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# On War as Hell

Roger P. Alford\*

If war is hell, then how do you make amends for the suffering of hell? Herein lies the conundrum of war reparations. International law can deal with revolutions, catastrophes, and lesser evils we euphemistically call acts of God. But when the fury of hell is unleashed on earth, international law quakes. The great irony of war is that the more catastrophic and widespread its destructive consequences, the less likely that those caught in its path will ever be repaid for their injury. There simply is not enough salve to heal the wounds of war.

Heaven knows we try. Indeed, war reparations are on the make in the twenty-first century: we enthusiastically embrace mechanisms for Holocaust reparations, Gulf War reparations, Yugoslav reparations, and Ethiopian and Eritrean reparations. But beneath the veneer, it is clear that no effective remedy exists to respond to the horror of war.

Like many others, I have spent much of my career working to redress the consequences of wars and revolutions: first, at the Iran–United States Claims Tribunal as a legal advisor; second, in private practice representing claimants before the United Nations Compensation Commission; third, as a senior legal advisor for the Claims Resolution Tribunal resolving claims to Holocaust-era dormant Swiss bank accounts; and most recently, advising clients regarding prisoner-of-war claims against Japanese corporations arising out of the Second World War. This perspective therefore contains my musings on war and its aftermath.

## I. REVOLUTIONS ARE EASY

We should begin with a minor thesis: revolutions are easy. International law is now well positioned to respond to revolutions. The modern trend toward an effective response to revolutions was sown from the seeds of failure. After Fidel Castro seized control of Cuba, the United States took halting steps to address the harm done to US property interests, failed to freeze Cuban assets in the US, and offered no adequate recourse for claimants to sue in United States courts. To this day, Cuba owes US

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nationals billions of dollars in expropriated assets. This fact alone is a major impediment to normalizing relations with Havana, and the Helms-Burton Act is exhibit one.

The United States and the world community learned a great deal from the Cuban revolution and similar revolts. Since that time, mechanisms for enforcing international rights have been established and international law itself has blossomed through a network of bilateral investment treaties and judicial decisions protecting foreign investment. Now we know the drill when a revolution occurs: immediately freeze the country's assets, invoke investment treaties, waive sovereign immunity for acts of expropriation, establish a dispute resolution mechanism, and honor that mechanism's awards through frozen assets, lump-sum settlements, or assets chased under the New York Convention. Indeed, revolutions are so easy that the so-called Hull formula now represents customary and conventional international law. We can credibly state, as international courts regularly do, that in the aftermath of a revolution, foreign investors whose property has been expropriated must receive prompt, adequate, and effective compensation representing the full value of their losses.

The Iran–United States Claims Tribunal is the exemplar, the darling of the international legal community's response to revolutions. Following the seizure of the United States embassy on November 4, 1979, the United States quickly seized millions in Iranian assets. On January 19, 1981, on the last day of the Carter Administration, Warren Christopher signed the Algiers Accords establishing a tribunal to resolve claims by American nationals against the government of Iran arising out of the Iranian revolution.<sup>1</sup> Over the course of the next twenty years, the tribunal awarded US nationals over \$2.1 billion in damages. The governments of Iran and the United States refuse to speak to one another (at least in public), but the Iranian people love the United States. In their eyes, the time is ripe for rapprochement with the "Great Satan." We too are making furtive steps in their direction, with serious debates in the halls of Washington regarding an eventual easing of sanctions against Iran. Had there not been a mechanism for resolving the disputes between US nationals and Iran, the potential for normalized relations with Iran would have been significantly diminished, much as it still is with Cuba. The suffering caused to the American victims of the Iranian revolution has been adequately addressed, and the two countries can and will eventually move forward in

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1. See *Declaration of the Government of the Democratic and Popular Republic of Algeria* ("General Declaration"), 1 Iran–US Cl Trib Rptr 3 (Jan 19, 1981); *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran* ("Claims Settlement Declaration"), 1 Iran–US Cl Trib Rptr 9 (Jan 19, 1981).

their relationship with that impediment removed, assuming, of course, that Iran renounces terrorism and becomes part of the community of civilized nations.

In short, with rare exception, the reason that revolutions are easy for international law is because the level of harm generally caused by revolutions is sufficiently cognizable, the dispute resolution mechanisms sufficiently robust, and the available resources sufficiently ample that affected States need not make hard choices between supporting victim constituents or compromising the long-term future relationship with the revolutionary state. The affected States can embrace both full compensation and future peace and stability.

## II. WARS ARE HARD, VERY HARD

If revolutions are easy, wars are very hard. War reparations are especially hard on the credibility and efficacy of international law. Wars are hard because the suffering is so great and reparations so onerous that often there is no mutuality of interest between the victorious governments and their own constituent victims. Wars force victorious States to make hard choices between looking backward to repair the harm caused to constituent victims and looking forward to a relationship with a potential strong and strategic ally. Just as “the conduct of [w]ar, in its great features, is . . . policy itself;”<sup>2</sup> so too it often appears that war reparation schemes have almost everything to do with international relations, and very little to do with international law. The victorious States must choose either wholly to embrace compensation to the victims, future peace and stability with the vanquished, or a balance of both that will satisfy neither the victims nor the vanquished. To turn an old maxim on its head, failure to address war reparations properly may result in a bad peace after a good war.<sup>3</sup>

### A. COMPENSATING THE VICTIMS AT THE EXPENSE OF THE VANQUISHED

First, wars are hard because if the victorious countries only focus on reparations for the war, they will do so at the expense of any future relationship with the vanquished countries. The Treaty of Versailles required Germany to “make compensation for all damage done to the civilian population of the Allied Powers . . . and to their property . . . and in general all damage.”<sup>4</sup>

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2. Carl von Clausewitz, 3 *On War* 130 (Routledge & Kegan Paul 1962).
  3. Consider Letter by Benjamin Franklin to Sir Joseph Banks (July 27, 1783) (“There never was a good war nor a bad peace.”).
  4. Article 232 of that treaty provides:  
The Allied and Associated Governments recognise that the resources of Germany are not adequate . . . to make complete reparation for all such loss and damage. The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerence of each as

Shortly after the Treaty of Versailles, John Maynard Keynes wrote that reparations are “preach[ed] . . . in the name of Justice,” but such justice is not so simple “[i]n the great events of man’s history, in the unwinding of the complex fates of nations.” He famously predicted that the reparations scheme established at Versailles would reduce Germany “to servitude for a generation . . . , degrad[e] the lives of millions of human beings, and . . . depriv[e] a whole nation of happiness.”<sup>5</sup> As is well-known now, his predictions were correct. The consequences of the Treaty of Versailles were devastating for Germany. Germany agreed to pay reparations for all damage caused by the war, amounting to over \$30 billion. Although it initially attempted to meet its payment obligations, Germany quickly began to fall behind. Revised reparations schemes were developed after Germany’s initial defaults, including one referred to as the Young Plan, which would have obligated Germany to make annual payments until 1988. By 1932, Germany gave up all hope of ever paying all the reparations demanded.<sup>6</sup>

Many Germans greatly objected to the War Guilt clause and resented the onerous reparations they were forced to pay as a result of the Treaty of Versailles. Adolf Hitler built his early career railing against the “November Criminals” who approved the Armistice at the eleventh hour of the eleventh day of the eleventh month of 1918. With the Treaty of Versailles, Hitler wrote in *Mein Kampf*, “the shameless and monstrous word ‘reparations’ was able to make itself at home in Germany.”<sup>7</sup> In speeches falsely contrasting the “boundless humanity” of the Brest-Litovsk peace treaty Germany imposed on Russia with the “inhuman cruelty” of the Treaty of Versailles, Hitler said he was “struck by the glances of [thousands of] hostile eyes” and the “surging mass full of the holiest indignation and boundless wrath.” He repeated this theme “dozens of times . . . until . . . a certain clear and unified conception became current among the people from among whom the [Nazi] movement gathered its first members.”<sup>8</sup> The seeds of discontent were sown at Versailles and bore devastating fruit in the Second World War.

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an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage.

Treaty of the Peace Between the Allied and Associated Powers and Germany, June 28, 1919, art 232, 2 Bevans 43, S Treaty Doc No 66-49, reprinted in 13 Am J Intl L 151 (1919).

5. John Maynard Keynes, *The Economic Consequences of the Peace* 225 (Harcourt, Brace & Howe 1920).
6. Elyse J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 NYU L Rev 840, 858–59 (1992).
7. Adolf Hitler, *Mein Kampf* 468 (Houghton Mifflin 1999).
8. Id.

## B. EMBRACING THE VANQUISHED AT THE EXPENSE OF THE VICTIMS

Second, wars are hard because if the victorious focus only on the future relationship with the vanquished, it will do so at the expense of the victims of the war. The aftermath of the war in the Pacific aptly illustrates this problem. Following the Second World War, the United States and Japan signed a peace treaty, the purpose of which the United States asserts was to limit the exposure of Japan only to those amounts claimed by the Allied Powers and to preclude the rights of victims of the war to claim directly against Japan and her nationals.<sup>9</sup> In furtherance of this treaty, the United States waived its claim to war reparations. This policy and subsequent nurturing of the US–Japan relationship has transformed Japan from one of our greatest enemies into one of our strongest allies. Japan is now and has been our closest ally in Asia for decades.

But the soft underbelly of this policy is that it was undertaken at the expense of United States constituent victims. Under United States legislation, each prisoner-of-war was authorized to receive \$1.50 for each day he was held as a prisoner-of-war and was subjected to forced labor and inhuman treatment.<sup>10</sup> The unspoken deficiency in the policy toward Japan has festered for fifty years and now US prisoners-of-war and other victims are attempting to challenge the wisdom of that policy employed at their expense. They are doing so by suing Japanese corporations that benefited from the slave labor (the Japanese government enjoys sovereign immunity), and arguing that the conduct of these corporations in employing slave labor violated international law. Thus far, their claims have been unsuccessful, with a federal district court in California arguing that the United States government intended to preclude their claims by signing the Peace Treaty.<sup>11</sup> Had Japan taken the courageous approach of Germany and provided compensation when it later had the ability to pay, matters would have been different. While Germany has paid in excess of \$50 billion in war reparations, Japan has hidden behind the peace treaties, and victims of the war in the Pacific remain bitter at the burdens they have been forced to bear in the name of a strong alliance with Japan.

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9. See Treaty of Peace with Japan, arts 14(a)(2)(I) and 14(a)(2)(V)(b), 3 UST 3169 (1952), which provides:

each of the Allied Powers [has] the right to seize, retain, liquidate, or otherwise dispose of all property, rights and interests of (a) Japan and Japanese nationals, (b) persons acting for or on behalf of Japan or Japanese nationals, and (c) entities owned or controlled by Japan or Japanese nationals. Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

10. See 50 USC app § 2005(d)(3) (1994).

11. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F Supp 2d 939 (ND Cal 2000).

### C. EMBRACING BOTH, SATISFYING NEITHER

Third, wars are hard because if the victorious countries attempt to strike a middle ground and balance reparation to victims with nurturing a potential relationship with the vanquished, both the victims and the vanquished will remain unsatisfied with the result. This essentially is what has been attempted with the Gulf War. Immediately following Iraq's invasion of Kuwait, the UN Security Council passed Resolution 687, providing that "Iraq . . . is liable under international law for any direct loss, damage . . . or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." Following the war, the United Nations established the United Nations Compensation Commission ("UNCC") to resolve claims of victims of the Gulf War and established a payment mechanism by tapping 30 percent of all Iraqi oil revenues to pay claimants. Despite the noble efforts of the United Nations, Gulf War victims remain unsatisfied with the results because the UNCC has awarded only partial compensation to individual victims and has disingenuously denied compensation to many meritorious corporate and government claims. Under the UNCC regime, individual claimants are denied full recovery for the extent of their injuries, with the UNCC providing a fixed fee of \$2,500 for serious personal injury and \$10,000 per family in the event of death, and in some cases more if the claimant can provide adequate proof.<sup>12</sup> Fixing the amount of loss to such a relatively low amount will ensure that the families of the victims will not feel that the full extent of their injuries has been compensated. Corporate and government claimants are often denied compensation based on strained interpretations of what constitutes evidence of a direct loss or an offsetting gain. For example, in a number of recent UNCC decisions, airline industries were denied compensation for the increased fuel prices they paid following the Gulf War on the grounds that this price increase was not a direct result of the Gulf War. However, when oil companies brought claims for losses suffered as a direct result of the Gulf War, their claims were denied or set-off because of direct gains they enjoyed from the increase in oil prices. The UNCC thus established the paradoxical precedent of denying claims for hundreds of millions of dollars from purchasers of oil because the "increase in oil prices was not a direct consequence of the invasion and occupation of Kuwait,"<sup>13</sup> and then denying claims for hundreds of millions of dollars from suppliers of oil because "oil prices . . . increased drastically as a result of Iraq's invasion and occupation of Kuwait and the fears of shortages that

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12. See First Session of the Governing Council of the United Nations Compensation Commission, *Criteria for Expedited Processing of Urgent Claims*, paras 12–14, UN Doc No S/AC.26/1991/1 (1991).

13. United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment [sic] of "E2" Claims, para 96, UN Doc No S/AC.26/1999/22 (1999). See *id.* at Annex I for the recommended disposition of the claims.

ensued."<sup>14</sup> With such antilogies, one is left with the impression that for corporate and government claims the goal of minimizing payment obligations is sometimes paramount over a unified theory for compensating meritorious claims.

Presumably these measures were undertaken not only in recognition of the limited resources of Iraq, but also to limit the overall exposure of Iraq to Gulf War reparation claims, anticipating a day when Iraq may no longer be an enemy of the international community. From Iraq's perspective, the UNCC is fundamentally unjust and unfair, depleting precious oil resources to pay the claims of undeserving victims. Indeed, Saddam Hussein was so incensed by the reparation regime that for years he refused to pump oil at all, thereby denying the UNCC a source of funding the awards and condemning his own people to death and starvation. Moreover, unlike the Peace Treaty, which provided a measure of certainty to Japan regarding its long-term exposure to war reparations, the Gulf War approach offers no such security for Iraq. The UNCC is supplemental to other avenues of compensation, permitting claimants to pursue any other avenue that may be available to them, including contractual arbitration clauses and litigation in foreign courts.<sup>15</sup> To the extent Iraqi assets are or will be located outside Iraq, they likely will be subject to attachment by claimants who believe they have not had their full day in court at the UNCC. To borrow from John Foster Dulles, because the UNCC approach "validated, or kept contingently alive, monetary reparations claims" against Iraq, "her ordinary commercial credit w[ill] vanish, the incentive of her people w[ill] be destroyed and . . . [t]here w[ill] be bitter competition [among the [victims]] for the largest possible percentage of an illusory pot of gold."<sup>16</sup> The UNCC approach thus poses a potential impediment to an eventual peace with Iraq should Iraq change its course and meet the longstanding demands of the United Nations.

### III. WHITHER WAR REPARATIONS

As the sun was rising on New York on the morning of September 11, 2001, I was sitting across the table from the Iraqi delegation at the United Nations headquarters in Geneva, listening to the Iraqis bemoan the suffering of their people and the injustice of the United Nations' war reparation scheme. Their words in effect said, "How can you let our people continue to suffer, and give our money to these

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14. United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment [sic] of "E1" Claims, para 56, UN Doc No S/AC.26/2000/16 (2000).

15. See United Nations Compensation Commission, *Further Measures to Avoid Multiple Recovery of Compensation by Claimants*, UN Doc No S/AC.26/1992/13 (1992).

16. *In re World War II Era Japanese Forced Labor Litigation*, 114 F Supp 2d at 946 (cited in note 11) (quoting US Dept of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951)).

multinational corporations who actually enjoyed a net benefit from the war through increased sales of their product.” Immediately following the hearing, the Iraqis left in a rush, without a word, without a greeting, without a furtive glance in our direction. The highest-ranking American at the UNCC came over and exchanged greetings with claimant’s counsel and expressed apologies for departing in haste, explaining that “I’m sorry, but I must run. There has been an attack on America.” Shocked and confused at this news, we too rushed out of the UN complex to the Hotel du Rhône and watched in horror as live pictures on forty channels in twenty languages broadcast the World Trade Center crashing to the ground. My thoughts were immediate: “My God, here we are still dealing with the aftermath of the Gulf War and now we have another war on our hands.” And so we do. And so it goes with war and its legal consequences.

The United States is now waging a just war against terrorism and the Taliban regime has fallen. The question of war reparations against Afghanistan will soon present itself. Afghanistan is a poor country, with a gross national product of approximately \$21 billion. It cannot begin to adequately compensate for the injuries caused by the terrorist attacks to which it is an accomplice. The United States is taking heroic steps to compensate the victims of the terrorist attacks unilaterally out of its own pocket, but these funds will never heal the wounds or fully compensate the victims for these terrorist attacks. Class action lawsuits have already been filed and no doubt there will be claims brought in US courts against Afghanistan for injuries suffered as a result of the terrorist attacks. It is clear under international law that a change in government does not absolve the country from its legal obligations arising under the previous regime.<sup>17</sup> Thus claimants may seek billions in compensation from the new government in Afghanistan and may be successful if they can overcome sovereign immunity limitations. Claims brought against Afghanistan in United States courts may overcome sovereignty immunity challenges under two exceptions to the Foreign Sovereign Immunities Act. Under the noncommercial tort exception, a military or terrorist attack causing damage or losses in the United States would result in the waiver of immunity, provided the act or omission was attributable to Afghanistan or an Afghan official or employee acting within the scope of his office or employment.<sup>18</sup> Under the so-called Flatow Amendment, Afghanistan also could be held responsible for the terrorist attacks of September 11, 2001 because it provided “material support or resources” to the terrorists.<sup>19</sup> This could expose Afghanistan to tens of billions of dollars in claims, and severely undermine any long-term prospects

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17. See Restatement (Third) Foreign Relations Law § 208 cmt a (1987) (asserting that the “capacities, rights, and duties” of a state “are not affected by a mere change in the regime or in the form of government or its ideology”).

18. See 28 USC § 1605(a)(5) (1994); see also *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428 (1989).

19. 28 USC § 1605(a)(7) (1994 & Supp II 1996).

for a successful new Afghan government. However, such an approach is unlikely as it would require the President to designate Afghanistan as a state sponsor of terrorism, something that is unthinkable given the current government now in place in Afghanistan. Even if the United States does not include Afghanistan as a state sponsor of terrorism under the Flatow Amendment, the issue of war reparations will present itself as a diplomatic question or for resolution in either a judicial or nonjudicial forum. With the new government now in place in Afghanistan, the victorious United States will again face the dilemma of choosing between restoring the relationship with the vanquished at the expense of the victims, compensating the victims fully at the expense of future peace with the vanquished, or broaching a middle path that will fully satisfy neither the vanquished nor the victims.<sup>20</sup>

By most accounts, the United States has performed admirably in the war on terror since September 11, 2001. But when it is victorious it will face the daunting prospect of war reparations. Right now our thoughts and concerns are unwavering in support of the victims of the terrorist attacks. It is said that in the conduct of war, the terrorist soon forgets the night of terror, but the victims never forget. In their eyes, he who has killed is a killer for life. The terrorist may choose another occupation, hide under another identity, but for the victims he is an executioner, and an executioner he remains even after the backdrop has changed and he is acting in another play upon a different stage.<sup>21</sup> Certainly for the victims, it is hard to imagine Afghanistan (or Iraq or Iran for that matter) as a future ally of the United States. But the same could be said of Japan in December 1941. The genius of the United States is the foresight to see in the enemy of today a possible strategic ally of tomorrow. How the United States can remain true to that impulse while also taking heed of the cries of the victims is difficult to imagine. As the world's great military superpower, the United States is in a remarkably strong position to take a leading role in establishing international norms for war reparations. Just as a century ago no customary international norms regarding the law of war prize could be established without due

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20. To date, the United States has not precluded lawsuits against Afghanistan, but has passed legislation stipulating that those victims who wish to submit a claim for compensation from funds provided by the United States must "waive[] the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001." Air Transportation Safety and System Stabilization Act § 405(c)(3)(B), Pub L No 107-42, 115 Stat 230, 239-40 (2001). For those victims who choose not to claim compensation from this fund, there is nothing to prevent lawsuits from being filed against Afghanistan in US courts. Even those who claim compensation under the fund may sue those who conspired to commit the terrorist acts. The Final Rule clarifies that "Section 405(c)(3)(B) of the Act provides that upon the submission of a claim under the Fund, the claimant waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, except for civil actions to recover collateral source obligations. . . and civil actions against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act." 28 CFR § 104.21(d) (2002); see also 28 CFR § 104.61(a) (2002).

21. See Elie Wiesel, *Night, Dawn, The Accident 177-78* (Hill & Wang 1972).

regard to the practice of the great naval superpower England,<sup>22</sup> so too today no guiding principles on a “law” of war reparations can be enunciated without reference to the practice and opinions of the United States.

So, then, as the United States prepares to respond to demands for war reparations, one must ask whether there are international law principles that offer a coherent response to war reparations. Is there a general and consistent practice among states? Should states exact a certain level of war reparations out of a desire to balance past injuries with future peace? The most basic of questions are not clearly settled, including: (i) the establishment of principles for determining appropriate compensation for acts of war; (ii) the relevance of the vanquished country’s present or future ability to pay; (iii) the responsibility of states for war-like conduct undertaken by non-state actors; (iv) the prioritizing of claims among individuals, corporations, and governments; and (v) the evidence required to establish a claim.

Although discerning detailed principles based on the custom and practice of states with respect to war reparations is difficult, one can make a few preliminary observations. First, the general principle should be that for unlawful acts of war it is for the injured state to claim injury on behalf of its citizens and that the state has a right to claim “[r]estitution in kind, or . . . payment of a sum corresponding to the value which a restitution in kind would bear.”<sup>23</sup> International tribunals have regularly applied this fair market value standard for revolutionary conduct, and occasionally do so for acts of war.<sup>24</sup> That said, as a second corollary principle for determining the appropriate manner and schedule of compensation—as well as the appropriateness of waiving, deferring, or subrogating claims—the victorious state should have the right to take into account the vanquished countries’ financial condition and strategic importance. This is in order to balance the desire to realize full compensation and the need to inflict a liability that will have an appropriate deterrent effect, with the competing desire not to destroy the economic livelihood of the vanquished country and afford that country some certainty as to the finality and totality of its payment obligations.<sup>25</sup> Such an approach reflects the right of the victorious country to rely on a principle of proportionality, balancing compensation to victims and reconstruction and restoration of the relationship with the vanquished. In some cases, this will mean a state precluding its own nationals from filing private lawsuits for meritorious claims. Third, a state should be held responsible for the war-like conduct of non-state actors if the state colluded, conspired, or had prior knowledge of unlawful acts and failed to

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22. See *The Paquete Habana*, 175 US 677, 688, 695 (1900).

23. *Factory at Chorzow (Ger v Pol)*, 1928 PCIJ (ser A) No 17, at 47.

24. For a survey of the application of this standard by international tribunals, see *Ebrahimi v Iran*, Award No 560-44-3, 30 Iran-US Cl Trib Rep 170, 236-54 (Allison concurring) (Oct 12, 1994).

25. Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), UN Doc S/22559 at para 13 (1991).

warn the intended targets. In addition, a state should be held responsible for ratifying or endorsing the conduct of non-state actors after the unlawful events transpired.<sup>26</sup> Fourth, the victorious state should prioritize claims so that those most severely affected by the war will receive redress before other victims of the war. In practice this means that individuals shall be compensated before governments or corporations, and that principal payments should be paid to every claimant before interest payments are paid to any. Finally, in making a claim the victorious state should establish in “concrete form . . . the damages for which compensation is required or an estimation of the amount of those damages,”<sup>27</sup> unless a fixed loss approach is adopted, in which case the claimant must establish proof of injury.<sup>28</sup>

In short, international law has well-established principles of *jus ad bellum* and *jus in bello*, but it has yet to embrace principles for *jus post bellum*.<sup>29</sup> International law should develop broad theories for *jus post bellum*, including principles of war reparations. Such principles would clearly establish that, while a victorious country has the legal right to claim full compensation for damages directly caused by unlawful acts of war conducted by a state (or by non-state actors with a state’s knowledge, acquiescence, or ratification), it also has the right on behalf of its nationals to waive claims for full compensation. And in making any claim it has the obligation to prioritize among categories of claimants and to provide concrete evidence of all injuries sustained. The difficulties in establishing such broad principles should not be insurmountable. After all, if international law has succeeded in establishing laws for the engagement and conduct of war and laws of war crimes, why can it not establish clear principles for war reparations? War is hell, and thus far at least, establishing rules of war reparations has been hell for international law.

Applied to the current situation in which the United States wishes to balance compensation to victims with the need to rebuild war-torn Afghanistan through foreign aid and assistance, the United States could determine that Afghanistan is internationally responsible for the conduct of the non-state terrorist actors because it

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26. *Corfu Channel (United Kingdom v Albania)*, Judgment (Merits), 1949 ICJ Rep 18–23; *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ Rep 3, 42.

27. *Fisheries Jurisdiction (W Germany v Iceland)*, para 76, 1974 ICJ 175, 204.

28. See United Nations Compensation Commission Governing Council, Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth Session, UN Doc No S/AC.26/1992/10, art 35 (1992).

29. International relations scholars have recently begun articulating principles of *jus post bellum*, modernizing and expanding just war theory to address principles for the termination of war and the transition to peace. According to one commentator, included in *jus post bellum* is the principle that “any terms of peace must be proportional to the end of reasonable rights vindication.” Brian Orend, *War and International Justice: A Kantian Perspective* 232–33 (Wilfrid Laurier University 2000); see Brian Orend, *Jus Post Bellum*, 31 J of Soc Phil 117 (2000); Michael J. Schuck, *When the Shooting Stops: Missing Elements in the Just War Theory*, 111 The Christian Century 982 (Oct 26, 1994) (one principle of *jus post bellum* would prevent punitive terms of surrender such as those in the Treaty of Versailles).

colluded, conspired, had prior knowledge, or subsequently ratified their conduct. It could also enter into an agreement or treaty with Afghanistan declaring that Afghanistan is liable under international law for any direct loss, damage, or injury to United States nationals and corporations as a result of the events of September 11, 2001, but that the United States waives all reparations claims of the United States and its nationals arising out of such events. Such an agreement would be intended to preclude and preempt any litigation in United States courts against Afghanistan. Failing such an agreement, the United States could simply pass legislation precluding claims against the new government of Afghanistan. Finally, in balancing concern for the victims, the United States could—and indeed is—providing a measure of justice to victims of September 11, 2001, by offering a mechanism for compensating victims of the terrorist attacks. This mechanism should prioritize among claimants and require those claimants to provide adequate proof of the existence and extent of their injuries. It appears that the United States is doing this by deducting from the amounts that may be claimed any funds received from collateral sources, by providing compensation only for physical injuries and not property damage, and by requiring claimants to provide adequate information regarding their losses.<sup>30</sup> In taking such steps, the United States could evince a state practice that balances the competing goals for war reparations and develop international law principles that could become the hallmark of any reparation scheme worthy of the name *jus post bellum*.

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30. See Air Transportation Safety and System Stabilization Act § 405 (cited in note 20); see also Final Rule Governing the September 11th Victim Compensation Fund, 28 CFR 104.2(a)(1) and 28 CFR 104.2(c)(1) (2002).