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Legal Foundations for “Making Amends” to Civilians Harmed by Armed Conflict

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Introduction

International concern for civilians harmed by armed conflict has increased substantially since World War II. The Fourth Geneva Convention of 1949 expanded civilian protection during times of war.¹ In the following decades, other developments, including the Geneva Conventions' two Additional Protocols, the Rome Statute of the recently created International Criminal Court, and the emerging doctrine on the Responsibility to Protect, have contributed to a growing movement to address civilian harm as a result of conflict.² Most of the international legal developments dealing with civilian harm have focused on unlawful activities by warring parties. There are, however, legal precepts and increasing state practice that support the development of a comprehensive framework for assisting civilians harmed by lawful as well as unlawful conduct during armed conflict.

A new principle—"making amends"—has begun to emerge on the international stage. The concept of "amends" highlights the importance of helping civilians harmed by the lawful actions of warring parties. The Campaign for Innocent Victims in Conflict (CIVIC), which introduced the principle through its Making Amends Campaign,³ has articulated the need for warring parties to recognize and provide assistance to civilian victims for harm caused by their lawful conduct. While warring parties must be accountable to victims for unlawful conflict-related harm, the Campaign and this paper focus on victims of lawful conduct in combat because the needs of such victims have not been fully addressed in existing international law.⁴

¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* Oct. 21, 1950) [hereinafter Geneva Convention IV].

² Two additional protocols in 1977 further clarified the protections of Geneva Convention IV. The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (*entered into force* Dec. 7, 1978) [hereinafter Additional Protocol I]; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 609 (*entered into force* Dec. 7, 1978) [hereinafter Additional Protocol II]. Examples of developments in the past twenty years include the United Nations Compensation Commission, established by S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) and S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *opened for signature* Dec. 3, 1997, 36 I.L.M. 1507 (*entered into force* Mar. 1, 1999) [hereinafter Mine Ban Treaty]; International Criminal Court, established by the Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 37 I.L.M. 999 (*entered into force* July 1, 2002); INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 18, 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; U.N. High-Level Panel on Threats, Challenges and Change, *A More Secured World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21 2006) [hereinafter Basic Principles and Guidelines for Victims]; and Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, Dublin Diplomatic Conference on Cluster Munitions CCM/77 (*entered into force* Aug. 1, 2010). See also HUGO SLIM, *KILLING CIVILIANS: METHOD, MADNESS, AND MORALITY IN WAR 19-21* (2008) (discussing the emergence of the principle of civilian protection in the laws of war since the aftermath of World War II).

³ See CIVIC: Campaign for Innocent Victims in Conflict, <http://www.civicworldwide.org/> (last visited Jan. 30, 2012); MAC: Making Amends Campaign, <http://www.makingamendscampaign.org> (last visited Jan. 30, 2012).

⁴ Victims of all harm—lawful or unlawful—should receive meaningful recognition and assistance. In addition, assistance must be provided in a timely fashion, often in the immediate aftermath of the sustained harm, so as to ensure real help for victims. The Making Amends Campaign focuses on the need for warring parties to make amends to victims of lawful harm because these victims currently fall in a legal gap. Neither the Campaign nor this paper, however, suggests that a legal assessment of the type of harm has to be made in order for warring parties to make amends. For example, warring parties should not slow or stop making much needed amends to harmed civilians while investigators try to determine whether the harm caused was the result of an unlawfully disproportionate attack or a lawfully proportionate one.

Amends may take the form of monetary payments, reconstruction projects, livelihood assistance programs, community aid, or other dignifying gestures such as apologies. Recipients should include civilian victims—defined broadly as individuals, families, and communities—who have experienced any of a range of harms from the lawful conduct. The purpose of making amends is to honor suffering and help rebuild lives.⁵ Although the international community has not adopted making amends as a legal rule, this victim-centered principle has underpinnings in international human rights and humanitarian law; both legal arenas stress the importance of protecting and preserving the dignity and humanity of victims, particularly during armed conflict.

Making amends can be beneficial on multiple levels. It acknowledges the inherent dignity of all individuals and can assist civilians in realizing and securing their basic human rights.⁶ It works to heal the wounds left by warring parties and helps victims move on to a new future. In addition, it can ease post-conflict tensions and thus help contribute to lasting peace. The making of amends, however, is never a license to harm civilians in the course of armed conflict, nor should receiving amends preclude victims from also exercising their established legal rights, especially in the case of intentional harm, such as war crimes and other serious abuses.

While civilian protection during times of war has grown significantly in recent years, the principle of making amends addresses a current gap, in both law and policy, in ameliorating civilian suffering caused by armed conflict. For example, the U.N. principles on providing reparations to victims, which were adopted in 2005, urge states to provide a variety of assistance to a range of victims; however, they only apply when the harm was a result of unlawful conduct.⁷ Programs designed for specific conflicts sometimes have required warring parties to give substantial post-conflict support to civilian victims, but these programs reflect *ad hoc* responses to particular situations rather than adherence to any codified principle.

Nevertheless, this paper shows that there are numerous legal sources that support the principle that civilian victims of armed conflict should receive amends. This paper also elaborates on the key elements of the principle and outlines existing precepts and practices that underpin each of these elements.⁸ The paper examines international treaties, resolutions and guidelines adopted by the U.N. General Assembly, principles from the International Law Commission, and documents from international human rights bodies and criminal courts. While many of these sources call for assistance for victims of unlawful conduct, they also provide legal backing for individual elements of making amends and are germane to the discussion of amends for lawful harm because they show that civilian victims are entitled to be treated with dignity and humanity. In addition, the paper looks at the designs of conflict-specific programs and post-conflict claims commissions, which in general reflect an increase in the practice of warring parties

⁵ MAC: Making Amends Campaign, Making Amends Guiding Principles, <http://www.makingamendscampaign.org/resources/guiding-principles/> (last visited Jan. 30, 2012).

⁶ See Universal Declaration of Human Rights pmbl., G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

⁷ See generally Basic Principles and Guidelines for Victims, *supra* note 2.

⁸ This paper focuses on the legal foundations of the principle of making amends and does not address how best to design the workings of a specific amends program.

assisting victims. The paper explains that this compilation of legal sources taken as a whole helps provide a foundation for the principle and elements of making amends.⁹

This paper opens with a discussion of the gap the principle of making amends seeks to fill. It then examines how the principle promotes dignity and humanity. The majority of the paper analyzes legal support for each of the following five elements of making amends.¹⁰ First, victims of lawful harm should receive amends. Second, individuals, families, and communities should all be considered victims of armed conflict. Third, amends should address the range of harms victims suffer, such as physical, psychological, emotional, social, and economic injury. Fourth, the wide variety of possible amends should include financial compensation, medical assistance or programs, and dignifying gestures, such as apologies. Finally, warring parties themselves should make amends for the harm they cause civilians. The paper concludes that while no specific obligation currently exists under international law for making amends, international legal norms and domestic practice nonetheless underpin the principle.

The principle of making amends addresses a gap in international law

The principle of making amends aims to fill a two-part gap in international law by helping more victims and requiring warring parties to play a greater role in providing relief for the harms they cause. First, the principle is based on the idea that victims of lawfully caused harm should receive recognition of and assistance for their suffering. Various mechanisms exist to address injury to victims of violations of international law.¹¹ In most cases, however, victims of lawful harm, such as civilians caught in the crossfire of a battle or unintentionally killed during an air strike on a legitimate military target, fall through the legal cracks. The principle of making amends seeks to ensure that the needs of this additional category of victims are met.¹²

Second, the principle calls on warring parties to provide the amends. Morally, warring parties should alleviate the suffering they caused. Furthermore, victims often find amends more meaningful if the amends come from the party that injured them.¹³

This paper will not address what entity should assume primary responsibility for assisting victims, but the making of amends seeks to complement other mechanisms.¹⁴ U.N. agencies, the International Committee

⁹ For purposes of this paper, only sources available in English were consulted, with a focus on developments during the past twenty years. Consequently, this document is not an exhaustive compilation of every legal source supporting the arguments for making amends.

¹⁰ These elements are drawn from the Making Amends Guiding Principles, which the International Human Rights Clinic helped articulate and draft. The “elements” referred to in this paper represent the core guiding principles. See MAC: Making Amends Campaign, Making Amends Guiding Principles, *supra* note 5.

¹¹ For example, as their full name suggests, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law call for remedies and reparations for victims of unlawful harm.

¹² See discussion *supra* note 4.

¹³ CIVIC, LOSING THE PEOPLE: THE COSTS AND CONSEQUENCES OF CIVILIAN SUFFERING IN AFGHANISTAN 66 (2009).

¹⁴ Victim assistance advocates have argued that the state in whose territory victims live should bear primary responsibility. They argue this approach has practical advantages because such a state has more access to victims. They also assert that, since victim assistance is designed to guarantee the human rights of victims, it makes sense to follow the human rights principle that a state is responsible for its citizens. The Convention on Cluster Munitions exemplifies this approach. See Convention on Cluster

of the Red Cross, and nongovernmental organizations all provide valuable humanitarian aid. States affected by armed conflict sometimes establish victim assistance programs, such as those required under the Convention on Cluster Munitions.¹⁵ The international community contributes financial, material, and other support for all of the above. Instead of competing with such mechanisms, the principle of making amends is designed to address a neglected niche in the international legal framework. It seeks to fill a legal gap by more fully and explicitly encompassing the range of civilian victims of armed conflict while increasing the involvement of warring parties.

The principle of making amends promotes the principles of dignity and humanity

Human dignity in international law has been described “as a basic ideal so generally recognized as to require no independent support.”¹⁶ Every individual possesses dignity simply by virtue of being human.¹⁷ The preamble of the Universal Declaration of Human Rights (UDHR) articulates the importance of the “inherent dignity” of all humans by noting that human dignity is the “foundation of freedom, justice and peace in the world.”¹⁸ Article 1 further states, “All human beings are born free and equal in dignity and rights” and “should act towards one another in a spirit of brotherhood.”¹⁹ It thus suggests that people should assist each other in order to preserve human dignity. Human rights instruments since the UDHR have repeatedly reiterated the importance of this principle.²⁰ International humanitarian law, often called the laws of war, has also increasingly acknowledged “inherent dignity.”²¹ In establishing victim assistance obligations, the Convention on Cluster Munitions states its purpose is to protect dignity and ensure the “full realisation” of human rights.²² The principle of making amends advances this commitment to defend the dignity of all victims of armed conflict. Warring parties can demonstrate their recognition of the inherent dignity of war victims by acknowledging and seeking to make amends for the harm they have caused.

Humanity, a guiding principle of international humanitarian law, is similarly foundational to the making of amends. The Martens Clause, which first appeared in the 1899 Hague Peace Convention and has been reiterated in many international humanitarian law instruments since, exemplifies how important humanity

Munitions, *supra* note 2, art. 5. Because making amends and victim assistance both seek to ensure the best for victims, one approach should complement rather than compete with the other.

¹⁵ *Id.*

¹⁶ Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. OF INT’L L. 848, 848-49 (1983).

¹⁷ Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, 30 HAMLINE J. PUB. L. & POL’Y 33, 45-46 (2008).

¹⁸ Universal Declaration of Human Rights, *supra* note 6, pmb1.

¹⁹ *Id.*, art. 1.

²⁰ *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination pmb1., *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969); International Covenant on Economic, Social and Cultural Rights pmb1., *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976); International Covenant on Civil and Political Rights pmb1., *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmb1., *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987); Convention on the Rights of the Child pmb1., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990); International Convention on the Protection of the Rights of All Migrant Workers and Their Families art. 70, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 93 (*entered into force* July 1, 2003). *See also* McBeth, *supra* note 17, at 44-45.

²¹ *See, e.g.*, Convention on Cluster Munitions, *supra* note 2, pmb1.

²² *Id.*

is to the laws of war.²³ It states that, along with custom, “principles of humanity” and the “dictates of the public conscience” serve as sources of law in the absence of other international agreements. Making amends reflects the kind of humanity associated with international humanitarian law because the principle focuses on the plight of civilian victims and this area of law is centrally concerned with the treatment of civilians. Thus the principle of making amends is designed to help ensure that war victims maintain both their dignity and humanity.

Elements of making amends

The principle of making amends should be implemented according to the following elements. This part examines how legal precepts and practice underpin each of them individually.

Victims of lawful harm should receive amends

The overarching purpose of the principle of amends is to recognize and help civilians harmed in armed conflict, and therefore a key element of the principle is that civilian victims of lawful harm should receive recognition and assistance. Some international legal sources and increasing state practice support this idea, although, as discussed above, the law has generally overlooked victims of lawful harm. The principle of amends seeks to ensure that gap is filled.²⁴

Making amends should have no bearing on a warring party’s legal responsibility for the harm it caused. In addition, it should not prevent individuals from pursuing legal remedies for violations of international or domestic law. The making of amends is designed to recognize and provide help for victims as soon as possible. Determining the legal ramifications of an incident should be dealt with separately.²⁵

According to international humanitarian law, attacks are unlawful if they target civilians or fail to distinguish between combatants and civilians, military objectives and civilian objects.²⁶ Such attacks are

²³ Additional Protocol I, *supra* note 2, art. 1, para. 2 (“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”). This language represents a modern form of the Martens Clause, which first appeared in the preamble to the Hague Convention (II) with Respect to the Laws and Customs of War on Land, *adopted* July 29, 1899, 32 Stat. 1803 (*entered into force* Sept. 4, 1900). Similar language has also appeared, *inter alia*, in the preamble to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, *adopted* Oct. 18, 1907, 36 Stat. 2227 (*entered into force* Jan. 26, 1910); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 63, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 62, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*entered into force* Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War art. 142, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950); Geneva Convention IV, *supra* note 1, art. 158; Additional Protocol II, *supra* note 2, pmbll.; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects pmbll., *adopted* Oct. 10, 1980, 1343 U.N.T.S. 137, 19 I.L.M. 1523 (*entered into force* Dec. 2, 1983); and Convention on Cluster Munitions, *supra* note 2, pmbll. The scope of the clause remains debated, but its “widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause.” Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT. REV. RED CROSS 125, 132 (1997).

²⁴ This approach to alleviating suffering should not be seen as an excuse for harming civilians, and warring parties that use compensation to pay off victims are not providing amends.

²⁵ For a more detailed discussion, see *supra* note 4.

²⁶ Additional Protocol I, *supra* note 2, art. 48.

considered “indiscriminate,” and if expected civilian harm outweighs anticipated military gain, are deemed “disproportionate.”²⁷ Attacks with specifically prohibited weapons are also unlawful. Even a lawful attack that has a legitimate military objective and is proportionate, however, can kill or injure civilians who become caught in the crossfire.

Despite the general gap in international law, certain weapons treaties contain victim assistance provisions that apply to victims of lawful as well as unlawful harm. The Mine Ban Treaty mandates that states parties in a position to do so must provide cooperation and assistance to landmine victims, and the Convention on Cluster Munitions goes further by detailing obligations for affected states parties to help cluster munition victims in their own territory.²⁸ In both cases, the measures apply to victims harmed by the weapons before as well as after the treaties went into effect. In other words, they require assistance not only for harm that results from future use in violation of the instruments but also for harm that occurred prior to when the treaties made the weapons inherently unlawful.²⁹ Their provisions thus apply, in part, to victims of lawful harm.

Conflict-specific schemes run by the United States have also covered victims of lawful harm. The Afghan Civilian Assistance Program³⁰ was established to assist Afghan civilians who “have suffered losses as a result of US military operations against insurgents and the Taliban” in the country.³¹ Since 2003, the program has provided assistance to those “negatively impacted by the presence of the international military,” without attribution of legal fault.³² It has offered assistance such as education and training, medical care, livestock provision, and infrastructure development.³³ The program has been funded through appropriations from legislation that does not specifically address the legality of the U.S. military attacks,³⁴ but instead states that “funds shall be used for humanitarian and reconstruction assistance for the Afghan people including health and education programs, housing, to improve the status of women, infrastructure, and *assistance for victims of war* and displaced persons.”³⁵ In Iraq, the Marla Ruzicka Iraqi War Victims Fund similarly has provided help to affected families for rehabilitation and reconstruction. It has explicitly recognized the need to assist Iraqi “families and communities who have suffered losses as a

²⁷ *Id.*, art. 51, paras. 4 and 5.

²⁸ Mine Ban Treaty, *supra* note 2, art. 6; Convention on Cluster Munitions, *supra* note 2, art. 5.

²⁹ Note that in many cases pre-dating these treaties, use of landmines and cluster munitions represented violations of general, existing international humanitarian law. In addition, many drafters were motivated by a sense that use of the weapons was unjustified even before the treaties. Nevertheless, the two disarmament treaties make no legal judgment on past use. Therefore, they apply to victims of any lawful use of the weapons as well as the more common unlawful use.

³⁰ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, H.R. 4775, 107th Cong. (2002) (providing funds for the Afghan Civilian Assistance Program); Fiscal Year 2003 Omnibus Appropriations Act, P.L.108-107 108th Cong. (2003) (providing funds for the Afghan Civilian Assistance Program); CIVIC, BACKGROUND: THE AFGHAN CIVILIAN ASSISTANCE PROGRAM (Jan. 2009), http://www.civicworldwide.org/storage/civicdev/acap_background.pdf.

³¹ USAID OFFICE OF INSPECTOR GENERAL, AUDIT OF USAID/AFGHANISTAN’S AFGHAN CIVILIAN ASSISTANCE PROGRAM, Audit Report No. 5-206-10-004-P, at 3 (2009), <http://www.usaid.gov/oig/public/fy10rpts/5-306-10-004-p.pdf>.

³² INTERNATIONAL ORGANIZATION FOR MIGRATION—AFGHANISTAN, AFGHAN CIVILIAN ASSISTANCE PROGRAM FACT SHEET (Sept. 2008), http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/afghanistan/acap_factsheet_sept08.pdf [hereinafter ACAP Fact Sheet].

³³ *Id.*

³⁴ *Id.* (describing how the Afghan Civilian Assistance Program is funded through appropriations authorized by the Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 164 (2003), <http://www.gpo.gov/fdsys/pkg/PLAW-108publ7/pdf/PLAW-108publ7.pdf>).

³⁵ Consolidated Appropriations Resolution, *supra* note 34, at 164 (emphasis added).

result of military operations” but has made no mention of the legality of the harm.³⁶ Though not created for this purpose, a small portion of the United States Commander’s Emergency Response Program (CERP), established in 2003, has been used to provide condolence payments to victims and their families in Iraq and Afghanistan. The program does not determine payments based on lawfulness of harm, and its Standard Operating Procedures specifically state that a condolence payment is not equivalent to “an acknowledgement of any moral or legal responsibility for someone’s death, injury, or damaged property.”³⁷ Yet even if motivated as much by a desire to “win hearts and minds” for counterinsurgency purposes as by a humanitarian imperative, such programs arguably reflect an increase in assistance to victims of lawful harm.

Legal sources outside of the armed conflict context support the position that many victims have already benefited from mechanisms that apply to those who have suffered harm from lawful acts. Rules related to transboundary environmental harm offer a model for helping victims when lawful acts cause harm. The International Law Commission, a U.N. organization that aims to codify international law, has argued that victims should receive compensation specifically for lawful, yet harmful, transboundary activity. The Commission’s Principles on the Allocation of Loss of Transboundary Harm Arising out of Hazardous Activities, noted in a 2006 U.N. General Assembly resolution,³⁸ call on states to provide “prompt and adequate compensation to victims” for any lawful activities that give rise to damage across national borders.³⁹ The principles cover “transboundary damage caused by hazardous activities *not prohibited by international law*,”⁴⁰ such as industrial pollution that releases toxic fumes and harmful chemicals. While non-binding, the principles parallel the idea behind schemes for making amends: in both cases civilians receive assistance to help them cope with harm resulting from lawful activities. Lawful acts of war, like lawful environmentally hazardous activities, are inherently dangerous activities. Both the Principles of Transboundary Harm and the principle of making amends in the armed conflict context seek to provide the utmost protection to victims by ensuring that they receive assistance in the event that these activities cause injury. International legal sources and state practice thus illuminate the benefits of and provide models for assisting victims of lawful harm.

³⁶ Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559, 573 (2003) (allocating initial funds for the Iraq Relief and Reconstruction Fund to be used by September 30, 2004); Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209, 1225 (2003) (allocating additional funds for the Iraq Relief and Reconstruction Fund to be used by September 30, 2006); Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13, 119 Stat. 231, 267 (2005) (designating that at least \$20 million of the Iraq Relief and Reconstruction Fund should be used to assist Iraq families and communities who have suffered losses due to military operations in the country and naming these funds the “Marla Ruzicka War Victims Fund”); *see also* CIVIC, BACKGROUND: THE MARLA RUZICKA IRAQI WAR VICTIMS FUND (Jan. 2009), http://www.civicworldwide.org/storage/civicdev/marlafund_background.pdf.

³⁷ “Condolence payments are different from claims and are not an admission of fault by the [U.S. Government]. It is crucial to remember that when a Commander uses CERP [Commander’s Emergency Response Program] funds, it is not an acknowledgement of any moral or legal responsibility for someone’s death, injury, or damaged property. Condolence payments are symbolic gestures and are not paid to compensate someone for a loss.” MULTI-NATIONAL CORPS–IRAQ, COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) STANDARD OPERATING PROCEDURES (SOP) B-12 (Jan. 26, 2009), <http://info.publicintelligence.net/MAAWS%20Jan%202009.pdf> [hereinafter CERP SOP]. The program also authorizes commanders to execute larger-scale projects to meet the emergency humanitarian, relief, and reconstruction needs of civilians. *Id.*, B-2. *See also* Mark S. Martins, *The Commander’s Emergency Response Program*, 37 JOINT FORCE Q. 46 (2005), http://www.dtic.mil/doctrine/jel/jfq_pubs/0937.pdf.

³⁸ Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, G.A. Res. 61/36, ¶ 2, U.N. Doc. A/RES/61/36 (Dec. 18, 2006), <http://www.undemocracy.com/A-RES-61-36.pdf>.

³⁹ *Id.* annex, principle 3.

⁴⁰ *Id.* annex, principle 1.

Individuals, families, and communities are all victims of armed conflict

In keeping both with legal precepts and practices and with the victim-centered approach of making amends, the term victim should be interpreted broadly to include individuals, families, and communities. At least two relevant international instruments have taken this approach in the past decade. In 2005, the U.N. General Assembly adopted the non-binding Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines for Victims).⁴¹ This document defines victims as people who individually or collectively suffered harm, the immediate family and dependents of persons directly harmed, and persons who suffered harm in trying to assist or prevent harm to other victims.⁴² The Convention on Cluster Munitions, which bans future use of cluster munitions and seeks to minimize the harm of past use, goes further to recognize that victimization extends beyond individuals and families to entire communities.⁴³ Because cluster munition survivors themselves were instrumental in the campaign to create the convention, the final product is particularly sensitive to the interests of victims.⁴⁴

Several programs established for specific conflicts have also adopted a broad view of who, beyond an individual, qualifies as a victim in a conflict situation. The Afghan Civilian Assistance Program⁴⁵ and the Marla Ruzicka Iraqi War Victims Fund,⁴⁶ both financed by the United States, have assisted families and communities that have suffered losses from U.S. and Coalition military activity since 2003. The NATO Post-Operations Emergency Relief Fund has provided aid for Afghan communities affected by International Security Assistance Force (ISAF) operations to establish immediate emergency projects and perform essential infrastructure repairs.⁴⁷ The World Bank's Emergency Peace Support Project for Nepal has recognized that conflict-affected groups include the families of civilians killed during armed conflict as well as persons who became disabled, internally displaced persons, families of disappeared persons, minors involved in the conflict, orphaned children, and widows.⁴⁸ Viewed as a whole, these varied

⁴¹ Basic Principles and Guidelines for Victims, *supra* note 2. Amends seek to provide a broad range of assistance to victims of lawful harm. As such, they are distinct from, and should not be confused with, reparations, which victims have a legal right to receive from warring parties that have harmed them unlawfully, e.g., in violation of the warring parties' international legal obligations.

⁴² *Id.* principle 8.

⁴³ Convention on Cluster Munitions, *supra* note 2, art. 2, para. 1.

⁴⁴ See, e.g., Branislav Kapetanovic, Cluster Munition Coalition Spokesperson, Opening Statement at the Convention on Cluster Munitions Signing Conference, Oslo, Norway (Dec. 3, 2008) (transcript available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/12/cmc-opening-statement-branislav-031208.pdf>); Ban Advocates Statement at the Convention on Cluster Munitions Signing Conference, Oslo, Norway (Dec. 4, 2008) (transcript available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/12/ban-advocates-statement-041208.pdf>).

⁴⁵ ACAP Fact Sheet, *supra* note 32; see also CIVIC, BACKGROUND: AFGHAN CIVILIAN ASSISTANCE PROGRAM, *supra* note 30.

⁴⁶ USAID OFFICE OF INSPECTOR GENERAL, AUDIT OF USAID/IRAQ'S MANAGEMENT OF THE MARLA RUZICKA IRAQI WAR VICTIMS FUND, Audit Report No. E-267-08-002-P (2008), <http://www.usaid.gov/oig/public/fy08rpts/e-267-08-002-p.pdf> [hereinafter Marla Ruzicka Fund Report].

⁴⁷ NATO PUBLIC DIPLOMACY DIVISION, FACT SHEET: NATO-ISAF POST-OPERATIONS EMERGENCY RELIEF FUND (Oct. 2009), <http://www.nato.int/isaf/topics/factsheets/factsheet-pohrf.pdf> [hereinafter POERF Fact Sheet].

⁴⁸ FINANCING AGREEMENT (EMERGENCY SUPPORT PEACE PROJECT) BETWEEN NEPAL AND INTERNATIONAL DEVELOPMENT ASSOCIATION, GRANT NUMBER H367-NP, at 4 (Aug. 26, 2008), <http://go.worldbank.org/JSRIB5I850> [hereinafter World Bank Emergency Support Peace Project for Nepal].

programs and international instruments support the premise that individuals, families, and communities affected by armed conflict are all victims.

Civilian victims should receive amends for a broad range of harms

Various international bodies and numerous states have acknowledged that civilians should receive assistance for death, physical injury, loss or damage to property, and psychological, emotional, social, and economic harms. Their programs support the idea of accompanying the expansive definition of victim with recognition that victims deserve amends for the wide range of harms they suffer.

Conflict-specific programs have consistently covered personal injury and death that have resulted from military action. The U.N. Compensation Commission, which operated from 1991 to 2007 to settle claims against Iraq from the 1991 Gulf War, compensated victims for death, dismemberment, serious disfigurement, sexual assault, and torture.⁴⁹ The World Bank's Emergency Peace Support Project for Nepal was created to compensate victims for, among other harms, the disability, death, or disappearance of family members.⁵⁰ Colombia's National Commission for Reparation and Reconciliation was designed to provide assistance for physical injury and death.⁵¹ NATO's Post-Operations Emergency Relief Fund, the Afghan Civilian Assistance Program, and the Marla Ruzicka Iraqi War Victims Fund have helped meet the essential medical needs of those physically harmed by combat operations in Afghanistan and Iraq.⁵² The U.S. Commander's Emergency Response Program has provided condolence payments for death or serious bodily injury to civilians resulting from combat operations of the U.S. Army.⁵³

Existing programs have also frequently covered damage to and loss of property. The U.N. Compensation Commission and the Eritrea-Ethiopia Claims Commission, which issued its final awards on damages in 2009, both allowed claims for property loss and damage, and many other claims commissions have been principally concerned with the return of or compensation for property lost as a result of specific armed conflicts.⁵⁴ Colombia's program has required that paramilitary groups restore damaged property to victims.⁵⁵ The U.S. Commander's Emergency Response Program has allowed condolence payments to be paid for property damage.⁵⁶ The Post-Operations Emergency Relief Fund, the Afghan Civilian Assistance

⁴⁹ United Nations Compensation Commission, Decision Taken by the Governing Council of the United Nations Compensation Commission during its Second Session, at the 15th Meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish, at 2, U.N. Doc. S/AC.26/1991/3 (Oct. 23, 1991) [hereinafter UNCC Decision 3].

⁵⁰ World Bank Emergency Peace Support Project for Nepal, *supra* note 48. According to International Human Rights Clinic field research, as of early 2010, Nepal had yet to roll out the promised programs to provide assistance to those disabled by the country's ten-year armed conflict.

⁵¹ National Commission for Reparation and Reconciliation (CNRR), Types of Reparation, http://www.cnrr.org.co/contenido/09i/spip.php?article12&var_recherche=types%20of%20reparation (last visited Jan. 30, 2012).

⁵² POERF Fact Sheet, *supra* note 47; ACAP Fact Sheet, *supra* note 32; Marla Ruzicka Fund Report, *supra* note 46, at 1, 3

⁵³ CERP SOP, *supra* note 37, at B-11.

⁵⁴ *See, e.g.*, United Nations Compensation Commission, The UNCC at a Glance, <http://www.uncc.ch/ataglance.htm> (last visited Jan. 30, 2012); Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Jan. 30, 2012); Commission for Real Property Claims of Displaced Persons and Refugees website, https://www.law.kuleuven.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm (last visited Jan. 30, 2012) (addressing property claims in Bosnia and Herzegovina); Iran-United States Claims Tribunal, IUCST Background Information, <http://www.iusct.org/background-english.html> (last visited Jan. 30, 2012); Kosovo Property Agency: Kosovo Property Claims Commission, <http://www.kpaonline.org/kpcc.asp> (last visited Jan. 30, 2012) (addressing property claims in Kosovo).

⁵⁵ CNRR, Types of Reparation, *supra* note 51.

⁵⁶ CERP SOP, *supra* note 37, at B-11.

Project, and the Marla Ruzicka Iraqi War Victims Fund have provided materials and assistance for immediate essential repairs and home rehabilitation related to property losses from armed conflict.⁵⁷

Beyond this widespread acceptance that civilians should receive assistance for death, personal injury, and property loss and damage, several international instruments and existing conflict-specific programs have mandated help for civilians for a variety of other harms. In the Convention on Cluster Munitions, harm encompasses not only physical injury, but also mental harm, economic loss, and social marginalization.⁵⁸ Principle 8 of the Basic Principles and Guidelines for Victims recognizes the physical, psychological, emotional, and economic harm of civilian victims.⁵⁹ In addition, both the Convention on Cluster Munitions and the Basic Principles and Guidelines for the Victims specify that a substantial violation of a person's fundamental human rights is a form of harm in itself.⁶⁰

Conflict-specific programs have further acknowledged the importance of providing assistance for psychological, emotional, and socioeconomic harm. The U.N. Compensation Commission recognized that persons were entitled to compensation for suffering beyond serious personal injury, including mental pain and anguish, mental harm caused by the death of an immediate family member, and illegal detainment.⁶¹ The Commission also compensated individuals in cases where the loss of economic resources threatened their lives and the lives of their immediate families.⁶² In practice, the Commission made awards for a wide variety of claims by individuals. For instance, the Commission's claims review panel recommended compensation for a victim who suffered a fatal heart attack caused by the stress and emotion of seeing a son arrested by Iraqi Forces. It also recommended compensation for an individual who experienced panic and fear induced by a bomb explosion even though the person was not physically wounded.⁶³ The World Bank's Emergency Peace Support Project for Nepal has had a mandate to provide reintegration support to address legal and mental harm suffered by civilians.⁶⁴ The Post-Operations Emergency Relief Fund, the Afghan Civilian Assistance Program, and the Marla Ruzicka Iraqi War Victims Fund have acknowledged that harm extends beyond immediate physical injury to include economic damage to livelihoods.⁶⁵ Thus international and national sources call for harm to encompass a comprehensive range of suffering that civilians experience as a result of armed conflict.

Amends should take a variety of forms

Victims of armed conflict increasingly have access to different forms of assistance and remedies, which indicates a growing recognition that such assistance and remedies should be tailored to the range of harm victims suffer and their resulting needs. At the international level, the Mine Ban Treaty requires contributions to the care and rehabilitation and social and economic reintegration of landmine victims.⁶⁶

⁵⁷ POERF Fact Sheet, *supra* note 47; ACAP Fact Sheet, *supra* note 32; Marla Ruzicka Fund Report, *supra* note 46, at 3.

⁵⁸ Convention on Cluster Munitions, *supra* note 2, art. 2, para. 1.

⁵⁹ Basic Principles and Guidelines for Victims, *supra* note 2, principle 8.

⁶⁰ *Id.*; Convention on Cluster Munitions, *supra* note 2, art. 2, para. 1.

⁶¹ UNCC Decision 3, *supra* note 49, at 2-3.

⁶² *Id.* at 3.

⁶³ United Nations Compensation Commission Governing Council, First Installment of Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), U.N. Doc. S/AC.26/1994/1 (May 26, 1994), <http://www.uncc.ch/reports/r94-01.pdf>.

⁶⁴ World Bank Emergency Support Peace Project for Nepal, *supra* note 48, at 4.

⁶⁵ POERF Fact Sheet, *supra* note 47; ACAP Fact Sheet, *supra* note 32; Marla Ruzicka Fund Report, *supra* note 46, at 3.

⁶⁶ Mine Ban Treaty, *supra* note 2, art. 6, para. 3.

The Convention on Cluster Munitions, which has more detailed victim assistance obligations, mandates non-discriminatory “age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support” and obligates states to provide for the “social and economic inclusion” of victims.⁶⁷ The Basic Principles and Guidelines for Victims recommend the creation of state programs to provide adequate, effective, and prompt aid such as medical, psychological, and social services, compensation for lost economic opportunities, and costs related to legal assistance. The document also calls for restitution, rehabilitation, and satisfaction measures. Restitution is designed to restore victims to their original situations before injury, including by the “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”⁶⁸ Rehabilitation “should include medical and psychological care as well as legal and social services.”⁶⁹ Satisfaction measures should encompass the cessation of continuing violations, factual verifications of what happened, official declarations or judicial decisions restoring victims’ dignity, public apologies and acceptance of responsibility, and commemorations and tributes to victims.⁷⁰ Over the past two decades, the Inter-American Court of Human Rights has increasingly required measures of redress and satisfaction, pledges of non-repetition, acts that preserve the memory of victims and promote truth, and remedies that address the health and welfare of victims.⁷¹

Programs established to address civilian harm in specific conflicts have also provided a spectrum of recognition and assistance to victims. In 1988, the U.S. government formally apologized to the approximately 120,000 Japanese Americans interned during World War II, in addition to setting up a monetary compensation scheme for those surviving.⁷² Colombia’s Commission for Reparation and Reconciliation has entitled victims to a right to truth, a right to justice, and a right to reparations.⁷³ In this context, the right to truth includes a specific obligation for paramilitary groups to reveal the location of victims of forced disappearances. The right to justice includes the right of victims to participate in all judicial proceedings and to request reparations. The right to reparations encompasses a right to restitution of property, a right to physical and mental rehabilitation, a right to satisfaction, and a right to non-recurrence.⁷⁴ Beyond one-time monetary payments to survivor families of victims killed during armed conflict, the World Bank’s Emergency Peace Support Project for Nepal has called for reintegration support to conflict-affected groups by providing for “training, legal and counseling services, rehabilitation services for disabled people, stipends and grants, and the piloting of other interventions.”⁷⁵ As the above examples demonstrate, existing programs as well as international documents provide for a variety of assistance beyond just monetary compensation to civilian victims of armed conflict.

⁶⁷ Convention on Cluster Munitions, *supra* note 2, art. 5, para. 1. Both the Mine Ban Treaty and the Convention on Cluster Munitions require all states “in a position to do so” to provide such assistance to victims. The latter, however, places primary responsibility for assistance on the state with victims “in areas under its jurisdiction or control.” Mine Ban Treaty, *supra* note 2, art. 6, para. 3; Convention on Cluster Munitions, *supra* note 2, arts. 6, para. 7, and 5, para. 1.

⁶⁸ Basic Principles and Guidelines for Victims, *supra* note 2, principle 19.

⁶⁹ *Id.* principle 21

⁷⁰ *Id.*

⁷¹ Ignacio Alvarez et al., *Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U. L. REV. 1375, 1386-90 (2007) (discussing the range of the IACHR’s non-monetary reparations).

⁷² Civil Liberties Act of 1988, 50a U.S.C. § 1989b *et seq.* (2006); *see also* Julie Johnson, *President Signs Law to Redress Wartime Wrong*, NY TIMES, Aug. 11, 1988, at A16 (using 120,000 as the number of internees).

⁷³ CNRR, Types of Reparation, *supra* note 51.

⁷⁴ *Id.*

⁷⁵ World Bank Emergency Peace Support Project for Nepal, *supra* note 48, at 4. In early 2010, Nepalese victims told researchers from the International Human Rights Clinic that the government had generally not implemented such support, but its inclusion in the program’s blueprint shows recognition of its importance.

Warring parties should make the amends

When warring parties unlawfully inflict harm on civilians in the course of armed conflict, they are legally liable to account for that harm, and in applicable instances, provide redress, including in the form of reparations. Yet civilian victims do not suffer less if their home is lawfully destroyed or their relatives lawfully killed in the course of combat operations. It follows logically that a warring party should meaningfully address the lawful harm it causes civilians and that when multiple warring parties are responsible for civilian harm, each should ensure victims receive full and appropriate amends.⁷⁶

Morality too calls for warring parties to recognize and ease the suffering they cause, even when existing laws do not obligate them to do so. In addition, recognition and assistance often mean more to victims if they come from the injuring party.⁷⁷ Finally, and most relevant to this paper, international legal principles and state practice increasingly look to warring parties to provide relief for the harm they caused during armed conflict.

Various sources of international law call on injuring parties to recognize and assist persons harmed by their actions. For example, the Basic Principles and Guidelines for Victims establish that offending states should provide reparations to victims of specific violations of human rights law and international humanitarian law.⁷⁸ Under Article 75 of the Rome Statute, the International Criminal Court may order individuals to provide reparations to victims of their acts.⁷⁹ The Principles on Transboundary Harm expect states to ensure the availability of adequate compensation to victims of their harm, even if, as noted above, they caused it lawfully.⁸⁰

Multiple conflict-specific programs have adopted a similar approach. The government of Iraq provided compensation through the U.N. Compensation Commission for conflict-related injury and damage suffered by civilians during the 1991 Gulf War.⁸¹ Under the Eritrea-Ethiopia Claims Commission, Eritrea and Ethiopia were both responsible for providing compensation for injuries they respectively caused civilian victims in violation of international humanitarian law during their border dispute from 1998 to 2000.⁸² Through its Commander's Emergency Response Fund, the United States has provided condolence

⁷⁶ The primary goal of making amends is to ensure that victims receive recognition and assistance from the warring parties who harmed them. When the injuring warring party cannot be determined or is unwilling or unable to provide amends, however, the state in which the civilian lives should take steps to assist. Warring parties that are unable to provide prompt and adequate amends should seek assistance from the international community to ensure victims receive the recognition and help they deserve. Certain international humanitarian law instruments lay a foundation for the provision of international assistance for victims. For example, Article 6 of the Convention on Cluster Munitions obliges states parties "in a position to do so" to provide international cooperation and assistance to other states parties affected by cluster munitions. Convention on Cluster Munitions, *supra* note 2, art. 6. Article 6 of the Mine Ban Treaty similarly provides that states parties shall provide to the extent possible cooperation and assistance to other states parties for implementing the treaty. Mine Ban Treaty, *supra* note 2, art. 6.

⁷⁷ CIVIC, LOSING THE PEOPLE, *supra* note 13, at 66.

⁷⁸ Basic Principles and Guidelines for Victims, *supra* note 2, principle 15.

⁷⁹ Rome Statute of the International Criminal Court, *supra* note 2, art. 75.

⁸⁰ Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, *supra* note 38, at 3.

⁸¹ United Nations Compensation Commission, Introduction, <http://www.uncc.ch/introduc.htm> (last visited Jan. 30, 2012).

⁸² Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, *supra* note 54.

payments to civilians injured by U.S. military activity in both Afghanistan and Iraq.⁸³ U.S. and Coalition forces have provided further relief for civilians harmed by their actions through NATO's Post-Operations Emergency Relief Fund, the Afghan Civilian Assistance Program, and the Marla Ruzicka Iraqi War Victims Fund.⁸⁴ These specific mechanisms, along with international legal sources, reflect the growing recognition of warring parties' need to reduce the suffering caused by the harm they inflict during armed conflict.

Conclusion

Under the principle of making amends discussed in this paper, civilian victims, whether individuals, families, or entire communities, should receive amends when they are lawfully harmed in armed conflict. These amends should recognize and address the broad range of combat-related harm by taking a variety of forms, both monetary and non-monetary. Warring parties should make amends to civilian victims affected by their lawful conduct. Implemented as a whole, these elements promote the dignity and humanity of civilian victims.

Existing international law does not mandate specifically that warring parties make amends to victims of lawful harm, but a variety of legal sources demonstrate an existing foundation for each of its major tenets. In addition, existing practice from a number of states shows that warring parties are increasingly recognizing the value of making amends. Legal precepts and practice thus do not require, but certainly support, turning this innovation into an accepted principle.

⁸³ Martins, *The Commander's Emergency Response Program*, *supra* note 37, at 47.

⁸⁴ POERF Fact Sheet, *supra* note 47; ACAP Fact Sheet, *supra* note 32; Marla Ruzicka Fund Report, *supra* note 46, at 3.