violate the provisions of the Foreign Claims Act and the statutory requirement that decisions of US foreign claims

³⁵⁵ Ibid. § II, para. 7.b.

³⁵⁶ Ibid. § II, para. 7c.

³⁵⁷ Ibid. § II, para. 8.

³⁵⁸ Although the Claims Commissions were not explicitly granted the power to make final and binding decisions in any of the pertinent documents, this power accreted to them through time. Under the Claims Annex, they may 'take decisions' on liability, 'the kind and scope of damage, as well as to order payment'. Claims Annex, para. 3. Further, the Claims Commissions also had the authority to obtain expert testimony to help them decide issues in cases before them, and to direct the parties to provide them with whatever information they required. Claims Appendix, para. 4.

³⁵⁹ The non-NATO Troop Contributing Nations, as a precondition to participation in IFOR, all expressly agreed 'to be responsible for claims for damages arising out of [their soldiers'] acts and omissions and made by third parties from the nation in which the damage in question occurred'. See Letter from Goran Berg, Swedish Ambassador to Belgium, to Javier Solana, Secretary General, NATO (19 December 1995). In this exchange of letters, the non-NATO Troop Contributing Nations also agreed to 'waive all claims against each other and other non-NATO contributing nations for damage to property owned or used by, and injury to personnel belonging to, their contingents in the IFOR'. Ibid.

³⁶⁰ The Croatian Arbitration Tribunal used the London Court of International Arbitration Rules (LCIA Rules). Under these rules, the neutral third member of the Arbitration Tribunal makes a decision on the case if the other members are unable to agree. LCIA Rules, Art. 16.3 (1985). Accordingly, a decision could still be made on a case with which the Troop Contributing Nations do not agree.

³⁶¹ Respondent's Statement of Defence at 1, *Feliks, d.o.o. v. US* (26 February 1997) (on file with US Army Claims Service Europe).

commissioners are final and conclusive.³⁶² The tribunal did not contest the US assertion. The US found the tribunal's decision to be reasonable, and therefore paid the claim in accordance with the decision.

(b) Damages to transportation infrastructure

Under the Dayton SOFAs, the receiving states agreed to 'provide, free of cost, such facilities NATO needs for the preparation for and execution of the Operation'.³⁶³ 'Facilities' were defined as 'all premises and land required for conducting the operational, training and administrative activities by NATO for the Operation as well as for accommodations of NATO personnel'.³⁶⁴ NATO was allowed to use the airports, roads and ports of the receiving states without paying 'duties, dues, tolls or charges', but could not 'claim exemption from reasonable charges for services requested and received ...'.³⁶⁵

During the course of the operation, the wheeled and tracked vehicles of the Troop Contributing Nations used the roads in both Bosnia-Herzegovina and Croatia extensively. Before the operation, the vehicles of the Former Warring Factions and the UN also used many of the same roads. The US had two large claims for road damages filed against it, one for approximately \$10,000,000 in Croatia, and one for DM 8,600,000 in Bosnia-Herzegovina. At the Paris NATO Sending States Claims Conference, the SHAPE Legal Advisor suggested that these alleged damages to the roads, the so-called Main Supply Routes, should be claims against SFOR itself, and not against the individual Troop Contributing Nations. Further, it was the consensus of the delegations present that these claims should ordinarily be waived as the unavoidable results of conducting the operation, and therefore akin to combat damages.³⁶⁶ The delegations concurred with the SHAPE Legal Advisor's suggestion that he forward this issue to the NATO Political Committee for resolution.

(c) Applicable Receiving State law with regard to liability and the amount of awards

As previously noted, the US Forces ordinarily apply receiving state law in adjudicating claims against them under the Foreign Claims Act. Croatia made quick progress in recodifying the law of the Former Yugoslavia, and at first, both the Federation of

³⁶² 10 USC § 2735 (1994); AR 27-20, para. 10-12f(4). Accordingly, if a claimant were to bring a case before a US court resulting from the denial of a claim by a foreign claims commission, the court could only review the case to determine whether the foreign claims commission had followed the appropriate regulations in deciding the case, not whether the decision was correct. See *Rodrigue v. US*, 968 F.2d 1430, 1432-34 (1st Cir. 1992) (Although the claimants in *Rodrigue* contested denial of their claim under the related Military Claims Act, 10 USC § 2731, the same principle of finality of the administrative ruling would apply.)

³⁶³ Dayton SOFAs, Art. 14. ³⁶⁴ Dayton SOFAs, Art. 1.

³⁶⁵ Dayton SOFAs, Art. 9. Non-temporary improvements made to receiving state infrastructures during the course of the operation 'shall become part of and in the same ownership as that infrastructure. Temporary improvements or modifications may be removed at the discretion of the [SFOR Commander], and the facility returned to as near its original condition as possible'. Dayton SOFAs, Art. 17.

³⁶⁶ The entities which comprise Bosnia-Herzegovina agreed to, and Croatia endorsed, the proposition that 'the IFOR and its personnel shall not be liable for any damages to civilian or governmental property caused by combat damage or combat related activities'. GFAP, Annex 1-A, Art. VI, para. 9 (a). 'Peacekeeping' or 'peace enforcement' operations present significant problems with the practical application of these definitions. Under US Army claims policy, '[w]hen war has not been declared, as, for instance, during a peacekeeping operation, the combat activities exclusion nevertheless applies to actual combat situations until hostile activities cease'. DA Pam. 27-162 (n. 46) para. 10-3b. Various claims conferences held between the NATO Troop Contributing Nations after the beginning of the operation revealed a lack of consensus amongst them with regard to the application of these concepts to claims.

Bosnia–Herzegovina and the Republika Srpska appeared to provisionally apply the law of the Former Yugoslavia.³⁶⁷ Fortunately, with regard to tort law and the appropriate measure of awards in cases, the law of the Former Yugoslavia was still substantially applicable in Bosnia–Herzegovina and Croatia during the early part of the IFOR/SFOR mission.³⁶⁸ The ordinary standard of tort liability in Bosnia–Herzegovina and Croatia is comparative negligence.³⁶⁹ Certain Former Yugoslavian tort concepts were quite different from ordinary Anglo-American law. For example, under the concept of ‘presumed fault’, ‘whoever causes damage to another has an obligation to compensate for it, unless he or she can prove the damage was caused without his or her fault’.³⁷⁰ The principle of presumed fault is perhaps similar to that of a rebuttable presumption in Anglo-American law, for ‘only the mildest degree of fault is presumed’.³⁷¹ In the administrative settling of claims by US forces, however, this concept rarely played a role.

The largest single category of claims against the US forces resulted from vehicular accidents.³⁷² Using standard pricing guides³⁷³ and estimates from local garages, it was fairly easy to determine an objective basis upon which to pay the claim for property damage to the automobile. Cases of personal injury, however, were much more difficult to resolve. Under the law of Bosnia–Herzegovina and Croatia, so-called ‘immaterial damages’, or what Anglo-American jurisprudence would recognize as damages for pain and suffering, are payable. The US forces used a standardized compensation table for such damages as physical pain, fear and mental anguish as a basis for their negotiations in personal injury cases in both Bosnia–Herzegovina and Croatia.³⁷⁴

Two cases from Bosnia highlight how such provisions worked in an operational setting. In the first case, a man indicted by the International Criminal Tribunal for former Yugoslavia (ICTY) filed a claim against a Troop Contributing Nation for damages caused to his house during his arrest by that Nation’s troops in December 1997—an arrest which he resisted with rifle fire. Both the man and a soldier were wounded during the exchange. The SFOR Legal Advisor opined that the claim was without merit. First, an investigation by the Troop Contributing Nation contingent showed that the soldiers had acted properly within their rules of engagement (ROE). Second, the mission in which they implemented their ROE was lawful, pursuant to the ICTY indictment. Third, the man knew or should have known that he was indicted, and that he had no right to resist arrest. He therefore

³⁶⁷ IFOR Claims Office Sarajevo SOI (n. 318) Attachment I, at 1.

³⁶⁸ *Zakon o Obveznim Odosima (ZOO)* (The Law on Obligatory Relations). The first translations and comparative analyses of applicable Bosnian and Croatian tort law were compiled by the Sarajevo and Zagreb IFOR claims offices in July and June 1996, respectively. Distribution to the Troop Contributing Nations’ claims activities did not begin until late July 1996. Some Sending States, such as Germany, have since compiled their own comparative studies of Bosnian and Croatian law. From the beginning of the operation until the late summer of 1996, US forces in Bosnia–Herzegovina and Croatia relied upon general principles of US tort law in settling less complex claims. Decisions on larger, more complex claims were deferred until the legal issues could be properly analysed under local law.

³⁶⁹ IFOR Claims Office Sarajevo SOI (n. 318) 7.

³⁷⁰ ZOO, Art. 154(1) (translation made by IFOR–Zagreb Claims Office, 1996).

³⁷¹ IFOR Claims Office Sarajevo SOI (n. 318) Attachment I, fn. 1.

³⁷² For example, during the period 10 January 1997 to 10 February 1997 in Bosnia, the US forces paid 58 claims. Of these, 25 resulted from vehicular accidents, 13 from crop damage, nine from damage to residential property, six from the detonation of ordnance, two from damage to private roads, and one each for damage to public roads, personal property, and livestock. Memorandum from Staff Sergeant R. Steele, Claims Non-commissioned Officer In Charge, 1st Infantry Division, Task Force Eagle (23 February 1997) (on file with US Army Claims Service Europe).

³⁷³ EurotaxSchwacke GmbH, *Schwackeliste* (May 1997).

³⁷⁴ IFOR Claims Office Sarajevo SOI (n. 318) Attachment J.

assumed the risk of damages to his property when he chose to fire upon the arresting soldiers.³⁷⁵ In the second case, villagers filed claims against SFOR for property damages caused by SFOR troops in March 2002 while searching their village for another individual indicted by the ICTY. Although their claims were rejected as arising from combat or combat related activities, the SFOR commander authorized *ex gratia* payments to correct 'perceived wrongs' and to help the villagers repair their village.³⁷⁶

Between 1996 and 2007, The IFOR/SFOR and EUFOR/NATO claims offices received approximately 13,200 claims. Many were denied or settled in other fashions, but for those claims settled with cash payments, the total for all the contingents during this time period was approximately €11,700,000 out of approximately €75,000,000 claimed.³⁷⁷ These claims operations provide excellent case studies of just how complex and expensive it can be to conduct a large-scale, long-term military operation seeking to bring stability and the rule of law to a war-torn area, even when there is little or no actual armed conflict still occurring. To better understand the role played by the Troop Contributing Nations in such a claims arrangement, it is useful to look at US claims operations in some detail.

(d) US claims operations in Bosnia-Herzegovina and Croatia

The US Army Claims Service commander delegated authority to the Chief, US Army Claims Service Europe, to appoint one- and three-member foreign claims commissions to process claims arising from the deployment of US forces into the former Yugoslavia.³⁷⁸ This delegation was pursuant to the Department of Defense's designation of the US Army as the service with claims responsibility for the Former Yugoslavia.³⁷⁹ Although the exact number of personnel and their location varied depending upon operational necessity, the US Army in Bosnia ordinarily had four to five one-member foreign claims commissions in Multinational Division (MND)-North³⁸⁰ at any given time in the beginning of the IFOR/SFOR mission. The commissioners in Bosnia were supervised by a senior claims commissioner at US forces headquarters in Tuzla. Ordinarily, there was also a one-member commission based in eastern Croatia. All of the foreign claims commissioners were military attorneys. The deployed commissions were complemented by a one-member commission and a three-member commission located at US Army Claims Service Europe. Civilian attorneys sat on the three-member foreign claims commission.

³⁷⁵ Memorandum from Colonel M. Neveu, SFOR Legal Advisor, Interpretation of SFOR Authority under Annex 1-A, GFAP, in Connection With Claim Kupreskic, Vlatka, SFOR Claim No. C-4724' (28 January 1998).

³⁷⁶ 'SFOR compensates Bosnian villagers for damage in operation to get Karadzic', *AFP* (27 April 2002) <<http://www.balkanpeace.org/hed/archive/apr02/hed4918.shtml>>.

³⁷⁷ The approximations for this time period are based on several different sources, including the Stephens Memorandum (n 353), and 'Operational Claims', a briefing by Captain M. Cohn, European Claims, US Army Claims Service Europe (March 2003).

³⁷⁸ Memorandum from Colonel J. Rosenblatt, Commander, US Army Claims Service, for Lieutenant Colonel F. Pribble, Chief, US Claims Service Europe (15 October 1995). The US forces in Bosnia-Herzegovina and Croatia operated only under the Foreign Claims Act in settling or denying claims in those two countries. The International Agreements Claims Act was inapplicable under the Dayton SOFAs because the agreements contained no cost-sharing measures, and because the agreements were between Implementation Force (IFOR) representatives and the Receiving States, not between the US and the Receiving States.

³⁷⁹ Memorandum from J. H. McNeill, Senior Deputy General Counsel, Office of General Counsel, US Department of Defense, for Colonel J. P. Burton, Legal Counsel, Joint Chiefs of Staff (12 March 1996).

³⁸⁰ The three lead nations in IFOR, the UK, France, and the US, were each assigned a geographical area of responsibility in Bosnia-Herzegovina. Within each of these divisional areas, the smaller units from other Troop Contributing Nations were also assigned, leading to their multinational character.

Claims activities in the Bosnian Theatre of Operations³⁸¹ occurred within the most complex set of claims regimes in which the US Army had worked with up until that time. Further, the business of investigating, adjudicating and settling claims in MND-North, Bosnia–Herzegovina, was very time-consuming and difficult because of the force protection requirements (despite the absence of combat conditions), the difficult roads, the shattered economy and the widespread destruction caused during the war. These problems were not as significant in Croatia. US foreign claims commissions relied heavily upon the US Army Civil-Military Affairs teams to provide the required translators and personal contacts necessary to settle claims and conduct investigations,³⁸² for cultural differences between the former Yugoslavs quickly became noticeably pronounced. For example, US forces in Bosnia-Herzegovina and Croatia devised bilingual claims forms to assist claimants in filing and properly documenting their claims. No one standard form was used, because different claims forms were required in different parts of the Former Yugoslavia to address local cultural sensitivities. For example, many Croatian claimants preferred forms written in so-called ‘New Croatian’, rather than Serbo-Croatian. Some claimants in the Republika Srpska preferred forms in Cyrillic, rather than Latin, script.³⁸³

Despite these challenges the US claims operations operated expeditiously, and as of 1 November 1998 the US Army had already settled 1,287 claims in Bosnia–Herzegovina for approximately \$1,430,670, and 274 claims in Croatia for approximately \$434,950.³⁸⁴ As the mission in Bosnia-Herzegovina and Croatia forces were reduced and lightened, the number of claims and the degree of damage decreased significantly. As that was happening, however, NATO and Troop Contributing Nations would face a new claims situation in a different part of the Former Yugoslavia—the Serbian province of Kosovo.

4. KFOR claims operations in Kosovo

Despite the lack of authorization by the UN Security Council, in March 1999 NATO forces began air strikes against Serbian targets in response to Yugoslavia’s refusal to comply with NATO’s demands to cease its attacks on Kosovar Albanians.³⁸⁵ The air strikes resulted in particular claims case that garnered significant international attention. On 30 May 1999, NATO aircraft attacked a bridge in the Serbian town of Varvarin, resulting in the deaths of ten civilians and injuries to 30. Even though Germany was not itself involved in the actual attacks, claimants sued the Federal Republic in German court for damages in the amount of €3.5 million, arguing that Germany as a NATO member, through its failure to prevent the strike, had violated both domestic German law and international law.³⁸⁶

The case was eventually appealed to the Federal Constitutional Court, which on 13 August 2013, affirmed the trial and appeal decisions in the case finding essentially that

³⁸¹ For US forces, the Bosnian Theatre of Operations included Austria, the Czech Republic, Hungary, and Slovakia, as well as the countries which comprised the Former Yugoslavia.

³⁸² US Army and US Air Force Combat Camera Teams proved to be very useful in documenting damages during the course of investigations.

³⁸³ Payments in Deutsche Mark, the *de facto* currency of Bosnia-Herzegovina at that time, were accepted readily on both sides of the Inter-Entity Boundary Line between the former warring parties, however.

³⁸⁴ Memorandum from Major William Kern, Chief, Operational Claims, US Army Claims Service Europe, 9 November 1998 [hereinafter Kern Memo (November 1998)].

³⁸⁵ ‘NATO’s role in relation to the conflict in Kosovo, Historical Overview’ (NATO website historical summary as of 15 July 1999), <www.nato.int/kosovo/history.htm>.

³⁸⁶ ‘Serbian Families Sue Germans Over NATO Bombing’ *Deutsche Welle* (15 October 2003), <<http://www.dw.com/en/serbian-families-sue-germans-over-nato-bombing/a-997339>>.

the plaintiffs had no cause of action as individual claimants for this sort of damage under either German or international law.³⁸⁷ This decision was consistent in many respects from an international law perspective with the US's 'voluntary humanitarian payment' of \$4.5 million to the families of the three people who were killed and the 27 who were injured when the US mistakenly bombed the embassy of the People's Republic of China in Belgrade on 7 May 1999. Later, China agreed to accept \$28 million for the damages to the embassy building, and the US agreed to accept \$2.87 million in compensation for the damages caused to US diplomatic facilities in China by rioters after the bombing.³⁸⁸

As to damages caused by NATO-led forces in Kosovo itself, these were dealt with in the Military Technical Agreement between the Kosovo Force (KFOR) and the Yugoslavian authorities that discontinued hostilities between the opposing forces and allowed the entry of KFOR into Kosovo.³⁸⁹ KFOR forces were not liable 'for any damages to private or public property that they may cause in the course of duties related to the implementation of this Agreement'.³⁹⁰ This strong stance, likely resulting in part from the NATO claims experience in Bosnia-Herzegovina and Croatia, was politically awkward, because the UN Interim Administration Mission in Kosovo (UNMIK) intended to pay claims, and the situation was no longer really a combat operation.³⁹¹ On this basis, however, certain contingents chose not to pay claims at this point.³⁹² Eventually, the problem was resolved by a UNMIK/KFOR joint declaration that included the commitment for both international entities to 'establish procedures in order to address any third party claims for property loss or damage and personal injury caused by them or any of their personnel'.³⁹³ The UNMIK regulation, which implemented the joint declaration in August 2000 provided that both UNMIK and KFOR would set up their own claims commissions to settle third party claims. Claims resulting from 'operational necessity' were barred, but importantly for claimants, the regulation was made effective retroactively to 10 June 1999.³⁹⁴

Although some KFOR contingents had already begun paying claims, the first KFOR Claims Office in Kosovo did not begin operations until 2001.³⁹⁵ At that time, it already had a backlog of about 100 claims.³⁹⁶ Although it was on a smaller scale, the KFOR claims operation was similar in many respects to the claims operations in IFOR/SFOR,³⁹⁷ and it dealt with similar challenges, such as the difficulty of establishing property ownership

³⁸⁷ 'Varvarin bridge case, Federal Constitutional Court' (13 August 2013), *ICRC*, <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=7044399B6E5615C0C1257D250049F4A2&action=openDocument&xp_countrySelected=DE&xp_topicSelected=GVAL-992BU6&from=topic> (discussing *36 Citizens of Yugoslavia v. Germany*, 2 BvR 2660/06, 2BvR 487/07, ILDC 2238 (DE 2013), EuGRZ 2013, 563, DÖV 2013, 946 (13 August 2013)).

³⁸⁸ K. Dumbaugh, 'Chinese Embassy Bombing in Belgrade: Compensation Issues' *Congressional Research Service* (Report No. RS20547) (12 April 2000) 4–5.

³⁸⁹ Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (9 June 1999) [hereinafter KFOR MTA].

³⁹⁰ KFOR MTA, Appendix B, para. 3.

³⁹¹ Lieutenant Colonel Z. Hegedüs and others (eds.), *NATO Legal Deskbook* (Mons: Allied Command Transformation Staff Element Europe, 2010) 273.

³⁹² The US did not pay claims for almost two years after the beginning of the operation. Center for Law and Military Operations, *Law and Military Operations in Kosovo: 1999–2001* (The Judge Advocate General's Law Center and School, Charlottesville December 2001) 162 [hereinafter *Kosovo*].

³⁹³ UNMIK/KFOR Joint Declaration, CJ(00)0320 (17 August 2000).

³⁹⁴ 'On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo', UNMIK Regulation No. 2000/47 (18 August 2000) [hereinafter UNMIK Reg. No. 2000/47].

³⁹⁵ First Lieutenant M. Paccioj, 'Kosovo's new Claims Office at Film City' *KFOR Chronicle* (3 August 2007), <http://www.nato.int/kfor/chronicle/2001/nr_010629d.htm>, accessed 27 November 2016.

³⁹⁶ Commander L. Kjelgaard, HQ KFOR Claims Officer, 'Claims in Kosovo' (briefing) (11 April 2002).

³⁹⁷ *Ibid.*

in a formerly communist country, and in establishing reliable valuations for goods and services in a war-torn economy.³⁹⁸ Preventative claims measures proved very successful, however, in easing the way for the conduct of exercises and the building of roads on land that the affected Kosovars now considered to be private property. Coordinating with local civilians and municipalities in advance, letting them know how their claims would be settled, and then paying in cash made a very positive impression on people who had become accustomed to having the government do as it liked with little or no compensation.³⁹⁹

Some KFOR units were based in countries that were already NATO members, such as Greece, or which had signed the PfP SOFA, such as Albania and the Former Yugoslavian Republic of Macedonia. The claims provisions of Article VIII, NATO SOFA, applied in these countries, which meant that the host nation, as the Receiving State, was responsible for collecting, investigating, and adjudicating claims, and then billing the responsible TCN Sending State for 75% of the costs of the claims.⁴⁰⁰ The North Atlantic Council granted a waiver of this provision to Albania and the Former Yugoslavian Republic of Macedonia, so claims in these countries were processed in a fashion similar to that applying in SFOR at the time.⁴⁰¹ For example, by August 1999, the NATO Claims Office in the Former Yugoslavian Republic of Macedonia had already settled about 120 claims of the approximately 300 it had already received during the KFOR operation.⁴⁰²

Under the KFOR claims procedure, the tasks of the HQ KFOR Claims Office were very similar to those of the NHQ Sarajevo Claims Offices. The HQ KFOR Claims Office served as the primary 'point of contact for all claims against KFOR generally'.⁴⁰³ Claims against HQ KFOR were handled there, and claims against Troop Contributing Nations are forwarded to them to be handled under their own respective national procedures.⁴⁰⁴ Troop Contributing Nations were encouraged to use the HQ KFOR procedure as model if they do not have one of their own.⁴⁰⁵ The HQ KFOR claims officer was responsible for maintaining oversight of all claims in Kosovo, and for reporting to the HQ KFOR Legal Advisor on their status.⁴⁰⁶ The claims officer was also the fund manager for the HQ KFOR claims account, and in this role coordinated closely with the HQ KFOR J8 (Finance).⁴⁰⁷ When the specific Troop Contributing Nation at fault for an otherwise meritorious claim could not be identified, the claims officer would seek guidance from JFC Naples whether payment should be made from the HQ KFOR claims account.⁴⁰⁸ Finally, the claims officer was responsible for convening the Kosovo Claims Appeals Commission when necessary.⁴⁰⁹

In the event a claimant was dissatisfied with a claims decision, and it was against either HQ KFOR or a Troop Contributing Nation, which voluntarily participated in the Kosovo Claims Appeals Commission process, the claimant could appeal a decision to the commission.⁴¹⁰ The commission was to be composed of three judicial officers, one appointed by the force against whom the claim lie, and two appointed by the HQ KFOR Legal Advisor, or if authorized, the HQ KFOR claims officer.⁴¹¹ The decisions of the commission were required to be unanimous, but they were not binding.⁴¹² If the Troop

³⁹⁸ Interview with Ms. L. Kjelgaard, Deputy Legal Advisor, Joint Warfare Centre (former HQ KFOR Claims Officer) (Stavanger, 17 August 2007).

³⁹⁹ *Ibid.* ⁴⁰⁰ NATO SOFA, Art. VIII, para. 5e. ⁴⁰¹ *Kosovo* (n. 392) 66.

⁴⁰² KFOR Press Statements, 'KFOR Statement on road traffic accidents on Saturday 28 and Sunday 29 August in FYROM' (30 August 1999) <<http://www.nato.int/kosovo/press/1999/k990830b.htm>>.

⁴⁰³ HQ KFOR Main SOP 3023, Claims, para. 4 (22 March 2003). ⁴⁰⁴ *Ibid.* para. 6.

⁴⁰⁵ *Ibid.* referring to Annex B.

⁴⁰⁶ *Ibid.* para. 4(a). ⁴⁰⁷ *Ibid.* para. 4(b). ⁴⁰⁸ *Ibid.* para. 4(c). ⁴⁰⁹ *Ibid.* para. 4(d).

⁴¹⁰ *Ibid.* Preamble; Annex C. ⁴¹¹ *Ibid.* para. 11. ⁴¹² *Ibid.* Preamble, para. 12.

Contributing Nation did not participate in the commission process, the HQ KFOR claims office might still play a non-binding advisory role in disputes about claims.⁴¹³ Although only three Troop Contributing Nations and HQ KFOR participated in the Claims Appeal Commission process as of 2007,⁴¹⁴ generally the program was successful. For example, in the eight-year period between the beginning of the operation and 2007, the total number of claims filed in Kosovo was slightly over 900, and claims settlements had paid out approximately €250,000 on meritorious claims.⁴¹⁵

Not all claims against the KFOR Troop Contributing Nations were resolved to the claimants' satisfaction, however, and like the plaintiffs in the *Varvarin* case, some claimants sought to use Troop Contributing Nation domestic courts to receive compensation under national domestic law. For example, on 2 July 1999, three British KFOR soldiers opened fire on a moving vehicle occupied by a group of Kosovar Albanians. One of the men had an assault rifle, which he had discharged at some point. The shots from the British soldiers killed two men and wounded two others. The wounded civilians brought suit in British court, and the parties agreed that there should be a separate trial on liability.

The question of liability was addressed by the England and Wales High Court, which found that despite the fact that the situation in Kosovo at that time was still not secure, the soldiers could not have reasonably acted in self-defence because they were not being threatened by the vehicle occupant with the assault rifle. Further, the defence of combat immunity under English law was not available, because that would only apply where there was an imperative to act to protect the state, and in this case, there had been no reason to shoot under the rules of engagement the soldiers were operating under. Finally, the court noted that '[t]roops frequently have to carry out difficult and sensitive peace keeping functions, such as in Northern Ireland, whilst still being subject to common law duties of care', and that the UK government was liable to the plaintiffs because the soldiers were negligent in carrying out their duties.⁴¹⁶ Once liability was established, it was then just a question of damages, and for example, the most severely wounded plaintiff received £2,054,000 in compensation and £346,000 in legal costs.⁴¹⁷

5. Summary

The UN's claims experience in Bosnia-Herzegovina and Croatia led to the reforms of the late 1990s that reduced the UN's exposure to high-value and large-scale operational claims. NATO's claims experience in Bosnia-Herzegovina was grounded initially in those countries' dissatisfaction with the UN claims regime, which was negotiated into the Dayton SOFAs. Although local nationals appear to have been largely satisfied with the claims operations conducted by the IFOR/SFOR Troop Contributing Nations, those nations themselves were concerned with the potential size and scope of third-party claims, particularly infrastructure damage claims. Perhaps this concern led to the initial decision four years later to not pay any claims at all under KFOR, which was later recognized as

⁴¹³ UNMIK Reg. No. 2000/47 (n. 394) § 7.

⁴¹⁴ Statement by Captain O. Troian, HQ KFOR Claims Officer (personal correspondence 15 August 2007).

⁴¹⁵ *Ibid.* ⁴¹⁶ *Bici v. Ministry of Defence* [2004] EWHC 786 (QB).

⁴¹⁷ M. Moore, 'MOD pays out £2.4m to Kosovan shot in the jaw' (6 November 2008) *The Telegraph*, <<http://www.telegraph.co.uk/news/newstoppers/onthefrontline/3388546/Mod-pays-out-2.4m-to-Kosovan-shot-in-the-jaw.html>>. Contrast this amount with a typical UK payment in Afghanistan for a farmer shot and killed while working in his fields in 2010—\$3,500. 'Afghanistan civilian compensation: the sums received from UK forces' *Guardian* (28 March 2011) <<https://www.theguardian.com/world/datablog/2011/mar/28/afghanistan-civilian-compensation>> [hereinafter 'Afghanistan civilian compensation'].

an untenable approach to maintaining the political legitimacy of the mission. In terms of transparency, consistency, and accountability, the NATO-led claims operations in the Former Yugoslavia were imperfect, but good enough to largely address meritorious third-party claims while limiting financial exposure for the Troop Contributing Nations.

There were important exceptions to this assessment, however, as shown by the claimants seeking to litigate claims in the domestic courts of certain Troop Contributing Nations—sometimes quite successfully, as shown by the *Bici* case. In a certain sense, there are strong commonalities between the MINUSTAH firefight case and the *Georges* case on the one hand, and the *Bici* and *Varvarin* cases on the other. In both instances, individuals who suffered serious but non-mortal wounds received compensation apparently. On the basis of sovereign or organizational immunity, however, large-scale cases in which many innocent civilians died were found to be non-compensable. Apparent inconsistencies such as these, at least from the perspective of those who suffered injury, would become particularly problematic in NATO's next out of area operation—Afghanistan.

VIII. Claims Operations in Pakistan and Afghanistan

1. Pakistan

Before turning to NATO-led claims operations in Afghanistan, however, it is important to first note the claims arrangements NATO developed for a relatively short humanitarian mission in neighbouring Pakistan, which requested humanitarian assistance from NATO in the aftermath of the devastating earthquake it suffered on 8 October 2005. Over 73,000 people were killed in the earthquake, and relief efforts were complicated by the rugged Himalayan terrain of the affected area.⁴¹⁸ Negotiations to allow NATO forces access to Pakistan culminated in a Draft Exchange of Letters (DEOL) between Pakistan and NATO on 4 November 2005. In the DEOL, NATO personnel and foreign contractors were essentially given the status of experts-on-mission.⁴¹⁹ Specifically with regard to claims, the DEOL provided that Pakistan and NATO would waive all claims against each other for unintentional death, injury, or property damage caused to their forces by the acts or omissions of the other. Claims for damages against NATO personnel and contractors by third parties, however, were not waived, and were to be 'transmitted through the governmental Pakistani authorities to the designated NATO Representative'.⁴²⁰ The aid mission to Pakistan lasted three months, and concluded by 1 February 2006. NATO units delivered almost 3,500 tons of emergency supplies to Pakistan, and NATO medical units treated thousands of patients as engineers cleared debris and repaired roads.⁴²¹ The number of third-party claims against NATO appears to have been very small, and in fact, there may only have been one.⁴²² The Joint Command Lisbon legal advisor drafted a claims policy for use during the operation, but it had not been approved by SHAPE prior to the end of this short-term mission.⁴²³

⁴¹⁸ Iu Haq, 'Global Disasters: Pakistan's Experience' (2007) 83 *Intl L Stud* 257.

⁴¹⁹ Draft Exchange of Letters between NATO and the Islamic Republic of Pakistan, SG(2005)0795 (3 November 2005), paras. 7–11 [hereinafter Draft Exchange of Letters].

⁴²⁰ Draft Exchange of Letters, para. 17.

⁴²¹ 'Pakistan earthquake relief operation' NATO website (27 October 2010) <http://www.nato.int/cps/en/natohq/topics_50070.htm>.

⁴²² Letter from the Pakistani Embassy in Belgium to Ms. Burcu San, Office of the Secretary-General, NATO, No. Pol/RO-1/2006 (8 June 2006).

⁴²³ Interview with Lieutenant Colonel J. Hardy, Legal Advisor, Joint Command Lisbon (Oeiras, 22 April 2007).

Regardless, a review of its essential features is worthwhile, because it is a significant example of a practical and expedient means to deal with claims in a mission of short duration. First, the role of the deployed headquarters regarding claims was to serve as a point of contact with the Pakistani Ministry of Foreign Affairs, and as a conduit to pass the claim to the Troop Contributing Nation that was alleged to have caused the damage.⁴²⁴ Second, the headquarters required Troop Contributing Nations to notify it of the final disposition of the claims, so that it could inform the Ministry of Foreign Affairs.⁴²⁵ Third, 'in cases involving rescue, where a TCN is the rescuing party unless the TCN has caused the situation that requires rescue, the TCN should not normally pay damages as a rescuer'.⁴²⁶ Finally, in the event the proper Troop Contributing Nation could not be found, the headquarters would determine whether it would pay the claim on an *ex gratia* basis.⁴²⁷ The policy also contained a claims form, which required the claimant to provide basic information, briefly described the claims process, and provided a Ministry of Foreign Affairs point of contact.⁴²⁸

2. Afghanistan

(a) ISAF claims authorities

The International Security Assistance Force (ISAF) was originally deployed to Kabul, Afghanistan under a UN mandate.⁴²⁹ It was staffed by nations on six month rotations, beginning in December 2001,⁴³⁰ with the first rotation commanded by the UK.⁴³¹ ISAF's status in Afghanistan was established in a Military Technical Agreement between the force and the new Afghan government.⁴³² Under the Military Technical Agreement, ISAF was not legally liable for 'any damages to civilian or government property caused by any activity in pursuit of the ISAF mission'.⁴³³ Claims resulting from property damaged or injuries incurred outside the scope of the mission, however, were to be submitted to the Afghan Transitional Authority, which would forward them to ISAF for disposition.⁴³⁴

When NATO took command of ISAF in August 2003,⁴³⁵ it essentially remained under the Military Technical Agreement, as apparently confirmed by an exchange of letters between the Afghan government and NATO in 2004.⁴³⁶ At this point, however, the ISAF commander made a policy decision that for force protection reasons ISAF would compensate for mission-related damages where it was at fault, or where the Troop Contributing Nation which caused the damage could not be identified. The command recognized that the payment of otherwise proper claims supported ISAF efforts to help restore the rule of

⁴²⁴ Operation Pakistan Earthquake Relief Claims Policy (Draft), para. 6.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.* para. 7.

⁴²⁷ *Ibid.* para. 10.

⁴²⁸ *Ibid.* Annex A.

⁴²⁹ UNSCR 1386, S/RES/1386 (2001), para. 1.

⁴³⁰ 'ISAF's mission in Afghanistan, 2001–2014' NATO website, <http://www.nato.int/cps/en/natohq/topics_69366.htm> [hereinafter 'ISAF's mission'].

⁴³¹ See Letter Dated 14 January 2002 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2002/117 (25 January 2002), including a copy of the signed Military Technical Agreement.

⁴³² Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan—'Interim Administration'—(4 January 2002) [hereinafter Military Technical Agreement].

⁴³³ Military Technical Agreement, Annex A, para. 10.

⁴³⁴ Military Technical Agreement, Annex A, para. 10.

⁴³⁵ 'ISAF's mission' (n. 430).

⁴³⁶ See J. Voetelink, 'Status of Forces and Criminal Jurisdiction', LX *Netherlands Intl L Rev* (2013) 231.

law in Afghanistan.⁴³⁷ Ordinarily, Troop Contributing Nations would handle their own claims, and although not legally obligated to pay mission-related claims, could decide to settle them on an *ex gratia* basis.⁴³⁸ The ISAF Legal Advisors Office drafted a claims policy based in part on the SFOR and KFOR policies, and provided guidance and reviewed cases and documentation for Troop Contributing Nations upon request.⁴³⁹

Although the draft policy was not formally approved at this point, it was staffed with SHAPE and it served as a working document for successive ISAF rotations, and was published as an ISAF headquarters standard operating procedure. In many respects, it reflected the evolution of the ISAF mission over successive ISAF headquarters rotations.⁴⁴⁰ One early practical benefit of the coordination it established between the ISAF headquarters and the Troop Contributing Nations, and the Troop Contributing Nations being encouraged to provide claims forms to those who may have suffered damages, was seen in the area of traffic accidents. After accidents, potential claimants who were given such forms tended to go back to their business, whereas those who received no forms tended to follow ISAF vehicles back to their compounds.⁴⁴¹

The 2009 version of the policy moved the responsibility for ISAF-related claims from the ISAF headquarters in Kabul to the new International Joint Command,⁴⁴² located next to the Kabul international airport, and put in place more formal reporting requirements than had existed previously.⁴⁴³ Each of the subordinate regional commands was required to conduct intake of claims and preliminary investigations, and every base or compound was encouraged to have blank claims forms on hand to provide to claimants to complete, which would then be forwarded to the regional command claims office.⁴⁴⁴ Importantly, the Civilian Casualty Tracking Cell, the full function of which is discussed later in this chapter, was tasked with providing ‘data for claims verification on all casualties in Afghanistan, to include Operation Enduring Freedom and Special Operations forces’,⁴⁴⁵ Units were reminded that ISAF was not liable for damages caused in furtherance of the ISAF mission, but that this did ‘not preclude gratuitous settlement of otherwise meritorious claims’,⁴⁴⁶

The ISAF Claims Officer was made ‘responsible for processing and adjudicating claims against ISAF and, as appropriate, against [TCNs] arising under ISAF operations’.⁴⁴⁷ Each TCN was required to inform the ISAF Claims Officer as to who in their force was responsible for claims settlement, and the LEGAD at each regional command was required to serve as a point of contact between all bases and compounds in their respective commands’ areas, and to ‘forward submitted claims forms and documentation to the ISAF Claims Officer’.⁴⁴⁸ However, the policy noted that ‘[a]s a rule, TCNs are responsible for settling claims arising from their own acts and omissions and for those of their contractors for whom they have accepted responsibility’.⁴⁴⁹ In meritorious claims involving road traffic accidents for which the specific Troop Contributing Nations could not be identified, however, the ISAF Claims Office would adjudicate the claim and provide compensation.⁴⁵⁰ The claims policy also included annexes that set out the details of the ISAF claims process,

⁴³⁷ Statement by Mr. M. Hokenson, Deputy Chief Counsel, US Army Test & Evaluation Command (ISAF IV LEGAD) (personal correspondence 8 August 2007) [hereinafter Hokenson Letter].

⁴³⁸ Ibid. ⁴³⁹ Ibid. ⁴⁴⁰ Ibid. ⁴⁴¹ Ibid.

⁴⁴² ISAF HQ Standard Operating Procedures 1151, Claims Against ISAF, para. 1 (21 October 2009) [hereinafter ISAF HQ SOP 1151].

⁴⁴³ See ISAF HQ SOP 1151, Claims Against ISAF (15 April 2007).

⁴⁴⁴ ISAF HQ SOP 1151 (n. 442) para. 1. ⁴⁴⁵ Ibid. ⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid. para. 3. ⁴⁴⁸ Ibid. ⁴⁴⁹ Ibid. para. 5. ⁴⁵⁰ Ibid. para. 4.

the expectations of Troop Contributing Nation claims processes and guidelines for conducting effective claims operations, and examples of claims settlement forms written in both English and Dari or Pashto.⁴⁵¹

Effective 1 January 2015, the Military Technical Agreement was replaced by an Afghanistan-NATO SOFA.⁴⁵² With regard to claims, many of the operating principles of the Military Technical Agreement claims arrangement were retained, but there are some important differences. For example, NATO now agrees to ‘pay just and reasonable compensation in settlement of meritorious third party claims arising out of acts or omissions’ of its members ‘done in the performance of their official duties and incident to the non-combat activities of NATO Forces’.⁴⁵³ Further, although claims will be settled under the applicable NATO or Troop Contributing Nation legal policy authorities, NATO forces will now ‘seriously consider [. . .] the laws, customs and traditions of Afghanistan’ in settling claims,⁴⁵⁴ and NATO will ‘take into account any report of investigation or opinion provided to them by Afghan authorities regarding liability or amount of damages’.⁴⁵⁵ Finally, any issues that arise regarding claims will be handled by the Afghanistan-NATO Implementation Commission, which is co-chaired by the Islamic Republic of Afghanistan and NATO.⁴⁵⁶

(b) ISAF claims operations

Prior to the establishment of the headquarters claims function in the International Joint Command in 2009, the ISAF claims officers in Kabul found themselves very busy conducting claims intake and adjudicating claims even if they had little contact with Troop Contributing Nation claims programs in general.⁴⁵⁷ Claimants were generally from the Kabul area, but sometimes they travelled to ISAF headquarters to present their claims because they were uncertain where else to present them.⁴⁵⁸ Depending on the situation, the headquarters claims officers might visit the families of injured claimants at their homes⁴⁵⁹ or in hospitals to resolve non-combat claims where ISAF forces had been responsible. Perhaps not surprisingly given the traffic conditions in the Kabul area, the most common claims were those arising from vehicle accidents, but there were also interesting claims for injuries to alleged prize *buzkhasi* horses and so-called ‘agricultural’ cows, which were reputed to yield greater quantities of milk.⁴⁶⁰

The different ISAF Troop Contributing Nations administered their own programmes to handle claims for damages, which featured a variety of approaches to redressing damages.⁴⁶¹ For example, under Canadian law, the government may make *ex gratia* payments under certain conditions, such as those applying in Afghanistan. Canadian regulations define an *ex gratia* payment as ‘a benevolent payment made by the Crown’.

⁴⁵¹ Ibid. Annexes A–C.

⁴⁵² Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan [hereinafter Afghanistan-NATO SOFA].

⁴⁵³ Afghanistan-NATO SOFA, Art. 20, para. 2.

⁴⁵⁴ Ibid. para. 2.

⁴⁵⁵ Ibid. para. 3.

⁴⁵⁶ Ibid. para. 5.

⁴⁵⁷ Major S. Vichnevetskaia, ‘ISAF Claims Process in a Nutshell’ 16 *NATO Legal Gazette* 2, 3 (30 September 2008).

⁴⁵⁸ L. Kjelgaard, ‘HQ ISAF Claims Office’ 19 *NATO Legal Gazette* 12, 12–13 (April 2009).

⁴⁵⁹ Vichnevetskaia, (n. 457) 5.

⁴⁶⁰ Ibid.

⁴⁶¹ See Campaign for Innocent Victims in Conflict, ‘Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces’ (report) (2010) 5–13, <https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf> (describing US, UK, German, Italian, Dutch, Canadian, Polish, Norwegian, and Australian procedures and efforts).

These payments are ‘made in the public interest for loss or expenditure incurred where the Crown has no obligation of any kind or has no legal liability or where the claimant has no right of payment or is not entitled to relief in any form. An *ex gratia* payment is used only when there is no other statutory, regulatory or policy vehicle to make the payment’.⁴⁶² Using this authority, in 2009 Canada made payments of \$205,828 in *ex gratia* payments for 102 claims by Afghan civilians for damages and losses, and in 2010, it paid 57 *ex gratia* claims in the total amount of \$152,683.⁴⁶³ Between 2005 and 2011, the Canadian government made 453 *ex gratia* payments totalling \$1,047,946.⁴⁶⁴ Canadian forces discontinued combat operations in Afghanistan in July 2011.⁴⁶⁵

(c) US claims operations

In the wake of the US-led invasion, the US Air Force initially had single-service claims responsibility in Afghanistan. This meant that US Army legal advisors were required to investigate claims in the role of Unit Claims Officers, and forward their reports electronically to a US Air Force foreign claims commissioner at either Shaw Air Force Base in South Carolina or Prince Sultan Air Base in Saudi Arabia for approval.⁴⁶⁶ Initially, claims payments in Afghanistan were made with US dollars, because the local currency, the afghani, was not only seen as unstable, it was difficult for US finance offices to secure sufficient afghani banknotes.⁴⁶⁷ The Department of Defense assigned single-service claims responsibility for Afghanistan to the US Army in June 2003,⁴⁶⁸ and the claims program in Afghanistan has been overseen by the US Army Claims Service since that time. Although it does not appear to have made a meaningful difference in terms of actually paying claims, US forces in Afghanistan at this time operated under a different legal status than the ISAF forces. The legal authority for these so-called ‘Operation Enduring Freedom’ forces was an exchange of diplomatic notes between the government of Afghanistan and the US, which included a provision that the US was not liable for damage claims.⁴⁶⁹

From a mechanical perspective, there have been three important changes in the way the US conducts its claims operations in Afghanistan from a consistency and efficiency perspective, as compared to its earlier operations in the Former Yugoslavia. First, there is a central webpage maintained by US Army Claims Service to which foreign claims commissioners can

⁴⁶² ‘Directive on Claims and Ex Gratia Payments’, Government of Canada website (1 October 2009) <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=15782#appA>>.

⁴⁶³ ‘Canada paid \$650K to civilians caught in the cross-fire’ *CTV News* (6 September 2010) <<http://www.ctvnews.ca/canada-paid-650k-to-civilians-caught-in-the-crossfire-1.549791>>.

⁴⁶⁴ ‘Canadian military pays out over \$1m to Afghan civilians’ *Claim.com* (20 June 2011) <<http://www.claim.com/personal-injury-news/canadian-military-pays-out-over-1m-to-afghan-civilians/803/>> (quoting a Department of Defence spokesman). In contrast, the UK paid almost 1,000 damage claims for a total amount of £1.3 million in 2010 alone. ‘Afghanistan civilian compensation’ (n. 415).

⁴⁶⁵ AP, ‘Canadian Military leaves Kabul’ *Boston Globe* (13 March 2014) <<https://www.bostonglobe.com/news/world/2014/03/12/canada-ends-military-operations-afghanistan/jf4MiEJV5vrsqvbxDcFzqK/story.html>>.

⁴⁶⁶ *Legal Lessons Learned From Afghanistan and Iraq, Vol. I, Major Combat Operations (11 September 2001–1 May 2003)* 175–6 (The Judge Advocate General’s Legal Center & School, Charlottesville 1 August 2004) [hereinafter *Legal Lessons Vol. I*].

⁴⁶⁷ *Ibid.* 185–6. ⁴⁶⁸ DODI 5515.08 (n. 73) 5.

⁴⁶⁹ See ‘Diplomatic Note No.202’, Embassy of the United States of America, Kabul, Afghanistan (26 September 2002); ‘Note, Document No.791’, Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, Fifth Political Department (12 December 2002); and ‘Note, Document No.93’, Transitional Islamic State of Afghanistan, Ministry of Foreign Affairs, American and Canada Political Affairs Department (28 May 2003).

Part II Typical SOFA Rules

go for relevant claims information.⁴⁷⁰ Available to US government identification card holders, this webpage provides resources such as pricing information for Afghan livestock, links to governing legal authorities and sample claims cards that could be handed out to potential claimants.⁴⁷¹ Second, all foreign claims commissioners now receive standardized training.⁴⁷² The webpage provides training presentations and quizzes to test legal advisors on their knowledge of Foreign Claims Act claims operations.⁴⁷³ Third, there is a universal database into which claims are entered, which generates a unique claim number for each claim filed, and helps simplify claims tracking.⁴⁷⁴

From a funds perspective, a very significant change from claims operations in the Former Yugoslavia are the different possibilities of payment to Afghan civilians for the different losses they had suffered as a result of US forces' actions, combat or non-combat, expanded beyond the claims program established under the Foreign Claims Act. One result of the US invasion of Iraq in 2003 was the confiscation by US forces of millions of US dollars from the former Iraqi government and Ba'athist Party.⁴⁷⁵ This money formed the basis for what became known and regularized as the Commander's Emergency Response Program (CERP), which among other things, was used to make payments for combat damages.⁴⁷⁶

Beginning in November 2005, US forces in Afghanistan were authorized to make so-called 'condolence payments' of \$2,500 per instance of death, injury, or property damage for combat-related losses.⁴⁷⁷ Further, unlike the situation in Bosnia-Herzegovina and Croatia, US forces in Afghanistan were also eventually authorized to make solatia payments (using units' operating and maintenance funds rather than claims or CERP funds).⁴⁷⁸ Payments for death claims using solatia funds were initially limited to 100,000 afghani, or about \$2,336. In 2006, for example, US forces made \$210,758 in condolence payments and \$141,466 in solatia payments.⁴⁷⁹

In terms of the actual claims work itself, the three primary areas of claims against the US were those resulting from accidents with motor vehicles (with other vehicles, pedestrians, buildings, and livestock), short-term occupation of real estate by US forces, and confiscation of personal property such as building materials and supplies by US forces.⁴⁸⁰ As in Bosnia-Herzegovina, translation services continued to be very important. One foreign claims commissioner had the good fortune to have a translator who fought with the mujahedeen against the Soviet forces, and who because of that was greatly respected by the local nationals who incurred damages and wished to file claims. This streamlined claims intake and investigation.⁴⁸¹ US units would often provide 'claims cards' to Afghan nationals whose property they had damaged, which noted the time and place of the accident, and the unit that caused it. This assisted in the processing of claims because it

⁴⁷⁰ 'Foreign Claims Commissions Resources', see <http://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch18.pdf>. Available to US government identification card holders, the *US Army Claims Service* webpage provides resources such as pricing information for Afghan livestock, links to governing legal authorities and sample claims cards.

⁴⁷¹ *Ibid.* ⁴⁷² *Ibid.* ⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.* This database is called the Tort and Special Claims Application (TSCA).

⁴⁷⁵ Major M. D. Jones, 'Consistency and Equality: A Framework for Analyzing the "Combat Activities Exclusion" of the Foreign Claims Act' (2010) 204 *Military L Rev* 144, 147.

⁴⁷⁶ By 2016, it was not uncommon that the US legal advisor who served as a foreign claims commissioner also had a role to play in the making of CERP payments, which helped streamline payments to injured Receiving State nationals. Telephonic interview with Captain D. Faracos, Foreign Claims Commissioner, US Forces-Afghanistan (20 June 2016) [hereinafter Faracos Interview].

⁴⁷⁷ US Government Accountability Office, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' (Report No. GAO-07-699) (May 2007) 13.

⁴⁷⁸ *Ibid.* ⁴⁷⁹ *Ibid.* 20. ⁴⁸⁰ Dribben Letter (n. 141). ⁴⁸¹ Faracos Interview (n. 476).

made it easier to track which soldiers had been involved and could provide statements as to what happened.⁴⁸² Unfortunately, unscrupulous claimants also forged these cards and presented them with their claims.⁴⁸³ False claims were problematic—one US unit found it could reduce repeated claims for the same damage by using photographs and biometric data to confirm claimant identity.⁴⁸⁴

Since 1 January 2015, a new SOFA between Afghanistan and the US⁴⁸⁵ has replaced the two authorities under which US forces had previously operated in Afghanistan, the exchange of notes between Afghanistan and the US, and the Military Technical Agreement as made applicable to NATO. The claims provisions in the new SOFA essentially mirror the new Afghanistan-NATO SOFA, and therefore do not really result in any significant changes to the legal conditions under which the US conducts its claims programme in Afghanistan.⁴⁸⁶ The change in status coincided with a change in mission—the ISAF combat mission was completed, and a new training and support mission, Resolute Support, took its place. Regardless, there is still a significant amount of claims activity involving Sending State forces in Afghanistan. These include automobile accidents involving large military vehicles such as the new Mine Resistant Ambush Protected personnel carriers, or MRAPs, damages caused to private roads and fences with MRAPs, and things such as helicopters landing in areas and inadvertently blowing cut and dried hay away.⁴⁸⁷ From an adjudication perspective, these claims have become more difficult to investigate because although the security situation in many areas has not improved, there are fewer military units available to provide security for foreign claims commissioners needing to conduct claims investigations at the sites of the injury or damage.⁴⁸⁸

3. Challenges in claims operations in Afghanistan

(a) ISAF combat damage guidance and funds

The increased scale of the ISAF mission over time led to an increase in claims, and unfortunately, an increase in the numbers of Afghan civilian casualties and property damage. These losses became a very significant concern of both the Government of Afghanistan and NATO,⁴⁸⁹ and efforts were made to find ways to both reduce the impact of combat related damage. Realizing the negative mission impact and the inequity of being unable to reimburse innocent Afghans for the losses they suffered because of combat, certain NATO countries created and contributed to the Post-Operations Humanitarian Relief Fund.⁴⁹⁰

⁴⁸² R. Harrison, 'USFOR-A Legal Officer Meets with Local Afghan Clients to Validate and Settle Claims' DVIDSHub (23 June 2016) <<https://www.dvidshub.net/news/202221/usfor-legal-officer-meets-with-local-afghan-clients-validate-and-settle-claims>>.

⁴⁸³ Faracos Interview (n. 476).

⁴⁸⁴ Center for Law and Military Operations, *Tip of the Spear: 2010 Supplement to Forged in the Fire, Legal Lesson Learned During Military Operations 1994–2008* 441 (The Judge Advocate General's Legal Center and School, Charlottesville September 2010) [hereinafter *Tip of the Spear*].

⁴⁸⁵ Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America (30 September 2014), <<http://mfa.gov.af/Content/files/2013-11-18%20BSA%20TEXT.pdf>> [hereinafter Bilateral Security Agreement].

⁴⁸⁶ Compare Bilateral Security Agreement (n. 485), Art. 22, Claims, with Afghanistan-NATO SOFA (n. 452), Art. 20, Claims.

⁴⁸⁷ Faracos Interview (n. 476).

⁴⁸⁸ Ibid.

⁴⁸⁹ 'Hearts, minds and death: A worrying increase in civilian casualties' *The Economist* (10 May 2007) <<http://www.economist.com/node/9164957>>.

⁴⁹⁰ 'NATO's role in Afghanistan' (NATO press release describing the fund, 20 January 2010) available at the EU Parliament website, <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede250110natoroleafghanistan_/sede250110natoroleafghanistan_en.pdf>.

Later renamed the Post Operations Emergency Relief Fund, as of October 2009 this fund had been used to provide €2,369,791 worth of 'quick humanitarian assistance, such as the supply of food, water and shelter, or the repair of buildings or key infrastructure, immediately following sizable ISAF military operations'.⁴⁹¹ Interestingly, even with the multiple sources of funds available to US forces to redress battle-damage claims, some US units also used the fund, such as US Marines 'providing emergency financial assistance to internally displaced people who were forced to relocate due to MEB military operations' in southern Afghanistan.⁴⁹²

In August 2010, as the pace of combat in eastern and southern Afghanistan had further sharpened with the arrival of more US combat forces, NATO approved non-binding civilian casualty guidelines that encouraged Troop Contributing Nations to 'proactively offer assistance for civilian casualty cases or damages to civilian property', including such things as 'ex gratia payments or in-kind assistance, such as medical treatment, [and] the replacement of animals or crops ...'.⁴⁹³ The guidelines recognized that such offers of assistance 'should be discussed with, and coordinated through, village elders or alternative tribal structures, as well as district-level government authorities', and that because '[l]ocal customs and norms vary across Afghanistan', NATO forces should fully take this 'into account when determining the appropriate response to a particular incident, including the potential for ex gratia payments'.⁴⁹⁴

As the pace of combat increased, so too did the scale of these payments. For example, according to one assessment, in 2011, US forces made more than \$1.2 million in CERP and solatia payments for combat-related damage.⁴⁹⁵ Over time, the US moved to standardize the process by which its forces decided whether to make CERP payments, whether condolence payments for death or personal injury or 'battle damage' payments for property losses. Ordinarily, these payments were not exceed \$5,000 per instance of loss.⁴⁹⁶

NATO has been unable to achieve an approved operational claims program, and its one effort in this regard so far, 'NATO Claims Policy for Designated Crisis Response Operations', is that most remarkable of NATO authorities, the enigmatic 'non-paper'.⁴⁹⁷ Its terms are in generally in keeping with the principles of the NATO SOFA regarding claims, and certain of its operational experiences. For example, NATO operational headquarters and Troop Contributing Nations should settle claims against them by third parties, except for claims arising from combat, combat-related activity, or 'operational necessity'.⁴⁹⁸ Unfortunately, unless NATO were to buttress this policy with something similar to the US CERP programme,

⁴⁹¹ 'Fact Sheet: NATO-ISAF Post-Operations Emergency Relief Fund (POERF)', Public Diplomacy Division, NATO website (October 2009), <<http://www.nato.int/isaf/topics/factsheets/factsheet-pohrf.pdf>>.

⁴⁹² US Marine Corps Center for Lessons Learned, 'Civil Affairs Detachment Operations in Support of Marine Expeditionary Brigade—Afghanistan, Lessons Learned from 4th CAG, Detachment L, Afghanistan Deployment, May—December 2009' (report) (28 June 2010) 13.

⁴⁹³ 'NATO Nations Approve Civilian Casualty Guidelines' NATO webpage (6 August 2006), <http://www.nato.int/cps/en/natohq/official_texts_65114.htm?selectedLocale=en>.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Center for Civilians in Conflict, 'Ex-gratia Payments in Afghanistan: A Case for Standing Policy for the US Military' (report) (11 May 2015) 2. A different report states that between October 2010 and March 2011, US forces in Afghanistan made \$688,000 in condolence payments, and \$6.8 million in 'battle repair funds'. J. Ryan, 'Condolence payments to Afghans total millions' *Army Times* (23 January 2012) <<http://www.armytimes.com/news/2012/01/military-afghanistan-condolence-payments-millions-012312w/>>.

⁴⁹⁶ US Forces Afghanistan, 'Money As A Weapon System Afghanistan (MAAWS-A)', *USFOR-A Pub. 1-06, Commander's Emergency Response Program (CERP) SOP* (15 August 2015) 37.

⁴⁹⁷ See Captain P. Degezelle, 'General Principles of the NATO Claims Policy' 28 *NATO Legal Gazette* 13, 18 (July 2012), referencing Annex 1, AC/119-N (2004) 0058 (May 19, 2004).

⁴⁹⁸ *Ibid.* 19.

or even the Post Operations Emergency Relief Fund from the ISAF experience, this does not reflect the modern reality of ‘war amongst the people’. Further, many US claims that would be allowed under the Foreign Claims Act would be excluded by the term ‘operational necessity’, such as damage to roads from heavy military vehicle traffic.

(b) *Air strikes*

Air strikes in Afghanistan have proven to be a particularly concerning cause of civilian casualties, and they are very challenging to investigate and to resolve. There have been a significant number of air strikes conducted in Afghanistan that have resulted in the death and injury to numerous civilians, generally by US aircraft.⁴⁹⁹ On 4 September 2009, a German commander ordered an air strike on two disabled fuel tankers near Kunduz, believing at the time that they had been hijacked by the Taliban,⁵⁰⁰ that the Taliban might use the vehicles as improvised explosive devices against a nearby German base, and that there were no civilians at the location.⁵⁰¹ In fact, the insurgents had driven the vehicles into a sandbar on a nearby river, and they and numerous civilians had begun siphoning fuel from the tankers.⁵⁰² The air strike by US aircraft killed 91 people, and severely injured 11 others.⁵⁰³ The German government made voluntary payments of \$5,000 to each of the injured victims and to the families of those killed.⁵⁰⁴

Afghans who had suffered the loss of family member or injuries sued the Federal Republic in ten class-action lawsuits, seeking a total of €3.3 million in German court⁵⁰⁵ on grounds of official misconduct by the German commander, because he had relied on his on-site informant’s reports that there were no civilians at the site, rather than taking the advice of US forces to first investigate the site. The Bonn trial court found for the government, holding that was ‘no culpable official misconduct’ by the commander.⁵⁰⁶ On appeal, the Federal Court of Justice held that “‘the actions of civil servants’ could not “be equated with the actions of a soldier in a combat situation’;” and ‘that after “exhausting all available intelligence” [the commander] could not have known that civilians were in the targeted area’.⁵⁰⁷

⁴⁹⁹ For example, an attack on a group of civilians in three vehicles in February 2010 in Daikundi Province by US helicopters killed perhaps 16 men and wounded 12 others, including a woman and children. The vehicles had been under continuous observation by US drones for hours, and at the time of the attack, they were several miles away from the nearest US troops. Weeks later, the US paid each survivor of the attack \$2,900 and families of the dead \$4,800, in afghani. D. S. Cloud, ‘Anatomy of an Afghan war tragedy’ *Los Angeles Times* (10 April 2011) <<http://articles.latimes.com/2011/apr/10/world/la-fg-afghanistan-drone-20110410/4>>.

⁵⁰⁰ ‘Court rejects Afghan negligence claim against German government in Kunduz deaths’ *Deutsche Welle* (11 December 2013) <<http://www.dw.com/en/court-rejects-afghan-negligence-claim-against-german-government-in-kunduz-deaths/a-17287602>> [hereinafter ‘Court rejects Afghan negligence claim’].

⁵⁰¹ ‘German state not liable to pay compensation to victims of 2009 Kunduz airstrike’ *Deutsche Welle* (6 October 2016) <http://www.dw.com/en/german-state-not-liable-to-pay-compensation-to-victims-of-2009-kunduz-airstrike/a-35978028> [hereinafter ‘German state not liable’].

⁵⁰² ‘The accidental victims’ *Deutsche Welle* (20 March 2013) <<http://www.dw.com/en/the-accidental-victims/a-16681586>> [hereinafter ‘The accidental victims’].

⁵⁰³ M. Gebauer, ‘Aftermath of an Afghanistan Tragedy—Germany to Pay \$500,000 for Civilian Bombing Victims’ *Der Spiegel* (6 August 2010) <<http://www.spiegel.de/international/germany/aftermath-of-an-afghanistan-tragedy-germany-to-pay-500-000-for-civilian-bombing-victims-a-710439.html>>.

⁵⁰⁴ ‘German state not liable’ (n. 501). The payments were apparently made into accounts established with the Kabul Bank, to keep the Taliban from seizing any of the proceeds. Gebauer (n. 503).

⁵⁰⁵ ‘The accidental victims’ (n. 502). ⁵⁰⁶ ‘Court rejects Afghan negligence claim’ (n. 500).

⁵⁰⁷ ‘German state not liable’ (n. 501). The air strike also resulted in the resignation of the defence minister at the time, the dismissal of the *Bundeswehr* chief of staff, a two-year parliamentary investigation, an ISAF investigation, and an investigation of the commander on possible murder charges. ‘The accidental victims’ (n. 502). The prosecution of the commander was closed after state prosecutors in Karlsruhe determined that he was not ‘in a position to know that there were still civilians at the site at the time of the airstrikes’. ‘German prosecutors drop case against Kunduz airstrike colonel’, *Deutsche Welle* (19 April 2010) <<http://www.dw.com/en/german-prosecutors-drop-case-against-kunduz-airstrike-colonel/a-5483181>>.

It is worthwhile contrasting the approaches taken by NATO members regarding civilian losses in air strikes conducted in Afghanistan with those conducted during the same time frame in Libya. Although NATO aircraft attacked targets in Libya during Operation Unified Protector (OUP) in 2011 that resulted in civilian casualties, no payments have been made by NATO to victims or their survivors for these losses.⁵⁰⁸ According to the NATO Legal Advisor, 'as there have been very few claims for compensation associated with NATO actions during OUP, we see little rationale for a NATO-specific recommendation on compensation. There is no legal obligation to provide compensation for damage occurring in the course of lawfully-conducted military activities, nor is it the case that establishment of programs for compensation for such damage has become standard or expected practice.'⁵⁰⁹ Both ISAF and OUP were authorized by the UN Security Council under Chapter VII of the UN Charter; both missions resulted in air strikes that killed and injured protected civilians. In one campaign, even though there is no legal obligation to make any sort of payment for these losses, payments were made, and in the other they were not. From the perspective of those who suffered losses in Libya, it is perhaps difficult to understand that their injuries would not be addressed because there were not apparently enough claims to move NATO to take action.

(c) *Assessing and reducing civilian casualties*

The issue of sufficiently establishing the degree of injuries and damages is closely related to the problems with errant air strikes. To collect information on civilian casualty events and to reduce help civilian casualties, ISAF set up a civilian casualty cell working in its Combined Joint Operations Centre in 2008.⁵¹⁰ The cell was expanded into the larger Civilian Casualty Mitigation Team in 2011⁵¹¹ and its work was complemented by the use of Afghan-ISAF Joint Incident Assessment Teams to conduct investigations in the field.⁵¹² The different subordinate regional commands tracked casualties using different methodologies, however, often with their own civilian casualty analysis teams.⁵¹³ More important in the long term than just accurate counting is the ability to analyse incidents in which civilian casualties have occurred and determine in a systematic fashion whether modifications to tactics used by NATO forces might result in fewer incidental losses among non-combatants. Such a system was used in 2010 by Regional Command South, and was apparently successful not just in identifying beneficial changes in tactics, but also in increasing the transparency of the process by including UN, ICRC, and human rights groups as participants. Further, the different Troop Contributing Nations conducted their own investigations, 'which varied in depth and focus',⁵¹⁴ Determining who and how many non-combatants have been injured or killed is fundamental to assessing whether forces are acting in compliance with IHL, but is likewise as important to the broader question of human rights because of the ripple effects of such losses among a civilian population. Arriving at an accurate count is difficult in a theatre such as Afghanistan, and requires not just reconciliation of facts but of the counting methodologies as well.⁵¹⁵

⁵⁰⁸ D. Mepham, 'Nato must investigate the civilian casualties of its Libyan campaign' *Guardian* (14 May 2012) <<https://www.theguardian.com/commentisfree/2012/may/14/nato-civilian-casualties-libyan-campaign>>.

⁵⁰⁹ Letter from Peter Olson, NATO Legal Advisor, to Judge Kirsch, Chair, International Commission of Inquiry on Libya, United Nations (15 February 2012), attached to Report of the International Commission of Inquiry on Libya, Human Rights Council, A/HRC/19/68 (2 March 2012).

⁵¹⁰ Center for Civilians in Conflict, 'Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan' (report) (2014) 1, <http://civiliansinconflict.org/uploads/files/publications/ISAF_Civilian_Harm_Tracking.pdf>.

⁵¹¹ *Ibid.* 2.

⁵¹² *Ibid.* 6.

⁵¹³ *Ibid.* 15.

⁵¹⁴ *Ibid.* 16.

⁵¹⁵ *Ibid.* 359, fn 85.

Other measures to reduce civilian casualties included the development of pre-deployment training for ISAF forces specifically geared towards avoiding civilian casualties and collateral damage,⁵¹⁶ and continuing refinements in tactical directives and standard operating procedures issued by the ISAF commanders to guide the use of force by units.⁵¹⁷ In this sense, it is important that operational headquarters think outside of ordinary use of force items such as rules of engagement and targeting, and consider staff processes that relate to functional tasks that soldiers must conduct in a counter-insurgency, such as traffic control point operations as well.⁵¹⁸ Further, to be most effective at reducing civilian casualties, these processes and tasks need to be coordinated with public information campaigns to inform Receiving State nationals of steps they need to take when they come in contact with Sending State troops or convoys.⁵¹⁹

(d) *Transparency and consistency*

The lack of transparency and consistency can be irritating to civilian victims of combat damages, and undermine the positive attitude that the payment of meritorious claims is expected to engender in the local population. For example, when a US soldier murdered 16 Afghan family members, their survivors were paid \$50,000 per family member death.⁵²⁰ When a US gunship mistakenly attacked a hospital staffed by members of the non-governmental organization *Medicines sans Frontieres* in Kunduz in 2015, the US made condolence payments to more than 170 persons and families affected by the attack, and approved \$5.7 million to repair the facility.⁵²¹ A number of those who received the condolence payments were dissatisfied, noting that they only received \$6,000 per death as compared to the payments in the *US v. Bales* case.⁵²² Further, many victims were frustrated that they were given claims documentation to complete and submit, but that the combat activities exclusion would apparently prevent their claims from the attack being compensated.⁵²³ A representative from one non-governmental organization (NGO) has noted that ‘the arbitrary nature of how money is dispersed can intensify feelings of

⁵¹⁶ US Joint Forces Command, Joint Center for Operational Analysis, ‘Adaptive Learning for Afghanistan: Final Recommendations’ (report) (10 February 2011) 5; see also Headquarters, Department of the Army, *Army Tactics, Techniques and Procedures (ATTP) 3-37.31, Civilian Casualty Mitigation* (18 July 2012) (US Army training guidance on the legal and policy bases for conducting operations so as to minimize damages to civilians and their property); Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention: Observations, Insights, and Lessons, Handbook No. 12-16* (June 2012).

⁵¹⁷ J. M. Prescott, Chapter 15, ‘The North Atlantic Treaty Organization’, in G. Zyberli (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press, 2013) 354–5.

⁵¹⁸ Colonel J. M. Prescott, ‘Training EBAO and Humanitarian Considerations in Operations: Blue Force Looks Within’ *The Three Swords* (August 2007), 25–9.

⁵¹⁹ J. Ryan, ‘Condolence payments to Afghans total millions’ *Army Times* (23 January 2012), see also <<http://www.newsweek.com/2016/04/22/afghanistan-condolence-payments-kunduz-doctors-without-borders-airstrike-us-446017.html>>.

⁵²⁰ AP, ‘Afghanistan massacre survivors testify against Robert Bales at sentencing’ *Guardian* (21 August 2013) <<https://www.theguardian.com/world/2013/aug/21/staff-sergeant-robert-bales-afghanistan-massacre>>.

⁵²¹ US Central Command, ‘Subject: Summary of the Airstrike on the MSF Trauma Center in Kunduz, Afghanistan on October 3, 2015; Investigation and Follow-on Actions’ (report) (2016) 3, 5.

⁵²² I. Ali, ‘US Strike on Afghan Hospital in 2015 not a war crime: Pentagon’ *Reuters* (29 April 2016) <<http://www.reuters.com/article/us-usa-afghanistan-msf-investigation-idUSKCN0XQ24T>>; D. Moylan, ‘How Much For Your Child? Afghan Condolence Payments Draw Scrutiny’ *Newsweek.com* (9 April 2016) <<http://www.newsweek.com/2016/04/22/afghanistan-condolence-payments-kunduz-doctors-without-borders-airstrike-us-446017.html>>.

⁵²³ Moylan (n. 522).

ill-will on the ground, which ironically, the compensation payments are designed to mitigate after a casualty'.⁵²⁴

NGOs in particular have advocated that NATO forces work towards developing a compensation system that is more uniform and more equitable towards civilian Afghan victims of armed conflict. Human Rights Watch, for example, requested NATO leaders to consider the development of a 'centralized and unified condolence payment mechanism', and to work with Afghan security forces to ensure that this becomes part of their operations as well.⁵²⁵ The Campaign for Innocent Victims in Conflict has likewise expressed its concerns with the inequities of the Troop Contributing Nation-driven and non-uniform payment policies, and has suggested also suggested the adoption of a uniform system of providing payments to Afghan civilians for losses, and providing guidelines to commanders to reduce the variations in national payment practices that seem to occur with frequent unit rotations.⁵²⁶

Sending State nations are not insensitive to these problems, but there are other factors driving the operation of a claims system other than just the perception of the local population, such as fiscal laws and regulations. For example, one US Army brigade decided that it could improve the operational efficiency of the claims programme processing for property damage during the course of operations by deeming them all to be combat-related. Even though this meant that they were excluded from payment under the Foreign Claims Act, they were then handled through CERP, which meant the damages could be paid for on the spot rather than having to go through the more lengthy claims process.⁵²⁷ A different unit took a results oriented approach to determining whether the combat damage exception would apply. A legal advisor for this unit stated: 'For instance, [a] village might be searched out of abundance of caution rather than because of intel of known terrorists and be found to be a friendly village.'⁵²⁸ Because no combat occurred, damages during the search did not meet the definition of combat damage, and the payment of 'claims incurred in such operations met the intent and spirit of the Foreign Claims Act. Such claims were routinely paid.' These differences in interpretation and application, although well intended, could clearly lead to inconsistencies in claims adjudication from one unit to the next, and cause confusion among local claimants and claims adjudicators.⁵²⁹

A further complication in addressing claims in a transparent and consistent manner concerns the reality of having enemy combatants receiving payments for losses either inadvertently or, as shown in a recent court case in the UK, potentially as a matter of

⁵²⁴ D. S. Cloud, 'Compensation Payments Rising, Especially by Marines' *New York Times* (10 June 2006), <http://www.nytimes.com/2006/06/10/world/middleeast/10payments.html?_r=0>.

⁵²⁵ Human Rights Watch, 'Letter to NATO to Investigate Compensation for Civilian Casualties in Afghanistan' (2 April 2009), <<https://www.hrw.org/news/2009/04/02/letter-nato-investigate-compensation-civilian-casualties-afghanistan>>. Human Rights Watch has also requested that NATO 'consider a program to provide payments to [Libyan] civilian victims of NATO attacks without regard to wrongdoing ...'. 'NATO: Investigate Civilian Deaths in Libya' (14 May 2012) <<https://www.hrw.org/news/2012/05/14/nato-investigate-civilian-deaths-libya>>.

⁵²⁶ C. Rogers, 'Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces' Campaign for Innocent Victims in Conflict (2010) <https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf>.

⁵²⁷ *Tip of the Spear* (n. 484) 433.

⁵²⁸ *Legal Lessons Learned, Vol. I* (n. 466) 181 fn 33.

⁵²⁹ Not surprisingly, the same issues of claims processing times and the uneven application of the combat damage exclusion were very significant in the first large-scale counter-insurgency in which the US used the Foreign Claims Act, the Vietnam War. F. L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Washington, DC: Office of the Judge Advocate General and Center of Military History, 2001) 41–4.

court judgment. In Kunduz hospital air strike, it appears that some of the victims of the errant attack were in fact Taliban fighters.⁵³⁰ Although the US authorities were cognizant of this, there is no indication in the public record that condolence payments were withheld from any claimant on grounds that they were based on injuries or deaths suffered by insurgents.⁵³¹ Perhaps this was due to a pragmatic assessment by the US that the scope of the damage caused by the errant attack did not lend itself to painstaking analysis as to which dead and injured Afghan patients wearing Afghan clothes were likely Taliban.

A recent British case, however, puts the issue of compensating enemy combatants for non-physical damages incurred during the course of operations squarely into the spotlight. In *Serdar Mohammed v. Secretary of State for Defence*, the England and Wales Court of Appeals affirmed the right of a captured Taliban commander who was later convicted in Afghan court of offenses against the State to seek damages for having been detained in UK forces' custody longer than allowed by the ISAF detention standard operating procedure.⁵³² Under the European Convention of Human Rights (ECHR) and UK case law interpreting its application to military actions of UK forces abroad, the court found that his detention (although justified operationally) was therefore arbitrary and unlawful.⁵³³

The case was appealed to the UK Supreme Court, and in its decision rendered 17 January 2017, the Court disagreed with significant portions of the lower court's decision. The Court found that it was unnecessary to determine whether customary international law allowed for the detention of combatants in non-international armed conflict, because such authority was implicitly conferred by SC Res. 1386 (2001), and that ISAF Troop Contributing Nations were entitled to implement their own detention policies rather than being completely bound by the ISAF standard operating procedure.⁵³⁴ With regard to Serdar Mohammed's second period of detention (after the 96-hour ISAF detention period until 4 May 2010 when British forces were interrogating him), the Court held that the case should be remitted to trial to determine whether imperative reasons of security were an additional reason he was detained, and therefore his detention was appropriate under Art. 5, ECHR, in the context of SC Res. 1386 (2001). As to the period of time when Serdar Mohammed was being held pursuant to the request of Afghan authorities (4 May 2010 until his transfer), the Court held that the case should be remitted to trial to determine whether this period of detention appropriate under Art. 5(1)(c), ECHR, or was justified under Art. 5 for imperative reasons of security in the context of SC Res. 1368 (2001).⁵³⁵ Finally, although a majority of the Court held that whether the UK detention procedures complied with the requirements of Art. 5(4), ECHR, for an impartial body conducting initial and regular detention status reviews according to a fair procedure should also be

⁵³⁰ Approximately 20 patients in the facility were wounded Taliban fighters. *Medecins sans Frontieres*, 'Initial MSF internal review: Attack on Kunduz Trauma Centre', Afghanistan (report) (November 2015) 7, <http://www.doctorswithoutborders.org/sites/usa/files/msf_kunduz_review.pdf>.

⁵³¹ D. Lamothe, 'Pentagon faces question: Should it make condolence payments for Taliban killed in hospital bombing?' *Washington Post* (5 November 2015) <https://www.washingtonpost.com/news/checkpoint/wp/2015/11/05/pentagon-faces-question-should-it-make-condolence-payments-for-taliban-killed-in-hospital-bombing/?utm_term=.70090026912a>. This is quite different in practical and legal terms from the £9.5 million paid by the UK government to a British law firm that represented Iraqi clients, many of whom falsely alleged that they were non-combatant civilians who had been abused by UK forces in 2004. Owen Bowcott, 'Lawyers in cases against UK troops "knew clients belonged to Iraqi militia"', *The Guardian* (24 April 2017) <<https://www.theguardian.com/uk-news/2017/apr/24/lawyers-leigh-day-cases-against-uk-troops-allegedly-knew-clients-belonged-iraq-militia-mahdi-army>>.

⁵³² *Serdar Mohammed v. Secretary of State for Defence*, [2015] EWCA Civ. 843, paras. 8–9.

⁵³³ *Ibid.*

⁵³⁴ *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 2, paras. 30, 38–9, 119, 164, 224.

⁵³⁵ *Ibid.* paras. 83, 94–8, 111, 113, 204, 224, 235.

remitted to trial, it also noted that just because that standard was breached did not mean that Serdar Mohammed was necessarily entitled to damages—a different review process might still have resulted in him remaining in custody.⁵³⁶ From a claims perspective, these cases highlight the very different and sometimes complex outcomes that can occur as a result of different Troop Contributing Nations applying national and international legal authorities to operational functions in a theatre of operations—outcomes legally justifiable within each Troop Contributing Nation's domestic legal system, but to an innocent civilian in a theatre of operations who has suffered harm from the activities of a Sending State in her country, they likely seem inconsistent and unfair.

(e) *Environmental damages*

As demonstrated in *Georges v. UN*, the class action law suit by Haitian plaintiffs against the UN in US court for damages related to the catastrophic cholera outbreak, there is perhaps a greater willingness for those injured by acts of 'operational necessity' to claim for significant damages to their environment. The US has begun to deal with such claims as well. Particularly in the troop uplift in Afghanistan that began during the Obama Administration in 2009, US engineers and contractors quickly constructed new bases to house the new forces. For example, in late 2008 in rural Zabul Province, the US decided to build a base that would accommodate a helicopter task force and be served by a 2,000 metre runway at Forward Operating Base (FOB) Wolverine, not far from the Pakistani border.⁵³⁷ The planned footprint of this base was large, and a building site was chosen on empty land between four different villages in the FOB Wolverine area. Afghan governmental representatives in Kabul had informed the US forces that this land was government property. Unfortunately, this was not the case from the villagers' perspectives—they had traditionally used this land to grow wheat, and several high-value (and possibly irreplaceable) vineyards and almond orchards were located on it as well.⁵³⁸

Even worse, the base footprint was to be located directly over the *karez*s, or underground canals, that transported water from the mountains to the villages in this arid environment. The villagers were completely dependent upon the *karez*s and deep hand-dug wells for their domestic water supplies and irrigation.⁵³⁹ Not surprisingly, when a contractor employed by the Americans drilled a well into a *karez*, the villagers were angry. Shortly thereafter, an improvised explosive device damaged a contractor's vehicle.⁵⁴⁰ In a *shura*, a meeting of elders, with the ISAF commander, villagers made their concerns known, and the commander dispatched an American ISAF legal advisor to investigate, and if possible, settle their claims. Before the villagers' claims could be considered for adjudication under US Army claims procedures, however, there were a number of fundamental obstacles that had to be overcome.

First, the different villages had competing claims to much of the land underneath the base footprint. Any discussions regarding claims therefore had to be conducted in the presence of elders from multiple villages to ensure transparency. *Second*, villagers were reluctant to produce land ownership documentation. Depending on when they had acquired title to the land in question, their deeds could have been from the time of the monarchy,

⁵³⁶ *Ibid.* paras. 68, 110, 113, 134, 205–6, 209–20, 223–4, 232, 235.

⁵³⁷ M. M. Phillips, 'Learning a Hard History Lesson in "Talibanistan"' *Wall Street Journal* (14 May 2009) <<http://www.wsj.com/articles/SB124224652409516525>>.

⁵³⁸ Author's notes. ⁵³⁹ Phillips (n. 537). ⁵⁴⁰ Author's notes.

the Daud government, the communist government, the mujahedeen government, the Taliban government, or the new government of the Islamic Republic. Such paperwork would indicate political allegiance—and potentially endanger the deed holder. *Third*, the land ownership documentation that did exist did not include any maps or plans of the real estate. Therefore, before any claim could be discussed, the ownership boundaries had to be mapped. This required the ISAF legal advisor to walk each boundary of each plot of land of each villager with the interested villager, his neighbours and a US Air Force engineering team that used GPS feeds to chart the boundaries on a computer. Eventually, claims were settled and payments made for crop and land damage,⁵⁴¹ but the villagers continued to be frustrated by the reality that US forces could rapidly build a new base without their input on land they had traditionally used, but then take months to handle their simple and meritorious claims.⁵⁴²

(f) *Local law and custom*

From a US foreign claims commissioner perspective, the processing and settling of claims could appear opaque on the Afghan side as well. For example, US claims regulations require that Foreign Claims Act claims be adjudicated in accordance with local law and customs, but US legal advisors found it was not only difficult to determine what those laws and customs might be, these laws and customs would vary from region to region.⁵⁴³ This difficulty was compounded by the uneven quality and availability of translators and translated documents, difficulties in verifying property ownership, and accurately calculating damages.⁵⁴⁴

In certain instances, US forces also sought to make payments in a culturally appropriate way, following the age-old code and lifestyle of the Pashtun people (the largest Afghan ethnic group), *Pashtunwali*. For example, in February 2010, a US Special Forces night raid based on inaccurate information from an informant in western Afghanistan resulted in the shooting of a police chief, a government prosecutor, and three women. In April 2011, the commander of the US Joint Special Operations Command and a large entourage visited the village to apologize for the killings. Prior to meeting with elders, three Afghan soldiers accompanying the admiral ‘pinned down a sheep and held a blade to its throat in a traditional Afghan gesture seeking clemency’. The deference to Afghan custom was favourably received, village elder Haji Sharabuddin noted, but he still wanted the name of the informant who had provided the inaccurate information before he would feel justice had been fully served.⁵⁴⁵ As the combat phase of US operations wound down, it appears that efforts to pay claims in this sort of restorative justice fashion, though likely successful to a degree, did not continue. As of late 2016, for example, US units had neither the time nor the troop resources necessary to mount the security forces and secure the

⁵⁴¹ US records are not clear on the precise manner of resolution, but it is likely that they were handled in the end as real estate claims rather than damage claims. Dribben Letter (n. 141).

⁵⁴² Author’s notes. By July 2013, as the US wound down its combat operations, the large base was already being collapsed within a smaller perimeter better suited for the Afghan National Army. Staff Sergeant T. Morgan, ‘Retrograde Operations at FOB Wolverine’ DVIDS Hub website (21 July 2013) <<https://www.dvidshub.net/news/110773/retrograde-operations-fob-wolverine>>.

⁵⁴³ Faracos Interview (n. 476).

⁵⁴⁴ Dribben Letter (n. 141).

⁵⁴⁵ J. Cavendish, ‘US military offers sheep in apology for Afghanistan deaths’ *Christian Science Monitor* (8 April 2010) <<http://www.csmonitor.com/World/Asia-South-Central/2010/0408/US-military-offers-sheep-in-apology-for-Afghanistan-deaths>>.

transportation necessary to travel to claims payment sites and provide either claims or CERP payment in a *Pashtunwali*-influenced manner.⁵⁴⁶

4. Summary

For over 12 years, NATO-partner led or NATO-led and US-led forces under OEF operated in Afghanistan under SOFAs which provided them the authority to conduct combat operations in the Receiving State, but which did not require them to pay meritorious third-party claims. As with KFOR, both ISAF and OEF realized that paying claims was an essential part of maintaining the legitimacy of their missions as they engaged the Taliban and other insurgent forces. Mindful of this, the historical record of payments made to Afghans for deaths, injuries, and property damage shows that very significant sums were paid out over the course of the conflict by the Sending State forces. This history also reveals, however, the very significant concerns on the part of Afghans and the international community with regard to the transparency, consistency, and accountability in the investigation, adjudication, and payment of damage claims. As the US had experienced 40 years earlier in South Vietnam, operating an effective claims programme in the course of a counter-insurgency is hampered by the perhaps irresolvable tension in distinguishing between non-combat damage claims and combat damage claims, and generally only paying for the former even though the latter might be the losses that more quickly turn the local population against the Receiving State government.

IX. Conclusions

Damages resulting from the non-combat and combat movement and stationing of Sending State or international organization personnel and equipment into and within Receiving States might be mitigated by the careful planning and execution of such operations, but are unfortunately inevitable. Further, as the States and organizations involved in peace-keeping, peace enforcement, and regional security arrangements continue to place increasing reliance upon multinational contingents stationed outside their own States to accomplish these missions, these sorts of damages will occur in increasingly complex claims settlement regimes.

Settling the claims which arise from these damages is more than a matter of political expediency, however; it is completely in keeping with traditional and honoured principles of international law. As Grotius noted with regard to the property of neutrals taken or damaged during wartime: '[I]f the holding of an object is sufficient, it should not be used; if the use of it is enough, it should not be spoiled; if it must be spoiled, then the cost of it should be returned.'⁵⁴⁷ The prompt settling of meritorious claims in an efficient and fair manner furthers the rule of law by legitimizing the presence of the foreign forces, and pragmatically, also increases force protection. In this sense, Art. VIII of the NATO SOFA and the out-of-area programmes that complement it have an impressive, if imperfect, record of success over almost 70 years.

⁵⁴⁶ Faracos Interview (n. 476).

⁵⁴⁷ H. Grotius (n. 4) 383.

Academic literature is replete with plausible legal and policy arguments advocating uniform claims programmes that would ensure that all civilian victims who suffer damages in armed conflict receive recompense for their losses.⁵⁴⁸ Whilst the arguments advanced by NGOs in favour of such programmes tend to be less abstract and more focused on the holistic nature of the problems experienced in trying to implement such programmes, they too suffer from the failure to provide realistic solutions to find the money to pay such claims and the resources necessary to implement such programmes in a combat theatre of operations.⁵⁴⁹ It is perhaps in this context that we should note the uneven record of UN claims operations—it is far from clear that an international damage claims programme that is highly centralized and standardized actually works better than the distributed cost-sharing and *ex gratia* arrangements pioneered by the NATO SOFA and by NATO in out-of-area operations in satisfactorily resolving meritorious claims.

That said, is there not room for improvement in the out-of-area claims operations conducted by NATO, and is there not a higher degree of uniformity in claims resolution which could be effected? In the 20 years that NATO has been conducting these operations it has been unable to achieve an approved operational claims programme, and its one effort in this regard so far, the draft ‘NATO Claims Policy for Designated Crisis Response Operations’, is that most enigmatic of NATO authorities, the ‘non-paper’.⁵⁵⁰ Its terms appear to be a mixture of NATO SOFA principles regarding claims and certain of its operational experiences, set out with the implicit understanding that the ordinary reciprocity that underlies the Art. VIII claims process is likely to be inapplicable to a State needing to receive an out-of-area NATO force. For example, under this policy NATO operational headquarters and TCNs should settle claims against them by third parties, except for claims arising from combat, combat-related activity, or ‘operational necessity’.⁵⁵¹

Unfortunately, unless NATO were to buttress this policy with something similar to the US Commander’s Emergency Response Program (CERP), or even the Post-Operations Emergency Relief Fund (POERF) from the ISAF experience, this approach simply does not reflect the modern reality of ‘war amongst the people’. Further, if actually implemented, it might in fact act to increase inconsistency in multinational operations in Receiving States, and decrease transparency. For example, many claims that would be allowed under the Foreign Claims Act and paid by the US would be excluded by the term ‘operational necessity’, such as damage to roads from heavy military vehicle traffic. One NATO force paying these sorts of claims while another does not, even if it were a question of that TCN’s domestic laws and policies regarding claims, is not likely over the course of a modern military operation to go unnoticed in the Receiving State.

As NATO reorients itself from its operations outside the NATO area to face new hybrid threat challenges on its eastern flank and the threat of jihadi terrorism on and within its borders, perhaps the creation of a more uniform operational claims policy might not seem to be a priority. Claims operations in the modern international security environment, however, require planning, training, and close coordination with many different staff elements and operational processes to be effective. Claims programme efficacy

⁵⁴⁸ See generally Y. Ronen, ‘Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict’ (2009) 42 *Vanderbilt Journal of International Law* 181; B. Docherty, ‘Individual Property and Unlawful Destruction: An Expanded Compensation Model for Civilian Losses During Armed Conflict’ (10 March 2009) 49 *Harvard International Law Journal Online* 105; and E. Schwager, ‘The Right to Compensation for Victims of an Armed Conflict’ (2005) 4 *Chinese Journal of International Law* 417.

⁵⁴⁹ See nn. 525, 526.

⁵⁵⁰ See Degezelle (n. 497) 18–19.

⁵⁵¹ *Ibid.* 19.

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means achieving the degree of transparency, consistency, and accountability necessary to persuade civilian victims who have suffered losses or injuries that their damages will be meaningfully, although perhaps not completely, redressed. Anything less, particularly in wars fought among the people, means ceding irrecoverable mission legitimacy and popular support among the populations of Receiving States, and undermines the establishment of the rule of law in these war-torn countries.