When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act

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On an early September morning in Afghanistan, a twelve-thousand-pound M1114 Up-Armored High Mobility Multipurpose Wheeled Vehicle ("Humvee") barreled down a dirt road through the city of Khost, a large cloud of dust following close behind.[1] The Humvee led a convoy of four vehicles and was patrolling Khost to prevent possible Taliban attacks against intimidated voters on this election day. The driver of the lead vehicle intentionally drove at a dangerously fast speed down the narrow road. He remembered the convoy commander specifically telling him that "speed is our friend"; moving quickly was the best way to avoid ambushes.

Suddenly, the gunner on the lead vehicle pointed toward the ground to the left of the road, but the convoy continued moving without investigating the object. The second vehicle assumed the lead gunner had not pointed toward anything dangerous like an improvised explosive device; otherwise, something would have been said over the radio. The driver of the second vehicle continued on, only to feel a slight bump and hear what he thought was a yelp as the convoy traveled down the road.

Two days later Shabbir Khan, a Khost resident, arrived at the U.S. military's Forward Operating Base Salerno and requested to speak with claims personnel. Shabbir brought Polaroid pictures of a deceased Labrador and alleged through an interpreter that two days prior, a "big tan American truck" ran over Zemar, his family dog and

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1. This story is a hypothetical scenario.

protector of his house. After an investigation found that Shabbir's story was true, a U.S. claims commissioner unfamiliar with Afghani custom concluded that the cost of a similar dog from this region would cost USD $35 at the local market. He paid Shabbir the equivalent sum in Afghani, the Afghanistan currency.

The payment infuriated Shabbir; he complained that the sum was paltry and insulting and that it violated the custom of his people. Shabbir explained that if someone from his tribe had killed his dog, that tribesman would have, in accordance with their local custom, reimbursed him with a sheep as well as additional money.[2] After failing to convince the claims commissioner to increase his reimbursement, Shabbir, faced with the realization that he had no other options, accepted the money but swore to tell other members of his tribe about the injustice that the United States committed against him.[3] Shabbir returned to his village and told his tribal elder about the United States' actions, causing the tribal elder to decide that his tribe would no longer help the United States in its war against the Taliban.[4]

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2. *See* INT'L LEGAL FOUND., THE CUSTOMARY LAWS OF AFGHANISTAN 18 (2004), *available at* http://www.theilf.org/reports-ilfa-customary-laws.pdf. This report, created by the International Legal Foundation, has a section discussing the customary laws of the southern and eastern provinces in Afghanistan that outlines the specific guidelines for reimbursement when a person accidentally kills someone's dog. *Id.* The report states that the person who committed the act must "give the owner a sheep and a specified amount of money." *Id.* Furthermore, the report explains the significance of dogs: "[W]hile killing a dog is not considered the equivalent of killing a human, dogs symbolize the protection of a house and its boundaries; therefore, killing a dog is regarded as a serious insult requiring harsh punishment." *Id.*

3. There is a very limited appeals process under the Foreign Claims Act (FCA), which is the applicable law for this hypothetical scenario. U.S. DEP'T OF THE ARMY, ARMY REGULATION 27-20, CLAIMS 54-55 (2008), *available at* http://armypubs.army.mil/epubs/pdf/R27_20.pdf [hereinafter AR 27-20]. Once a claim is paid, the action is considered "final and conclusive." 10 U.S.C. § 2735 (2006).

4. Villages that have good relationships with the United States can be beneficial in multiple ways. First, the village may help the United States stop insurgent attacks. Tom A. Peter, *US Deal with Afghan Tribe Promises to Reduce Taliban Strikes*, THE CHRISTIAN SCIENCE MONITOR (Jan. 4, 2011), http://www.csmonitor.com/World/Asia-South-Central/2011/0104/US-deal-with-Afghan-tribe-promises-to-reduce-Taliban-strikes. For example, one village in Afghanistan made an agreement with the United States that, in exchange for the release of a local Taliban member, the village would prevent Taliban attacks and prevent foreign militants from being in the region. *Id.*

Second, some villages that maintain good relations with the United States provide much needed inside intelligence. Betsy Hiel, *One Village at a Time*, PITTSBURGH TRIBUNE REVIEW (July 2, 2008), http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/trib-in-afghanistan/s_575503.html. For example, in 2008, soldiers from the 101st Airborne Division

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Toward the end of World War I, General John J. Pershing, the leader of the American Expeditionary Force, sent a telegram to the U.S. Congress requesting legislation that would allow the U.S. military to pay for injuries and damages that it inflicted upon French civilians and their property.[5] From this request, and after several amendments spanning nearly fifty years, the Foreign Claims Act (FCA) was created.[6]

The FCA's purpose is to "promote and maintain friendly relations" between the U.S. armed forces and host nations through timely payment of meritorious foreign claims.[7] The FCA permits the

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met with a village elder in the Narizah village, which is located in the province of Khost (the same province as this hypothetical scenario). *Id.* The village was suspected of catering to the Taliban. *Id.* Consequently, the unit desired to gather intelligence about the Taliban from the village. *Id.* In explaining why he appreciates the United States and why he is willing to aid the United States' mission, Hakim Wali, the village elder of Narizah, stated, "We really appreciate that you are here for us. . . . You cooperate with us, and we will cooperate with our own government to make it better." *Id.* A U.S. soldier responded, "We understand that we [the United States] are your guests. . . . We need to follow the laws of your cultures." *Id.* Wali then explained how important it is for the United States to adhere to the Afghan culture: "By doing that, respecting our culture and tradition . . . if you do good things for the Pashtun people, they will never forget you." *Id.*

Finally, villagers sometimes reveal to U.S. soldiers the location of improvised explosive devices (IEDs). *Fear of Taliban Keeps Villagers from Reporting IEDs*, SOUTH ASIAN MEDIA NET (Jan. 7, 2011, 12:00 AM), http://www.mediawitty.com/test/NewsDetail.aspx?group_id=43&id=12917&folder_id=250&Page_Title=Fear%20of%20Taliban%20keeps%20villagers%20from%20reporting%20IEDs. This information is invaluable considering that the number one cause of U.S. deaths in both Iraq and Afghanistan is from IEDs. Tim Reese, *Searching for IEDs in Afghanistan*, THE SACRAMENTO BEE (July 9, 2010, 9:41 AM), http://blogs.sacbee.com/photos/2010/07/searching-for-ied-in-afghanist.html; Clay Wilson, *Improvised Explosive Devices (IEDs) in Iraq and Afghanistan: Effects and Countermeasures*, FEDERATION OF AMERICAN SCIENTISTS (Aug. 28, 2007), http://www.fas.org/sgp/crs/weapons/RS22330.pdf.

5. S. REP. NO. 65-379 (1918).

6. *See* 10 U.S.C. § 2734 (2006). The FCA provides in relevant part:

> To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned . . . may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions . . . to settle and pay in an amount not more than $100,000, a claim against the United States for damage to or loss of [real property, personal property, or personal injury to a foreign country or inhabitant of a foreign country].

Id.

7. *Id.* Furthermore, the FCA is intended to provide a stabilizing effect in regions where the citizens feel as though all of their rights are disregarded. REPORT OF THE GEN. BD., U.S.

United States to pay noncombat-related[8] claims brought by inhabitants of foreign countries for damage that U.S. soldiers inflict on the inhabitants' person or property.[9]

One provision of the FCA, the local law and custom provision, requires that the claims commissioner—the person charged with adjudicating a foreign claim—adjudicate the claim in accord with the local law and custom of the country from which the claim originates.[10] This important provision is aligned with the current U.S. war strategy—the counterinsurgency doctrine—that was implemented in Iraq and is currently employed in Afghanistan.[11] As opposed to the old theory of U.S. warfare, the counterinsurgency doctrine places a new emphasis on understanding and adhering to the local culture.[12] Accordingly, if a claims commissioner does not properly understand and apply the local law and custom provision to the claim, then his actions are at odds with the FCA's purpose as well as with U.S. war strategy.[13]

The problem is that the U.S. military has no universal system that dictates how claims commissioners should first identify the local law and then apply it to the foreign claim.[14] Rather, most claims commissioners attempt to comply with the provision by creating ad hoc programs, usually with minimal confidence.[15] This Note explores

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FORCES EUROPEAN THEATER, LEGAL QUESTIONS ARISING IN THE THEATER OF OPERATIONS 26 (1945), *available at* http://usacac.army.mil/cac2/cgsc/carl/eto/eto-087.pdf. By paying meritorious claims, claims personnel are able to "not only pleas[e] the individual directly involved but [also make] him an agent of goodwill for the United States among his neighbors." *Id.*

8. See *infra* notes 84–86 for further discussion of what constitutes "noncombat."

9. *See* 10 U.S.C. § 2734.

10. 32 C.F.R. § 536.139 (2006).

11. Dexter Filkins & John F. Burns, *Mock Iraqi Villages in Mojave Prepare Troops for Battle*, N.Y. TIMES (May 1, 2006), http://www.nytimes.com/2006/05/01/world/americas/01 insurgency.html; *see also* discussion *infra* Part I.E; *President Obama's Remarks on New Strategy for Afghanistan and Pakistan*, N.Y. TIMES (Mar. 27, 2009), http://www.nytimes.com/ 2009/03/27/us/politics/27obama-text.html?pagewanted=1.

12. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-24, 6-9, B-7, D-8 (2006), *available at* http://usacac.army.mil/cac2/coin/repository/FM_3-24.pdf [hereinafter FM 3-24].

13. *See infra* Part II.

14. *See* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 316 (2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ operational-law-handbook_2010.pdf [hereinafter OPERATIONAL LAW HANDBOOK].

15. *See* CTR. FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., I LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, MAJOR

that problem and offers two solutions based on the type of country in which the claim arose: one for nations with several types of legal systems divided by regions and one for nations with more uniform legal systems. Both solutions provide a framework to produce a uniform system that will ensure that claims commissioners understand the local law and custom and can therefore apply the proper remedy when adjudicating claims.

Part I of this Note begins with the legislative history of the FCA, from its inception to its modern-day meaning and application. It then briefly explains the FCA's relation to the counterinsurgency doctrine, while providing a basic background of the doctrine itself. Part II investigates the problems with the FCA's application and explains the importance of a new system, particularly given the complexities and potential for mistakes in the current system. Finally, Part III offers two solutions intended to help resolve the problems associated with today's application of the FCA.

I. A HISTORY OF THE FOREIGN CLAIMS ACT

A. The Foundation is Laid for the Foreign Claims Act: World War I

The need for FCA-type legislation first arose during World War I.[16] The original legislation, the foundation for the later-codified FCA, was titled "An Act to give indemnity for damages caused by American forces abroad" ("Indemnity Act")[17] and was signed into

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COMBAT OPERATIONS 186–7 (2003), *available at* http://www.fas.org/irp/doddir/army/clamo-v1.pdf [hereinafter LEGAL LESSONS VOL. I].

16. *See* Act to Give Indemnity for Damages Caused by American Forces Abroad, ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918) [hereinafter Indemnity Act], *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943); *see also supra* note 5 and accompanying text.

17. Indemnity Act, Pub. L. No. 65-133, 40 Stat. 532. The Indemnity Act stated in relevant part,

> That claims of inhabitants of France or of any other European country not an enemy or ally of any enemy for damages caused by American military forces may be presented to any officer designated by the President, and when approved by such an officer shall be paid under regulations made by the Secretary of War.
>
> Sec. 2. That claims under this statute shall not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occur.

Id.

law by President Woodrow Wilson on April 18, 1918.[18] The Indemnity Act was intended to provide reimbursement to Europeans for damages inflicted by American forces.[19] In adjudicating a claim, the Indemnity Act instructed claims commissioners to adopt the same law of the country in which the damages occurred.[20] For example, if a U.S. soldier damaged someone's property in France, then the claims commissioner would use French law—as opposed to American law—to determine whether the U.S. soldier was negligent in causing the damages.[21]

Although primarily intended to address issues in France, Congress resisted confining the language of the Indemnity Act to apply only to damages caused in that country.[22] While one congressman proposed more narrow language for the statute,[23] Congress ultimately decided

18. *Id.* Additionally, the Indemnity Act had overwhelming support from Congress and its committees. H.R. REP. NO. 65-341, at 2 (1918). For example, the Committee on Military Affairs from the House of Representatives approved the bill unanimously. *Id.* A major reason for its popularity was Congress's concern that the United States's reputation was being damaged among French civilians because the military would not reimburse the French for injuries it had caused to a French citizen's property. *Id.* Accordingly, Congress found that the act could help remedy this issue. *See id.*

This lack of a claims system was especially embarrassing for the United States when compared to the British, who already had a claims system in place. S. REP. NO. 65-379, at 2 (1918). General Pershing elaborated on this in a Senate Report: The "[i]nability to pay claims for injuries due to accidents caused by Government motor vehicles and other causes result in much hardship and injustice to French people and seriously injures [the reputation of the American Army in France] as compared with the British." *Id.*

19. Indemnity Act, 40 Stat. 532.

20. *Id.*

21. *See id.*

22. *See id.* Congressman Little of the U.S. House of Representatives worried that the language was left too broad, and he was particularly concerned about officers paying out any claims to German citizens. 56 CONG. REC. 4801 (1918). In insisting that the U.S. Congress write the language correctly, he noted that "you should draw it so that it says what we mean and means what we say, so that such criticisms would not arise." *Id.* at 4802. Little feared that, without correcting the language, Congress was essentially authorizing American military officers to commit treason by giving them power to pay claims to German citizens. *Id.* From this discussion, the House of Representatives agreed to include language that only allowed payment of claims to "France or of any other European country *not an enemy or ally of an enemy* for damages caused by American military forces." *Id.* at 4801–05 (emphasis added).

23. Congressman Miller questioned the necessity of making the bill so sweeping. *Id.* at 4800. He proposed narrowing the bill's language to only cover claims that arose from nonmission-related troop maneuvers that occurred within the French borders. *Id.*

Congressman Kahn responded to this with an anecdote to show Congressman Miller that his proposed language was not broad enough. *Id.* at 4800–01. He explained, "An officer is instructed to carry a dispatch to a certain place. He is not engaged in maneuvers. He starts off in

to give the officers and regulation-writers broad discretion with only one serious caveat: officers were not to pay claims derived from combat-related scenarios.[24]

The importance of incorporating the law or practice of the host nation (i.e., the current local law and custom provision) into the adjudication process was also heavily debated.[25] General Pershing was the first person to initiate this discussion.[26] In a telegram dated January 17, 1918, Pershing cabled, "Proposed legislation designed to authorize prompt settlement of the claims of inhabitants that would be paid by French government under French laws if resulting from acts of French forces."[27] The House of Representatives expressed satisfaction with General Pershing's suggestion.[28] Congressman Green, for example, noted his approval: "[I]f the forces in France were operating in this country, we would not want our laws to be abrogated. We would want compensation to be paid in accordance with our law, and that is what the French want, and that is what they ought to have."[29] To Congressman Green, the provision was so

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an automobile, and going down the road at a fast rate on a dark night he runs over a pig belonging to a French peasant." *Id.* at 4800. He then asked Miller whether the French peasant should be reimbursed for this, to which Miller agreed. *Id.*

Both congressmen concluded that it is best to not limit statutory language too much; rather, some discretion should be left to the "judgment of our officers on the other side [of the Atlantic], who are dealing with the inhabitants day after day." *Id.* at 4801.

24. *See id.* at 4799–4803. In the discussion regarding the exclusion of combat-related scenarios, one congressman noted matter-of-factly that the bill was not "intended to permit a person having, for instance, a residence, along the battle front, which has been blown up, to recover damages." *Id.* at 4799; *see also infra* notes 84–86 and accompanying text.

25. *See, e.g.*, S. REP. NO. 65-379, at 1–2 (1918).

26. *Id.* at 2. General Pershing, through his first-hand familiarity with the importance of having some type of claims' adjudication system, advocated strongly for the Indemnity Act. *Id.*

27. *Id.* Pershing added, "We avail ourselves of French laws to quarter our troops in homes of their people, and should therefore conform to the French laws in our relation to them as nearly as practicable." *Id.*

28. *See* 56 CONG. REC. 4801.

29. *Id.* Congressman Green was adamant about approving the local law provision. *Id.* He pointed out that this was not an issue that the United States could "afford to be otherwise than liberal" on. *Id.* Moreover, he was wary about adding obstacles to applying the law of France to the claims for situations that arose in France: "We cannot afford to stick on small things when the law of France gives some compensation. We ought to be willing to give the same compensation to the people of that country that their own laws give to them. That limits and prescribes exactly what shall be paid." *Id.* Green continued his explanation by noting that the British were already conducting this claims operation:

important that even if the statute's language did go a "little beyond what we would consider proper in this country, it seems to me that we can under no circumstances afford to have any difficulty or bad feeling created . . . between the inhabitants of France and other friendly countries where [the United States'] troops may be operating."[30] After this discussion, the bill, which included a provision that required local law to be applied to claim adjudication, passed.[31] President Wilson signed the Indemnity Act into law approximately two months later.[32]

B. The Birth of the Modern-Day Foreign Claims Act: World War II

Near the beginning of World War II, the United States recognized the necessity of updating the 1918 Indemnity Act.[33] In July 1941, the Secretary of the Navy urged Congress to enact a new claims act to provide coverage for the U.S. presence in Iceland.[34] Earlier that month, Iceland's prime minister sent a message to President Franklin D. Roosevelt explaining that Iceland was prepared to let the United States send troops to its country in order to bolster Iceland's defense.[35] The Prime Minister made the agreement contingent on the

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> It is what the other armies are doing. If that is what the British troops are doing, as I understand they are; if that is what the French troops are compelled by their own Government to do, and it follows the custom of our own military forces, then being over in that country and fighting by their side, we ought to be willing to do that ourselves. I do not think the bill needs any change as it stands.

Id.

30. *Id.* Green continued:

> [A]nd even if we should pay some claim that was somewhat exaggerated, or one for which no liability would arise in our own country, it would be well worth all it cost in sustaining the friendly feeling that now exists between us and those who are our allies in fact if not in name.

Id.

31. *Id.* at 4805.

32. *See* Indemnity Act, ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943).

33. U.S. DEP'T OF THE ARMY, PAMPHLET NO. 27-162, CLAIMS PROCEDURES 134–5 (2008) [hereinafter DA PAM. 27-162], *available at* http://armypubs.army.mil/epubs/pdf/p27_162.pdf.

34. *Id.*

35. Message from the Prime Minister of Iceland to the President of the United States, July 1, 1941, 55 Stat. 1547, 1547.

United States' acceptance of eight conditions, the most relevant of which required the United States to "undertake defense of the country without expense to Iceland and promise compensation for all damage occasioned to inhabitants by their military activities."[36] President Roosevelt[37] agreed to all eight conditions.[38]

In December 1941, with a new incentive to improve the foreign claims process, the Senate's Committee on Naval Affairs considered and reported favorably on a bill to settle claims for damages caused by American armed forces in foreign countries.[39] The bill was intended to authorize the Secretaries of War and Navy during a then-present national emergency to appoint a claims commission to settle the claims.[40] After clearing the House of Representative's Committee on Claims,[41] the House subsequently approved the bill, noting its similarity to the 1918 Indemnity Act.[42] The bill was signed on January 2, 1942[43] and was to be effective for the duration of the

36. *Id.* at 1547–48. Iceland's prime minister was concerned about not only potential invasion but also the possibility that the United States would try to stake a claim in its sovereignty after the war was over. *Id.* Additionally, British forces originally stationed in Iceland for its protection were preparing to leave as they were needed elsewhere. *Id.* Consequently, Iceland wanted to ensure that the United States would agree to the conditions before accepting U.S. protection. *Id.*

37. *Id.* The President promised "compensation for all damage occasioned to the inhabitants by [the United States'] military activities." *Id.* at 1549.

38. *Id.* In an explanation regarding why the United States would send its troops to Iceland, the president explained that it is the policy of the United States to ward off attempts at aggression and to protect the New World. *Id.*

39. *See* S. REP. NO. 77-872 (1941).

40. *Id.* President Roosevelt had declared a national emergency effective May 27, 1941. Proclamation No. 2487, 55 Stat. 1647 (May 27, 1941).

41. H.R. REP. NO. 77-1503 (1941).

42. 87 CONG. REC. 10074 (1941). Congressman Michener inquired, "This bill is similar to an act that was in existence during [World War I]?" *Id.* Congressman Ramspeck replied, "Yes." *Id.*

43. Act of Jan. 2, 1942, ch. 645, Pub. L. No. 77-133, 55 Stat. 880 (1942). The new statute read in relevant part,

> To provide for the prompt settlement of claims for damages occasioned by Army, Navy, and Marine Corps forces in foreign countries . . . [t]hat during the national emergency declared by the President on May 27, 1941, to exist, and for the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims, the Secretary of War and the Secretary of the Navy are hereby authorized to appoint a Claims Commission or Commissions . . . to consider, adjust, determine and make payments in final settlement of bona fide claims on account of damages caused by Army, Navy, and Marine Corps forces, or individual members thereof, in a foreign country or possession thereof . . . to the property, public or private, or the person of

national emergency as declared by President Roosevelt.[44]

This new statute underwent further changes, however, and in a letter dated March 3, 1943, the Chief of the Foreign Claims Branch, Major Roy L. Deal, urged Congress to amend the most recent version of the statute adopted in 1942.[45] Deal advocated for an increase in the amount allowed to be paid from the previous limit of $1,000 to a new limit of $5,000, reasoning that it would "tend to promote friendly relations with foreign countries in which we may have military or naval forces."[46] The Committee approved the amendments, and the statute that eventually became the modern-day FCA was signed on April 22, 1943.[47]

The FCA was used effectively throughout World War II, particularly toward the end of the war when the United States temporarily shifted its claims adjudication duties to the respective countries in which the claims occurred.[48] For example, in normal circumstances, if a U.S. soldier damaged a French civilian's property,

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> inhabitants of such foreign countries, where the amount of such claim does not exceed $1,000.

Id.

44. *See* Proclamation No. 2487, *supra* note 40 and accompanying text.

45. H.R. REP. NO. 78-312 (1943).

46. *Id.* Additionally, the House of Representatives' Committee on Claims recommended that language preventing combat-related damages be included. *Id.* Major Deal noted, however, that while language preventing those types of damages was not in the previous act, his claims office had considered that clause to be implicit because "under the laws of war, such claims are not allowed by any country." *Id.*

47. Act of Apr. 22, 1943, ch. 67, Pub. L. No. 78-39, 57 Stat. 66 (1943). The main explicit change from the FCA as adopted in 1942 is that claims were then payable "when such damage, loss, destruction, or injury is caused by Army, Navy, or Marine Corps forces, or individual members thereof, or otherwise incident to noncombat activities of such forces, where the amount of such claim does not exceed $5,000." *Id.* Additionally, the new statute added,

> That no claim of any national of any country at war with the United States, or of any ally of such enemy country, except as the Commission or the local military commander shall determine that the claimant is friendly to the United States, and no claim resulting from action by the enemy or resulting directly or indirectly from any act by our armed forces engaged in combat, shall be allowed under this Act.

Id. This last excerpt is the combat exclusion provision discussed *infra* notes 84–86.

48. REPORT OF THE GEN. BD., *supra* note 7, at 23–24. This procedure was an improvised policy that the United States negotiated with several European nations to complete claims filed toward the end of World War II. *Id.* The original idea for this policy came from dealings with the British. *Id.* at 24. However, the United States was so pleased with the results from the experience with Britain that it decided to negotiate a similar policy with France, the Netherlands, Belgium, Norway, and Luxembourg. *Id.*

U.S. personnel would adjudicate the claim.[49] However, under this temporary system, the French government would adjudicate the French civilian's claim against the U.S. military and then send the bill to the United States.[50] One military report noted that this system was more effective because the countries could dispose of the claims with their own "local customs, diverse laws, standards of justice and measurement of damages" of which U.S. claims personnel were not familiar.[51] Moreover, the process was even more successful in countries that had significant language, law, and custom barriers.[52] Consequently, the report explains that this type of claims process worked more effectively because the claims' personnel were knowledgeable about the local law and custom of the host nation.[53]

C. Application of the Law Today

Following World War II, the temporary claims system ceased,[54] and after minor amendments made over the next thirteen years, the

49. *See* Applicable law for claims under the Foreign Claims Act, 32 C.F.R. § 536.139 (2006).

50. REPORT OF THE GEN. BD., *supra* note 7, at 24.

51. *Id.*

52. *Id.* For example, the French and the Dutch had better success with this improvised claims policy than did the British. *Id.*

53. *Id.* The report also noted the problems that arose when claimants felt that their rights were being violated. *Id.* at 25–26. For example, one claimant was paid $50 for a piece of damaged property that actually cost $300 to repair or replace. *Id.* at 25. However, the report explained that, on the whole, it could "hardly be doubted that in the vast majority of cases, goodwill has been created to the extent of more than justifying the expenditures made under the act." *Id.* at 26. Additionally, "The relief afforded not only pleased the individual directly involved but made him an agent of goodwill for the United States among his neighbors." *Id.* Overall, the report made clear that claimants generally had more satisfaction with this new process, which adhered more effectively to the local laws and customs of the respective nations. *See id.*

54. DA PAM. 27-162, *supra* note 33, at 135. While this policy was temporary then, there are currently similar policies in place in many of the countries in which U.S. soldiers are permanently stationed. *Id.* For example, Article VIII of the North Atlantic Treaty Organization Status of Forces Agreement provides that when U.S. forces damage property of a third-party claimant in the receiving country in the scope of their duty, the claim will be filed with the authorities from that receiving country. *Id.* DA PAM. 27-162 is illustrative: "Thus, a claim arising from U.S. Army activities in Germany would properly be presented to German authorities and not to the U.S. Army. The German authorities would then adjudicate the claim under German law." *Id.*

FCA was made permanent in 1956.[55] The FCA has changed little since its 1956 enactment.[56] Consequently, most of the FCA's substance comes from military regulations.[57] These regulations help provide the framework for how the FCA operates today.[58]

The claims process begins by determining whether the FCA is the appropriate system to adjudicate the claim, as some exceptions preempt the FCA.[59] Assuming the claim is not preempted, the first step is to determine whether there is a proper claimant.[60] A claimant must be an inhabitant of a foreign country[61] who alleges damage to his/her property or injury to his/her person.[62] If the claimant is proper, then the claim will be referred to a claims commission based on the commission's geographic and financial area of responsibility.[63] Either a one-person Foreign Claims Commission (FCC) or a three-person FCC will oversee the claim, depending on the monetary value.[64]

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55. *Id.* at 135.

56. *Id.* There have been some minor changes in the FCA since 1956, mostly involving raising the amount of money that can be paid out in a claim. *See* 10 U.S.C. § 2734 (2006).

57. *See* AR 27-20, *supra* note 3; DA PAM. 27-162, *supra* note 33; OPERATIONAL LAW HANDBOOK, *supra* note 14. One example of how the regulations give substance to the FCA is the FCA's usage of the word "inhabitant." DA PAM. 27-162, *supra* note 33, at 135. While not defined in the FCA, DA PAM. 27-162 provides a definition: "[T]he word 'inhabitant' conveys a broader meaning than do either the words 'citizen' or 'national.'" *Id.* The pamphlet also explains that whether a person is an inhabitant is usually obvious; however, it lists examples and exceptions for more gray areas that a claims commissioner would not know simply by looking at the language of the FCA. *Id.* For further discussion of how the military has used regulations to define the FCA, see REPORT OF THE GEN. BD., *supra* note 7, at 15.

58. *See* AR 27-20, *supra* note 3; DA PAM. 27-162, *supra* note 33; OPERATIONAL LAW HANDBOOK, *supra* note 14.

59. One of the primary doctrines that sometimes preempts a claim from being adjudicated under the FCA is a Status of Forces Agreement ("SOFA"). OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316. For a basic background of SOFAs, see R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? (2011), http://www.fas.org/sgp/crs/natsec/RL34531.pdf ("Status of Forces Agreements . . . generally establish the framework under which U.S. military personnel operate in a foreign country, addressing how the domestic laws of the foreign jurisdiction shall be applied toward U.S. personnel while in that country.").

60. *See* 10 U.S.C. § 2734 (2006).

61. *Id.* § 2734(a). Soldiers and civilian employees of the United States would not qualify under this definition. DA PAM. 27-162, *supra* note 33, at 135.

62. *See* 10 U.S.C. § 2734(a). However, that injury or damage cannot come from situations that are combat related. *Id.* § 2734(b)(3).

63. DA PAM. 27-162, *supra* note 33, at 137.

64. AR 27-20, *supra* note 3, at 54. A one-member FCC has a $15,000 monetary authority if he is a judge advocate or a claims attorney; otherwise, the FCC has a $5,000 monetary

Acceptance of payment by the claimant constitutes full satisfaction of the claim.[65]

D. The Local Law and Custom Provision and its Exceptions

One important provision applied in all foreign claims[66] is that claims commissioners must abide by the law and custom of the country in which the claim originates in order to properly adjudicate the claim.[67] The Operational Law Handbook, used by claims commissioners, explains how to adhere to this provision.[68] Regarding predeployment protocol, the handbook encourages commissioners to familiarize themselves with the FCA and the local law and custom of the region to which they will be deployed.[69] It also instructs the commissioners to apply the law of the host nation in determining both liability and damages.[70] If further guidance is necessary, the Handbook advises claims commissioners to contact the Chief of

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authority. *Id.* A three-member field FCC may approve any claim not exceeding $50,000. *Id.* If the claim exceeds $50,000, then the claim will be forwarded to the Commander of the U.S. Army Claims Service. *Id.* Any payment in excess of $100,000 must be approved by the Secretary of the Army or its appropriate designee. *Id.*

65. 10 U.S.C. § 2734(e).

66. One exclusion, however, is if the claim was combat related. *Id.* § 2734(b)(3). When this occurs, the claim never reaches the point of applying the local law custom because it is excluded from payment. *Id.*

67. AR 27-20, *supra* note 3, at 52. The FCA mandates that "[i]n determining an appropriate award, the law and custom of the country in which the incident occurred will be applied to determine which elements of damages are payable and which individuals are entitled to compensation." *Id.*

However, there is one exception for claims in which the claimant is from another country and was temporarily located in the country in which the claim occurred:

> [W]here the claimant is an inhabitant of another foreign country and only temporarily within the country in which the incident occurred, the quantum of certain elements of damages, such as lost wages and future medical care, may be calculated based on the law and economic conditions in the country of the claimant's permanent residence. Where the decedent is the subject of a wrongful death case, the quantum will be determined based on the country of the decedent's permanent residence regardless of the fact that his survivors live in the United States or a different foreign country than the decedent.

Id.

68. *See* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

69. *Id.* The handbook also instructs claims commissioners to "attempt to compile local law summaries for all countries in which the unit is likely to conduct operations." *Id.*

70. *Id.* The handbook adds that this inquiry "includes the local law or custom pertaining to contributory or comparative negligence and joint tortfeasors." *Id.*

Claims in the appropriate host nation;[71] the Command Claims Service with geographic responsibility for the country, if present;[72] and the U.S. Army Claims Service.[73] Finally, the handbook notes that, after a claims commissioner has deployed, he may contact either "local attorneys for assistance, or obtain information on local law and custom from the U.S. Consulate or Embassy located in-country."[74]

In addition to the handbook's guidance, the military teaches several classes designed to instruct claims commissioners on the broader subject of foreign claims, of which local law and custom is a subtopic.[75] For example, each commissioner must complete a four-hour claims class and pass an examination before becoming certified to adjudicate claims.[76] Additionally, deploying claims commissioners attend a one-day Deployment Claims Conference at Fort Meade, Maryland.[77]

In addition to this training, the Army also encourages claims commissioners to attend a predeployment preparation program titled the Brigade Judge Advocate Mission Primer (BJAMP).[78] The

71. *Id.*

72. Telephone Interview with Foreign Torts Branch, U.S. Army Claims Serv., Fort Meade, Md. (Jan. 6, 2012).

73. OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

74. *Id.* The handbook also gives advice regarding conflict of law situations in which the local law and custom would be inapplicable either because of policy reasons or because there is nothing in the local law that pertains to the situation presented in the claim. *Id.* The handbook advises claims commissioners to follow the general principles applicable to tort law that are discussed in AR 27-20. *Id.*

75. Telephone Interview with Foreign Torts Branch, *supra* note 72.

76. *Id.*; *see also* Rochelle M. Howard, *Foreign Claims Training*, THE JUDGE ADVOCATE GENERAL'S CORPS, https://www.jagcnet.army.mil/8525752700445D3A/0/E22A6AF5445863DF8525765F004D794A/$file/FCC%20Training%20Oct%2009.pdf (last visited Feb. 7, 2012) (curriculum for class); *FCC Appointment Qualification Exam v.1228*, THE JUDGE ADVOCATE GENERAL'S CORPS, https://www.jagcnet.army.mil/8525752700445D3A/0/30D6DD8EAED7C6918525787D00676801/$file/FCC%20Quiz.pdf (last visited Feb. 7, 2012) (quiz for class).

77. Memorandum from LTC Gregory S. Mathers, Chief, Tort Claims Division, U.S. Army (May 4, 2010) (on file with author).

78. OFFICE OF THE JUDGE ADVOCATE GEN., *Pre-Deployment Preparation Program Frequently Asked Questions*, https://www.jagcnet.army.mil/__85257578006B54AF.nsf/0/168B0C1795FD0E828525776600681530?Open&Highlight=2,bjamp (click "Frequently Asked Questions" hyperlink) (last visited Feb. 7, 2012) [hereinafter PDP FAQ].

This program is a part of LTG Scott C. Black's—the Army's former Judge Advocate General—official Pre-Deployment Preparation Program (PDP). *See* Memorandum from LTG Scott C. Black, Judge Advocate General, U.S. Army, to Judge Advocate Legal Services Personnel, U.S. Army (Feb. 3, 2009), https://www.jagcnet.army.mil/85257578006B5F7E/0/

BJAMP is a three-day course that teaches claims commissioners about legal issues they might face in upcoming deployments.[79] The course covers all legal issues as opposed to strictly claims-related topics. Because of the breadth of legal issues required to be taught in the program, the curriculum is only able to allot minimal time to instruct claims commissioners on the specific local law and custom of the nation or region to which they are deploying.[80]

Today, many claims commissioners engage in ad hoc methods, discussed *infra* Part II, as they try to comply with the local law and custom provision.[81] Due to the complexity of the local law and custom in countries like Iraq and particularly Afghanistan, many commissioners struggle to determine the proper local law and custom.[82]

1. Limitations on the FCA and the Local Law & Custom Provision

While the Foreign Claims Act is written so that claims are adjudicated in accordance with local law and custom, certain provisions limit its applicability.[83] The FCA's largest limitation is the combat exclusion provision, which prevents the payment of claims that arise in combat-related situations.[84] This provision provides that,

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C58E252DED753B84852575780057510A/$file/PDP%20Policy%20Memo.pdf. The PDP is a program designed to prepare judge advocates for deployment. *Id.*

79. PDP FAQ, *supra* note 78.

80. For example, the program has only a one-hour course on the broad subject of "Islamic Law and Culture." OFFICE OF THE JUDGE ADVOCATE GEN., Brigade Judge Advocate Mission Primer Agenda, https://www.jagcnet.army.mil/__85257578006B54AF.nsf/0/168B0C1795FD0E828525776600681530?Open&Highlight=2,bjamp (click "BJAMP Agenda.docx" hyperlink) (last visited Jan. 9, 2012) [hereinafter Mission Primer].

81. LEGAL LESSONS VOL. I, *supra* note 15, at 186.

82. *Id.*; *see also* discussion *infra* Part II.

83. 10 U.S.C. § 2734 (2006); *see also* AR 27-20, *supra* note 3, at 51; DA PAM. 27-162, *supra* note 33, at 136.

84. 10 U.S.C. § 2734(b)(3). The FCA states, "A claim may be allowed . . . only if it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat." *Id.* It then provides an exception—which indicates that the situation could still be a valid claim—for circumstances in which an accident occurs relative to an aircraft if the situation was "indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission." *Id.*

However, the United States' military has two separate programs—Solatia and the Commander's Emergency Response Program ("CERP")—that are not limited by the combat

regardless of the local law, no claim will be paid if the claims commissioner determines that the situation was related to combat.[85] Since the FCA's enactment, the combat exclusion has occasionally puzzled claims commissioners who struggle to determine a consistent definition for what exactly is "combat" or "combat-related."[86]

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exclusion provision. Solatia payments are given as an expression of sympathy toward a victim or his family when there is no legal mechanism to make a claim. *See* AR 27-20, *supra* note 3, at 55. However, the maximum payout is $2,500. Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1795 (2009). To illustrate an example when a Solatia payment would be effective: if the United States injured an innocent Iraqi civilian in a firefight, it most likely could not pay the claim under the Foreign Claims Act because of the combat exclusion. *Id.* at 136. However, the United States could pay out a Solatia claim as a gesture of sympathy. AR 27-20, *supra* note 3, at 55.

CERP payments can be used in similar situations. The Judge Advocate General Operational Law Handbook notes, "CERP appropriated funds may be used for condolence payments to individual civilians for the death or physical injury resulting from U.S. . . . military operations that are not compensable under the Foreign Claims Act." OPERATIONAL LAW HANDBOOK, *supra* note 14, at 242. They can also be used to repair property damage that would not be payable under the FCA. *Id.*

For further discussion on these programs, see Will Oremus, *How Cheap Is an Iraqi Life?: The Thorny Debate Over Compensation Payments and Why It Matters to the U.S. War Effort*, SLATE (Dec. 23, 2010, 10:28 A.M.), http://www.slate.com/id/2278387/; Walter Pincus, *The Measure of a Life in Dollar and Cents*, WASH. POST, JUNE 18, 2007, at A15.

85. 10 U.S.C. § 2734(b)(3). The Army Regulation for Claims and its affiliated pamphlet shed some light on what defines a "combat activity." AR 27-20 defines combat activities as "[a]ctivities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict." AR 27-20, *supra* note 3, at 107. DA PAM. 27-162 explains that

> [c]laims arising 'directly or indirectly' from combat activities of the U.S. armed forces are not payable. Whether damages sustained in areas of armed conflict are attributable to combat activities or noncombat activities depends upon the facts of each case. Damages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy, are certain to be considered as arising from combat activities.

DA PAM. 27-162, *supra* note 33, at 136.

86. A good example of this confusion occurred in the beginning of the Iraq war. The U.S. Air Force had a procedure in which it classified all claims as "combat activity" for no other reason than that the claim took place in Iraq. Sitaraman, *supra* note 84, at 1793–94. So, for example, if a U.S. truck negligently crashed into an Iraqi's vehicle on a routine supply route during this time period, the claim would not have been payable. *See id.*

However, the definition for the combat-exclusion provision has recently been changed to provide claims commissioners with better guidance. Telephone Interview with Foreign Torts Branch, *supra* note 72.

For further discussion on the combat exclusion provision, see Michael D. Jones, *Consistency and Equality: A Framework for Analyzing the "Combat Activities Exclusion" of the Foreign Claims Act*, 204 MIL. L. REV. 144 (2010); John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455 (2008); Jordan

Several other minor limitations preclude claims from being adjudicated in accordance with the local law and custom. For example, FCA regulation forbids insurers or third-party payers from asserting a claim against the United States.[87] Additionally, claims that are not in the "best interest of the United States, [are] contrary to public policy, or otherwise" contrary to the intent of the statute may not be paid out.[88] Finally, there are numerous limitations on damages, regardless of the local custom, including a prohibition against paying a claimant's court costs, the costs of preparing a claim, expert witness fees, and punitive damages.[89] Consequently, while the FCA mandates that the local law and custom be applied in adjudicating foreign claims, these limitations may prevent this from happening.

E. The FCA's Relationship to the U.S. War Strategy—the Counterinsurgency Doctrine

While the FCA originated in World War I, it is still being implemented as part of the war strategy that the United States uses today in the form of the Counterinsurgency Doctrine.[90] The field manual for counterinsurgency describes the doctrine as a "mix of offensive, defensive, and stability operations conducted along multiple lines of operations. It requires Soldiers and Marines to employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies."[91] Furthermore, forces that have practiced counterinsurgency effectively have generally "[l]earned about the broader world outside the military and requested outside assistance in understanding foreign political, cultural, social and other situations beyond their experience."[92] As opposed to

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Walerstein, Note, *Coping with Combat Claims: An analysis of the Foreign Claims Act's Combat Exclusion*, 11 CARDOZO J. CONFLICT RESOL. 319 (2009).

87. 32 C.F.R. § 536.138(l) (2011).

88. *Id.* § 536.138(h). The statute continues by providing an example of this limitation in which the United States should not pay out a claim if the claimant was from a country considered to be unfriendly to the United States. *Id.*

89. AR 27-20, *supra* note 3, at 24.

90. FM 3-24, *supra* note 12, at D-8. The Counterinsurgency Field Manual discusses the FCA in the "Legal Considerations" section of the manual. *Id.*

91. *Id.* at Foreword.

92. *Id.* at x.

conventional warfare, counterinsurgency warfare places a greater emphasis on understanding and adhering to local culture.[93] As a result, the U.S. military has had to adjust its training. Indeed, many U.S. military units today undergo training scenarios that familiarize soldiers with the culture that they will encounter overseas.[94]

II. ANALYZING THE MILITARY'S APPLICATION OF THE LOCAL LAW & CUSTOM PROVISION

There is little doubt that an integral part of serving the FCA's purpose requires that the local law and custom is applied to the adjudication of the claims. Beginning with General Pershing in World War I and extending to the modern-day definition of a foreign claim, the FCA has always emphasized the importance of ensuring that the local law and custom of the host nation is applied to all qualifying claims.[95] Indeed, the results from the claims filed in World War II illustrate that the FCA works more effectively when claims commissioners are thoroughly knowledgeable about the local law and custom.[96] Furthermore, because of the emphasis that the counterinsurgency war strategy places on understanding and respecting the local population's culture, it is equally if not more important for claims commissioners to understand and correctly apply the proper local law and custom to foreign claims.[97]

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93. *Id.* at 1-23. The manual notes,

> In most COIN operations in which U.S. forces participate, insurgents hold a distinct advantage in their level of local knowledge. They speak the language, move easily within the society, and are more likely to understand the population's interests. Thus, effective COIN operations require a greater emphasis on certain skills, such as language and cultural understanding, than does conventional warfare. The interconnected, politico-military nature of insurgency and COIN requires immersion in the people and their lives to achieve victory.

Id.

94. *See* Kevin Stabinsky, *Linguists Key to Success for Afghan Soldiers Training in U.S.*, U.S. DEP'T OF DEFENSE (Nov. 2, 2006), http://www.defense.gov/news/NewsArticle.aspx?ID=1998; *see also* discussion *infra* Part III.

95. *See* discussion *supra* Part I.

96. REPORT OF THE GEN. BD., *supra* note 7, at 23–24; *see also* discussion *supra* Part I.B.

97. While the FCA is clearly an important aspect of the counterinsurgency doctrine, the two policies have similar explicit purposes as well—they both have a strong focus on catering to the local population. Whereas the FCA's stated purpose is to "promote and maintain friendly relations" with the host nation and its people, 10 U.S.C. § 2734(a) (2006), the counter

The problem, however, is that too often the commissioners charged with adjudicating the foreign claims improperly identify the local law and custom of the host nation and thus do not (and cannot) apply it properly.[98] This is in large part due to the lack of a uniform policy that provides specific guidance on *how* to identify the local law and custom.[99] Because of this, the claims commissioners' protocol in identifying and applying the local law and custom often involves engaging in ad hoc techniques.[100] Furthermore, claims commissioners have at times minimal confidence that they are applying the correct local law and custom to the claim.[101]

One technique that some commissioners use to determine the local law and custom is to ask local, host-nation attorneys who presumably have a better understanding of the law.[102] This approach has

insurgency doctrine notes that "by focusing on efforts *to secure the safety and support of the local populace*, and through a concerted effort to truly function as learning organizations, the Army and Marine Corps can defeat their insurgent enemies." FM 3-24, *supra* note 12, at x (emphasis added).

98. *See* LEGAL LESSONS VOL. I, *supra* note 15, at 186–87.

99. *See* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

100. *See* LEGAL LESSONS VOL. I, *supra* note 15, at 186–87; 2 CTR. FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, FULL SPECTRUM OPERATIONS 186–87 (2004) [hereinafter LEGAL LESSONS VOL. II], *available at* http://www.fas.org/irp/doddir/army/clamo-v2.pdf; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

101. *See* LEGAL LESSONS VOL II, *supra* note 100, at 187. Claims in Iraq could be considered an exception to this point, as many claims commissioners in that country have concluded that Iraqi tort and liability law is similar to the type of law practiced in the United States. *Id.* at 187–88. LTC Karin Tackaberry, a judge advocate who was formerly with the 82nd Airborne Division, provides a good example of this. Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, 2004-FEB ARMY LAW. 39, 40. She deployed with her unit to the Al Anbar province of Iraq in September of 2003. *Id*. LTC Tackaberry noted that, although foreign claims required the applicability of the law and custom of the country in which the incident occurred, "Fortunately, Iraqi tort law follows the same basic principles as common law torts." *Id*. As a result, claims commissioners could use their previous legal experience and training from United States common law to ascertain the proper law to apply in the assessment of liability and damages. *Id*.

However, at least one scholar has disagreed with the notion that the two laws are similar. *See* Witt, *supra* note 86, at 1476. John Fabian Witt, a professor of legal history at Columbia Law School, noted that while the "official army line on the local tort law of Iraq is that it resembles the Anglo-American common law of torts . . . that is almost certainly untrue, and there is very little to make us think that anyone put much time into deciding one way or another." *Id.*

102. LEGAL LESSONS VOL. II, *supra* note 100, at 187; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

encountered problems in the past, however, as the advice from local attorneys was often inconsistent and contradictory.[103] Other commissioners rely on interpreters.[104] However, this could be problematic as interpreters are not experts in the law, and in the past, the interpreters were more likely to only be able to assess the custom for damages rather than for liability.[105]

Compliance under the provision is made more difficult because there is not necessarily a consistent methodology in determining and then applying the local law and custom of the host nation. And while the military has programs in place to provide some training regarding the proper protocols by which to identify and then apply the local law and custom provision,[106] more efficient and effective programs could be instituted to better ensure that the proper laws are applied in the proper regions.[107] Further, those same programs could compile the amount of knowledge that would be passed from one deployment to the next.[108]

The problem of either not knowing or improperly applying the local law and custom to a claim is only amplified for claims filed in countries that either have no published legal code or have considerably different laws and customs than the United States.[109] Afghanistan, for example, has multiple types of both formal and informal laws.[110] One report from a nonprofit organization that

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103. LEGAL LESSONS VOL. II, *supra* note 100, at 187. Claims commissioners determined that there were a variety of factors that led to these inconsistencies from the local attorneys, including different laws from discrete areas as well as local attorneys being biased to their nearby regions. *Id.*

104. LEGAL LESSONS VOL. I, *supra* note 15, at 187.

105. *See id.* Interpreters were considered to be especially useful in determining the amount of damages that a claim was worth. *Id.* For example, if a U.S. vehicle struck a claimant's donkey, the interpreter could tell the claims commissioner whether $330 was a reasonable value for the donkey. *Id.*

106. *See supra* notes 68–80 and accompanying text.

107. *See infra* Part III.

108. *See infra* Part III.

109. For example, claims commissioners encountered an unusual local law and custom in Somalia in 1993. Vanessa Blum, *After the War, Time to Pay: How Jag Lawyers settle Foreign Claims over Noncombat Damage*, LEGAL TIMES, Apr. 21, 2003, at 1. The lawyers were trying to assess wrongful death claims in the country, and according to Somalia's law, a man's life was valued at 100 camels and a woman's life at 50 camels. *Id.* The defense department, seeing a very expensive issue, decided to establish a ceiling of $10,000 for death claims. *Id.*

110. AFG. LEGAL EDUC. PROJECT, AN INTRODUCTION TO THE LAW OF AFGHANISTAN 3 (3d

discusses Afghani customary laws divides the country into four geographic regions, based primarily on the discrete customs of each region.[111] Another authority on Afghani law explains that, while Afghanistan has both a constitution and a civil code, many Afghani tribes rely on a custom-based legal system rather than on formal Afghani civil law to resolve disputes.[112] When one claims commissioner was charged with assessing damages for a 19-year-old Afghan struck by a military vehicle, he was unsure which law should be applied.[113] Needing an answer, the claims commissioner spoke to expatriate Afghani lawyers and decided to apply remedy principles similar to U.S. law.[114] Although this situation did not result in any known problems, this type of approach could lead to disgruntled Afghanis if, for example, the expatriate Afghani lawyers gave incorrect advice. Indeed, other situations have caused problems when attorneys did not properly understand the local law and custom.[115]

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ed. 2011), *available at* http://alep.stanford.edu/wp-content/uploads/2011/02/Intro-Book-3d-Edition.pdf.

111. INT'L LEGAL FOUND., *supra* note 2.

112. *See* AFG. LEGAL EDUC. PROJECT, *supra* note 110, at 3. This type of custom-based law could be considered a form of alternative dispute resolution. *Id.* As opposed to settling disputes through the formal written law as applied in court, many Afghanis settle their disputes through this alternative method. *Id.* at 4. Many of those Afghani citizens turn to this method of resolving disputes because it is "considered more fair, efficient, accessible, and respectful of the local values than the [formal] system." *Id.* Rather than wait for the slow legal process, an Afghani would approach his tribal elders to assist in mediating the dispute. *Id.* at 3. The institutions comprised of these elders are often called *shuras* or *jirgas*. *Id.* This version of dispute resolution applies an informal law, custom, or tradition and has existed in Afghanistan for centuries. *Id.* Furthermore, these practices are still considered to be strongly prevalent but are especially popular in more rural regions of the country. *Id.* at 4.

113. Blum, *supra* note 109, at 2.

114. *Id*. To assess damages, the lawyer considered the man's age, future earnings, and dependents. *Id.*

115. For example, in a nonclaims-related situation, the attorney Natalie Rea, who now works as a staff attorney for the Legal Aid Society of New York, worked for an organization in Rwanda as a defense attorney for prisoners in that country. Leonard Post, *Teaching Defense: US Lawyers Teach Afghan Attorneys the Art of Defense*, NAT. LAW J., Jan. 10, 2005, *available at* http://theilf.org/wp-content/uploads/2011/07/National-Law-Journal-Teaching-Defense.pdf. Rea's initial strategy was to obtain plea bargains for the over 125,000 prisoners she and three other attorneys were in charge of defending. *Id.* However, she did not know that "a Rwandan would never admit to something just to get a shorter sentence" because it would cause the community to shun them. *Id*. Rea's organization learned from the mistake and, in an indication of the importance of understanding the customary laws of a nation, later undertook a mission to create a compilation of customary laws of Afghanistan, where the organization was defending Afghanis. *Id.* The compilation of customary laws is cited INT'L LEGAL FOUND., *supra* note 2.

The problem is not that claims commissioners refuse to cooperate with the provision. Indeed, as evidenced by many examples, commissioners are seeking out their own unique methods in an effort to comply with the provision.[116] Instead, the difficulty is that there is little to no uniform system in place to ensure that the proper local law and custom is consistently and correctly identified.[117] Without an effective system, claims commissioners have a difficult time ascertaining exactly what the local law and custom actually is, and as a result, each claims office utilizes inconsistent procedures in an attempt to understand and apply the local law and custom—a process that too often falls short of upholding the original intent of the FCA.[118]

III. PROPOSAL

The solution to this problem lies in creating a consistent process used throughout the military to assist claims commissioners in determining what the local law and custom is in the region in which they adjudicate claims. I propose two distinct methodologies, each addressing the unique challenges of a country's universal legal system or lack thereof, that can provide a consistent process for all claims commissioners.

A. Countries Without a Universal Legal System

For claims filed in countries without a universal legal system,[119] I propose a system that revolves around a central claims database. The database can provide claims commissioners with information about the local law and custom of the host region. To start the database, though, the first unit that deploys to a new region would need to initiate something that could constitute a foundation of the region's laws. This foundation would be the starting point for the database,

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See also *supra* note 2 and accompanying text for an example of a possible consequence of not applying the proper local law and custom to a claim.

116. *See supra* notes 102–05 and accompanying text.

117. *See* OPERATIONAL LAW HANDBOOK, *supra* note 14, at 316.

118. *Id.*; *see also supra* notes 102–05 and accompanying text.

119. *See, e.g.*, *supra* notes 109–12 and accompanying text.

and with every subsequent deployment, more information about that specific region could be added by each new claims commissioner.

The logistics of creating a foundation of law are not that far removed from what the military already does for deploying units—it teaches the units certain customs of the region to which the unit will be deploying.[120] Indeed, many units have a predeployment strategy in which they train in mock environments intended to familiarize the soldiers with the region and culture they will encounter.[121] The 3rd Brigade Combat Team ("BCT") from the 1st Armored Division did just this in a training scenario in New Mexico.[122] In preparing for a deployment to Afghanistan, the BCT hired a private government contractor to lead a training scenario designed to teach its soldiers Afghani social skills.[123] The brigade commander emphasized the importance of the training scenario in helping his soldiers understand the local culture, particularly because winning over the hearts and minds of the local population was central to their mission.[124]

Just as the military uses experts to compile and teach the customs of specific cultures, so too could the military organize a group of experts to create a foundation of the laws of a particular region. These experts would essentially amount to a think tank that would

120. Stabinsky, *supra* note 94; *see also* Robert Gray, *Wooing Afghan Hearts and Minds*, ABQJOURNAL.COM (Oct. 3, 2010), http://www.abqjournal.com/news/state/03232448state10-03-10.htm.

121. Stabinsky, *supra* note 94. In this situation, interpreters taught American soldiers about Afghan culture, habits, and simple phrases in their language. *Id.* Hassan Wilson, a native Afghan as well as one of the interpreters assisting in this effort, noted that "[w]hat we do is very important." *Id.* (quoting Hassan Wilson). While interpreters are not related to the combat part of the mission, they are "integral to mission success in a war in which winning the support of the Afghan people is equally as important as defeating extremists in combat." *Id.*

122. Robert Gray, *supra* note 120.

123. *Id.*

124. *Id.* The brigade commander explained that while governments used to disregard any type of diplomacy once the war began, the new counterinsurgency-type warfare is contrary to that:

> In a traditional war, diplomacy ends when war begins. . . . The discussion [of diplomacy] is over. Wiping out the opposing military force is expected to bring about the policy goal. But with counterinsurgency, the discussion is not beside the point; it is the point. The whole thing is an argument to win the support of the people.

Id. The brigade commander also noted that interest in this type of counterinsurgency doctrine is rather new and increased greatly following the start of Operation Iraqi Freedom on March 19, 2003. *Id.*

formulate general themes of the regional law likely to be encountered. The think tank could be comprised of attorneys, professors, and cultural anthropologists who have studied the specific region.[125] Just as the Army puts together a group of people to teach deploying troops about local cultures,[126] it could also organize a similar group of scholars to develop a foundation of laws that the claims commissioners could take with them prior to the first deployment to the new country.[127]

Once the foundation of law is created, the compilation of new information into the database could begin. Armed with the basic laws that the think tank compiled, the claims commissioner could visit the tribal elder[128] of the region and confirm the accuracy of the information.[129] At this point, the claims commissioner would have a greater understanding of the region's laws and custom and could send the information back to the Foreign Torts Branch at Fort Meade, Maryland. From there, the Foreign Torts Branch could create a database that could be accessible to all future and current claims commissioners.[130]

In addition to gathering information from the tribal elder, claims commissioners could record pertinent information on particular claims that they paid to claimants. If this information included facts about the claim along with explanations as to why the claimant was

125. It is particularly important that the specific region is researched, as the law could vary from one region to the next. *See supra* notes 103–05, 111.

126. *See supra* notes 121–24 and accompanying text.

127. Or, alternatively, it could expand the group it already uses to teach Islamic culture to include a group of scholars who could create the foundation of laws.

128. For a description of the importance of tribal elders to much of Afghan society, see KHALIL NOURI ET AL., RESTORING AFGHANISTAN'S TRIBAL BALANCE: AN INDIGENOUS PEACE PROCESS FOR UNIFYING A SHATTERED NATION (2011), *available at* http://newworldstrategies coalition.org/uploads/NWSC_White_Paper_2.27.11_-_Restoring_Tribal_Balance_1__1_.pdf. The report explains, *inter alia*, how a certain Afghani culture has its law instituted by ruling of a *Loya Jirga*, or a grand assembly of elders. *Id.* at 8.

129. The tribal elder example clearly might not fit for certain nations or cultures. However, the military could easily adjust its strategy and consult whoever it thought to be the most knowledgeable about local law or the most likely to be in charge of upholding the local law.

130. Sending the information to Fort Meade would be an ideal start to this system. Once the claims service at Fort Meade is able to put together a prototype, the military could then create a database that people across the globe could not only access in order to learn the law but could also directly input the information that they have learned. This would be more efficient, as it would eliminate Fort Meade as a middleman.

paid a particular amount, then future claims commissioners could use these examples as a type of "case law" to ensure that claims were being adjudicated consistently throughout the region.[131]

The ultimate goal of this new program is to create a comprehensive database that grows with each subsequent deployment. It is unreasonable to believe that any one unit or group of scholars could put together a perfect compilation of laws for a specific region. However, an evolving database is efficient and would further the claims mission if, each time a unit deploys, all the knowledge learned from the previous deployment is accessible and informative. There is little debate that conversations that take place between the old and the new claims commissioners when the new unit arrives are helpful in conveying information about the local law and custom; however, it is virtually impossible for claims commissioners to remember everything taught during those conversations. Constructing a universal database presents a solution that allows *everything* to be passed on and for each succeeding unit to serve the claims mission more properly than the past.

B. Countries With a Universal Legal System

An even more effective system is possible when the host nation utilizes a universal and uniform legal system.[132] For these situations,

131. The BJAMP already emphasizes the importance of continually updating the material it teaches to reflect current conditions in the countries where the United States is at war. PDP FAQ, *supra* note 78. In the BJAMP program, recently redeployed personnel may come to the conference, and currently deployed claims commissioners may share their experiences through video-teleconferencing. *Id.*

Additionally, the military has a program in place, the After Action Review (AAR), that is designed to help soldiers learn from past experiences. An AAR is "a professional discussion of an event, focused on performance standards, that enables soldiers to discover for themselves what happened, why it happened, and how to sustain strengths and improve on weaknesses. It is a tool leaders and units can use to get maximum benefit from every mission or task." *After Action Review*, AIR UNIV., http://www.au.af.mil/au/awc/awcgate/army/tc_25-20/chap1.htm (last visited Feb. 7, 2012).

132. While this proposal refers to a "nation," it could also mean a culture (e.g., Shiite religion). Further, if there is a particular group of countries that share a similar legal system, the proposal could apply to the entire group of countries. The proposal does not seek to create costs when a more efficient alternative is available. Thus, if there are only slightly nuanced differences between the laws, it would probably be wiser to use parts of both proposals. To illustrate: if all of Europe (I use Europe for simplicity purposes) had similar laws, then a

the Department of Defense, or a similar institution, could assemble a think tank similar to the one discussed in the previous proposal. However, more resources could be devoted here because it would cover an entire nation's or culture's laws and customs as opposed to one discrete region or tribe. The think tank could produce the equivalent of a hornbook or primer explaining liability and damage issues in the host nation.[133] Ideally, for future U.S. conflicts, the think tank would be established before troops ever enter the country. However, establishing a think tank can still be effective even in ongoing situations like, for example, Iraq. The think tank would essentially compile a set of guidelines in accordance with both the law and custom of the host nation as well as detail potential scenarios and the appropriate remedies of frequently arising foreign claims.[134] These guidelines could be useful for claims commissioners to review when assessing the viability of a foreign claim. Moreover, such a system would help claims commissioners avoid the types of problems

compilation of laws could be created for Europe. Then, once a claims commissioner deployed to a specific region in Europe, he could visit a leader of that region to discuss which laws fit and what should be amended, added, or subtracted.

133. This could be conducted in much the same process that occurs when each department of the government creates regulations, field manuals, and pamphlets. See U.S. DEP'T OF THE ARMY, ARMY REGULATION 25–0, THE ARMY PUBLISHING PROGRAM (2008), for information on how the Army creates and publishes its publications and forms.

134. This part of the proposal assumes that the United States only recognizes one type of law within the country. For example, when the United States arrived on the Haitian shores to provide disaster relief for the 2010 earthquake, there was no dispute as to what type of law the Haitians follow. Telephone Interview with Foreign Torts Branch, *supra* note 72. Consequently, compiling a fixed set of laws for regions like Haiti would be comparatively simple. However, when the United States invaded Iraq in 2003, it faced a different situation. *Id.* The Iraqis were dealing with numerous types of law—its own cultural laws (separated by, for example, the Shiites, Sunnis, and Kurds); the residual laws from the Saddam Hussein regime; and the new laws that the United States was trying to implement in conjunction with the new Iraqi government. *Id.*

This potential for different types of laws does not conflict with this proposal; instead, this solution merely proposes that the military institutes a policy to ensure that regardless of the law the claims commissioners decide to incorporate into the adjudication of claims, that it be the law that is incorporated consistently and not vary from one deployment to the next.

Additionally, whenever a proposed think tank is organized, that group could consult with the military and determine what type of legal code would be most appropriate to incorporate into the claims adjudication process. Upon determining this, the think tank could then decide on the correct laws.

that occurred in the past when local law and custom was applied with uncertainty in the adjudication of foreign claims.[135]

The International Legal Foundation (ILF) has already created something resembling this approach for its criminal defense attorneys.[136] The report, *The Customary Laws of Afghanistan*, is divided into four geographical regions of Afghanistan.[137] While the report focuses on criminal violations, it provides proof that such reports can be written, even about countries that have no universal legal system.[138] Furthermore, the report provides a template for how the military think tank could structure its own report to be more specific to foreign claims. It is a simple, easy-to-read-and-reference sixty-four-page document.[139] Creating a similar document would make it much more likely that claims commissioners would know the correct local law and custom when adjudicating foreign claims and be able to apply it properly.[140] Additionally, the ILF report was created by a single Afghan professor;[141] surely the United States has the resources to assemble a team of individuals who could create a similar primer for claims commissioners.

CONCLUSION

It is time to implement a program that will standardize the application of the local law and custom in foreign claims adjudication. Without a uniform program, claims commissioners will continue to either utilize ad hoc techniques that fall short of the intentions of the FCA or apply local laws incorrectly or inconsistently. Because of the relatively recent emergence of the counterinsurgency doctrine, there has never been a more important

135. *See* LEGAL LESSONS VOL. II, *supra* note 100, at 187.
136. *See* INT'L LEGAL FOUND., *supra* note 2.
137. *Id.* at 2–3.
138. *Id.* at 4.
139. *Id.* at 1.
140. While this proposed methodology involving a report would be easier to create for an entire nation, it also could be used for individual regions—similar to what the ILF did in its report. Thus, this methodology could technically be a solution for countries with a universal legal system as well as those without. However, it is likely not as effective or efficient a strategy for countries that have multiple regions because of the substantial variables of the law and custom within each discrete region.
141. *See* INT'L LEGAL FOUND., *supra* note 2, at 4.

time in American warfare history to adapt U.S. policy to the local law and custom of the host nation. The programs this Note recommends will better ensure that the FCA's purpose is effectuated, thus resulting in happier claimants and a stronger fulfillment of the U.S. war strategy.

AFTERWORD[142]

Before the claims commissioner finalized his investigation regarding Shabbir's claim, he reviewed the database that addressed laws within the Khost province. The claims commissioner read a short paragraph discussing the killing of dogs in that culture. After consulting the database he realized that he needed to pay Shabbir a higher amount than what he had originally estimated. The guideline explained that Khost local custom mandated that when a person kills a dog, he has to pay more than what it would cost to simply replace it.[143] Armed with this new information, the claims commissioner nearly tripled the amount he was originally going to pay Shabbir. The claims commissioner also explained to Shabbir why he was paying him such a large amount of money.

Shabbir returned to his village and spread the word that the United States had treated him well. Furthermore, Shabbir expressed his joy and encouragement that the claims commissioner had understood his people's custom. Shabbir made it a point to express his enthusiasm to the village elder, who was also impressed with the claims commissioner's actions. As a result, he decided that his village would consider providing the United States with the intelligence information that the nearby military unit had requested when its convoy traveled there only a few days prior.

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142. This is intended to be an alternative ending to the preface. It assumes that the claims commissioner is implementing the database I proposed for nations without a universal legal system.

143. *See supra* note 2 and accompanying text.