

Defensive Wars and the Reprisal Dilemma^{*}

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Abstract

I address a foundational problem with accounts of the morality of war that are derived from the Just War Tradition (JWT). Such accounts problematically focus on ‘the moment of crisis’: i.e. when a state is considering a resort to war. This is problematic because sometimes the state considering the resort to war is partly responsible for wrongly creating the conditions in which the resort to war becomes necessary. By ignoring this possibility, JWT effectively ignores, in its moral evaluation of wars, certain types of past wrongdoing. I argue that we can address this problem by incorporating an account of compensatory liability into an account of the morality of war. Doing so yields the view that, if we have culpably failed to compensate victims for past wrongs, we might be morally required to weigh the well-being of those victims more heavily in our calculation of proportionality when determining the permissibility of a defensive act that harms the victim as a side-effect. This, in turn, makes satisfying the proportionality constraint more difficult. The upshot is that sometimes, in order to wage a defensive war permissibly, we first have to discharge compensatory duties. This has implications for how we evaluate ‘cycles of reprisals’ that plague warfare.

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1. Introduction

The Just War Tradition (JWT) both in its contemporary canonical form (exemplified by the work of Michael Walzer¹) and in the more recent revisionary derivations developed since the turn of the century² problematically focuses on “the moment of crisis”—the point in time at which a state (or sub-state actor) is seriously considering a resort to war. The problem with assessing the morality of resorting to war at the moment of crisis is that sometimes the state considering the resort to war is partly responsible, by having committed past wrongs, for creating the situation in which the resort to war becomes necessary in the first place. JWT is not completely blind to past injustices—it does, after all, prohibit wars to protect territory wrongly annexed in the recent past.³ But the *scope* of past wrongs included in the determination of whether a candidate war is just, and the *way* that these wrongs are included in such a determination, are both quite limited. If JWT is ineluctably “ahistorical” in this way, then the theory is dangerously limited in that it blinds us to considerations morally relevant to the resort to war. In section 2 I explicate this problem in greater depth and connect it to the issue of how we ought to morally evaluate responses to ‘cycles of reprisals’ plaguing warfare.

I believe we can expand JWT in a way that enables it to look before the moment of crisis. This can be done by incorporating *duties of compensation* owed for past wrongs into the moral assessment of a resort to war. I argue in section 3 that such duties can impact the morality of engaging in defensive harms against those to whom we already owe compensation. The result, laid out in section 4, is that in assessing the morality of waging a wholly defensive war, it will be necessary to determine whether that war will harm civilians whom we have culpably failed to compensate for past wrongs. If so, the harms to those civilians should be accorded greater weight in the ‘costs column’ of the proportionality calculation, which determines whether the benefits of achieving the war’s just causes are worth the moral costs of the

¹ See Walzer [1977].

² See for example [Rodin 2002; McMahan 2009; Fabre 2012].

³ See for example McMahan [2005a: 12–13].

war. This leads to an interesting conclusion: in many cases *the only way to justly wage a defensive war is by first discharging our duty to compensate for past wrongs*.

2. The Reprisal Dilemma

There are many examples throughout history in which one country wrongs another, prompting the latter country to wrongly attack the first, thereby necessitating a resort to self-defense. For example, Hamas's wrongful attacks on Israeli civilians are in part a result of the Israeli government's continued unjust encroachment upon Palestinian land. The First Congo War was largely precipitated by the 1994 Rwandan Genocide: after the genocide, many of the Interahamwe Hutu militias that had carried out much of the attacks escaped to Zaire; in response, Tutsi-dominated Rwandan forces invaded Zaire.⁴ This is not to say that Hamas or the Tutsi forces had only retributive aims. It is likely that they had other aims as well, some of which might have been just. But to avoid political and historical controversy, and to keep examples free of confounding variables, I will construct a schematic case in which the aims of the aggrieved party are wholly retributive. (In the final section, I return to wars that are not wholly retributive).

Suppose a regional power, X, wrongly attacked and invaded a peaceful neighboring country, Y, several years ago. X's aim was to gain access to Y's lucrative alluvial diamond deposits. After a prolonged war of attrition, X withdrew its troops to the status quo antebellum borders. This conflict—which I will call the “First War”—cost Y thousands of lives and substantially diminished the well-being of millions more. X refused to pay any reparations even though it was manifestly morally required to do so. A year passes during which a pro-war faction in Y gains influence, largely due to the experiences of the First War. Once Y has regained its economic and military strength, it launches an invasion of the former invaders, as an act of retribution for the wrongs suffered in the First War. Thus the Second War ensues. Y will not foreseeably be made better off by this war.

⁴ See Reyntjens [2009: 18, 30, 45].

It is clear that X's conflict against Y in the First War is unjust. Hence Y has a just cause in defending itself against X in the First War. I will stipulate that in addition to having a just cause, Y's defense against X in the First War also satisfied the constraint of necessity (which says roughly that the resort to war must be the least harmful means of achieving the aims specified in the just cause) and the constraint of proportionality.

It is also clear that Y's conflict against X in the Second War is unjust. As I described it, Y's attack against X in the Second War is a response to X's invasion in the First War. More specifically, Y's attack constitutes a *retributive* war rather than a *corrective* war. The aim of a *corrective* war is to regain or compensate for what was wrongfully taken or lost in a previous conflict. The aim of a *retributive* war is to impose purportedly deserved harms on the parties responsible for a recent wrongful war. The two kinds of war are distinct, even though, (in the words of David Luban) "they both treat warfare as a justice-based response to a prior wrongful act of the adversary" [2011a: 6]. Given how wars are actually fought, retributive wars are unjust. Even if a form of retributivism according to which it is an intrinsic good that grievous wrongdoers suffer death is ultimately correct, wars in general are not the proper vehicle for disseminating retributive justice.⁵ This is because those who deserve death will likely be a small minority of the country's population—probably limited to the political and military elite who bear substantial responsibility for the government's recent actions.⁶ Any war aimed at retributively punishing them will certainly kill

⁵ Punitive aims in wars were, however, once regarded by medieval theologians and jurists of the Renaissance as exemplars of just aims; see Reichberg [2008]. Immanuel Kant, however, thought that since punishment implies an authority, punitive wars were a logical impossibility since there is no requisite authority in the international arena. For similar reasons, David Rodin rejects punitive wars; see Rodin [2002: 176–179]. For a comprehensive treatment of the possibility of retributive and punitive wars, see Luban [2011a].

⁶ X's soldiers who participated in the First War will bear responsibility for furthering the unjust aims of their superiors. It might be thought that they too would be targetable at the bar of retributive justice. But the indoctrination, manipulation, and coercion of these young and consequently cognitively underdeveloped combatants by their culture, state, and military, serve as partially excusing conditions combining to

innocent third parties as a side-effect. There might be circumstances in which it is permissible to kill innocents as a side-effect of achieving (only) intrinsically valuable retributive aims. Perhaps it is permissible to kill a single innocent as a necessary side-effect of inflicting deserved death on thousands of Nazi war criminals who would otherwise live long and happy lives on an isolated island.⁷ But even if this is so, it is extremely unlikely that any actual war will mete out enough deserved harms necessary to outweigh the harms inflicted on innocent third parties.⁸

The priority of the lives of innocents over the good of inflicting deserved death also explains why applying the analogue of the provocation defense in criminal law to Y's actions in the Second War does not justify Y's retaliatory actions. It might seem that we could preclude this sort of defense of Y's conduct by stipulating that its leaders act calmly and deliberately in their decision to retaliate. Accordingly, they are not in the grip of the "heat of passion" or "extreme emotional distress" of the sort that partially excuses unjust retaliatory murder in Anglo-American criminal law. But Mitchell Berman and Ian Farrell have argued that retaliation against a grievous wrongdoer partially *justifies* (rather than merely partially excuses) the provoked victim's actions [2011]. Suppose a private citizen having suffered a grievous wrong (such as a parent whose child is murdered) consequently

substantially diminish (though not necessarily eliminate) their culpability for what they do; consequently, it is unlikely that they deserve death.

⁷ I owe this example to an editor at the *Australasian Journal of Philosophy*.

⁸ The view that the welfare of innocents has this sort of priority is so basic that it is hard to justify it. It seems to be universally held among those working on the morality of war. For instance, Larry May says "[e]ven if intentionally taking the life of a serial killer could be morally justified, it would not be morally justified to... kill him in a way that risks killing his non-guilty neighbors" [2005: 20]. Jeff McMahan likewise claims that retributive aims cannot in practice be a just cause for war because "contemporary war inevitably causes harm to the innocent, even if unintentionally, that is vastly disproportionate to the importance of inflicting on wrongdoers whatever harms they deserve" [2008a: 84]. David Luban similar argues that "even for retributivists punishment through warmaking is morally unacceptable" partly because "punishment through warmaking punishes the wrong people" [2011a: 9]. See also Tadros [2014: 32, 34].

resorts to vigilantism by intentionally killing the wrongdoer. She thereby has committed a wrong, but one that is *less wrongful* than, say, “a garden-variety killing for financial gain” [ibid.: 1069]. Her “reason for killing partially reduces the wrongfulness of the killing”—because these reasons are also (partly) the law’s reasons for apprehending and punishing the wrongdoer [ibid.: 1070]. Victoria Nourse, though her analysis differs, similarly argues that provocation can provide a defense because “the law sees reason in the defendant’s emotion, reason that mirrors the law’s own sense of retribution” [Nourse: 1392]. This might seem to suggest that Y’s retaliatory attack against X in the Second War is not as wrongful as it would be if Y’s goal in attacking was to, say, spur jingoistic fervor in order to distract the public from domestic civil strife.

But even if the ‘partial justification’ model is correct in its claim that an unjust retaliatory attack against a provocateur is not as wrongful as paradigm cases of murder, it is not obvious that this is so when the retaliatory act foreseeably kills innocents as a side-effect. Consequently, the partial-justification model of the provocation-defense does not provide grounds for substantially diminishing the wrongfulness of Y’s retaliatory attack against X in the Second War; this is because the intrinsic good of inflicting deserved harms on a wrongdoer is outweighed or overridden by the reasons not to kill innocents.

Though X retains the just cause of self-defense, there is a sense in which X is partly to blame for the Second War. This is because (we can assume) Y’s unjust attack in the Second War was a foreseeable outcome of X’s unjust attack in the First War. The fact that the leaders of Y retain full-fledged attributive and evaluative responsibility for their unjust retaliation is consistent with maintaining that the leaders of X *also* bear responsibility for this predicament.⁹ Yet JWT allows X to ignore this fact in determining whether it is permitted to engage in a defensive war. This is problematic because it effectively allows governments to wipe the slate of responsibility clean with each new war, in that “blowback” from past actions that gave rise

⁹ Responsibility here is not ‘zero-sum’; increasing one party’s responsibility does not diminish that of the other responsible parties. See, for example, Zimmerman [1985: 355].

to the current war plays no role in determining what they are permitted to do in response to that blowback.¹⁰

And yet it seems absurd to say that X does not have a just cause in defending itself against its former victim, given that, by hypothesis, Y's attack will kill innocents in furtherance of no good other than retributive justice. This is why JWT claims that X is indeed permitted to resort to defensive war, provided that such a war is necessary and proportionate.

So we are left with a dilemma. If we maintain that X is indeed permitted to resort to war in self-defense against the culpable aggression of its former victim Y, then we ignore the role that X played in Y's aggression. If, alternatively, we claim that X is *not* permitted to resort to war in self-defense against Y, then we have, in effect, granted Y a moral permission to attack X, which is absurd. I will call this problem the "Reprisal Dilemma".

JWT accordingly fails to provide a normative framework for stopping 'cycles of violence' that occur between adversaries. This is because each reprisal provides a permission for its victim to engage in self-defense; when that victim then commits the next reprisal against its former victimizer, that former victimizer is correspondingly permitted to engage in self-defense. In what follows, I present a way to dissolve the dilemma—one which allows JWT to look beyond (or more properly, before) the moment of crisis to the historical context giving rise to the current crisis.

3. Compensatory Duties and Self-Defense

The method I propose for dissolving the Reprisal Dilemma adverts to X's compensatory duties to Y following the First War. To see how compensatory duties can be relevant to the morality of war, it is first necessary to say more about compensatory duties per se. In doing so, I will use examples of individual wrongdoing, after which I will draw lessons for warring parties.

¹⁰ Michael Neu seems to make a point similar to this in [2013].

3.1. *Compensating by Refraining from Harming*

If an individual is morally responsible for a wrongful harm imposed on another individual, then the first individual has a defeasible duty to compensate the victim. When an individual is responsible for wronging another, the wrongdoer has a compensatory duty to make the victim no worse off than she would be entitled had the wrongdoer not committed the wrong.¹¹ (Of course, achieving this goal is often prohibitively difficult or impossible).¹²

I argue that a failure to compensate for a past wrong can affect the permission to engage in self-defense. Consider this example. *Wrongdoer* and *Victim* reside in a failed state without a criminal or civil justice system and without a police force. Wrongdoer culpably and wrongfully raids Victim's farm, intending to steal some of her livestock. He fails in this aim, though he breaks Victim's arm in the process, as a result of which she will be in considerable pain for three months. Wrongdoer can be morally liable to deprivations necessary to compensate Victim. In effect, Wrongdoer owes Victim a functional, pain-free arm for a period of three months—or, more aptly, its equivalent value in money, goods, or services. The deprivation, however, cannot be too great relative to the relevant good done by discharging the compensatory duty. If forcing Wrongdoer to compensate Victim will cost Wrongdoer his life as a side-effect, then it is likely that enforcing Wrongdoer's compensatory duty is unjust.

Adding to the example, suppose that another individual, *Friend*, who is Victim's comrade, foreseeably takes it upon himself (without Victim's

¹¹ Robert Nozick adopts a similar counterfactual account of compensation when he says that “[s]omething fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A” [1974: 57]. This is, according to George Sher, the standard and official view of compensation [1997: 18, 29]. This counterfactual account of compensation has been criticized by others, though. See especially Roberts [2006].

¹² For discussion of some of the practical limitations of rectificatory compensation, see [Nickel 1976; Goodin 1989; Waldron 1992].

knowledge or consent) to avenge Victim by attacking Wrongdoer, even though this will not benefit Victim (or anyone else). Victim is a bystander to this attack. The only way Wrongdoer can prevent Friend from imposing serious harms is by defensively attacking Friend in a way that will foreseeably impose a harm on Victim as a side-effect. Though the harm that would be imposed on Victim is much less severe than the one Wrongdoer faces, it is not a trivial harm.

In general, it is permissible, at the bar of the lesser evil justification, to transgress an innocent bystander's right against being harmed as a side-effect of preventing a wrongful harm to yourself or to others, if the harm imposed on the bystander is not too great relative to the harm that would be averted. Put in the jargon of the literature on self-defense, the harm imposed on an innocent bystander must meet the constraint of *wide proportionality*.¹³ If it does, the bystander's rights are infringed though they are not violated—which is to say that wronging the bystander is permissible in order to avoid a substantially worse consequence. So it might seem that Wrongdoer is permitted to avert a substantial harm from Friend at the cost of imposing a much smaller harm on Victim.

Suppose further that a broken arm is precisely the harm that Wrongdoer will foreseeably impose on Victim as a side-effect if Wrongdoer is permitted to engage in self-defense against Friend. Recall that Wrongdoer owes Victim a pain-free, functional arm, or its equivalent value. And now, Wrongdoer has an opportunity to 'pay up'. He can do so by refraining from engaging in self-defense. After Wrongdoer absorbs Friend's attack, the former can say to Victim: "We're even now, because I didn't inflict harm on you that I would have been permitted to inflict if I hadn't owed you anything."

It might be argued that compensating someone cannot consist in refraining from making someone worse off than he or she currently is, since compensating someone requires benefitting her by returning what was lost. But as plausible as this view seems to be, it cannot be correct. A simple example shows this.

¹³ See McMahan [2009: 21]

Suppose Winner and Loser make a bet over a sports match. Loser promises that if he loses, Winner can take Loser's bicycle. Loser subsequently loses the bet. So he reveals to Winner the location of the bicycle and the combination to its lock. But before Winner retrieves the bicycle, she negligently harms Loser in an unrelated event. Winner consequently owes Loser compensation; but Winner has no assets. The bicycle, however, happens to be worth exactly what Winner owes. So one way (and the only way) for Winner to compensate Loser is by refraining from taking the bicycle. Assuming such a deprivation would be a harm, Winner thereby compensates Loser by refraining from harming him.

One might maintain that I have misdescribed Winner's conduct in the example. Once Winner wins the bet, the bicycle ipso facto becomes hers, even though it is still in Loser's possession. So we should redescribe Winner's compensatory duty not to deprive Loser of the bicycle as a duty Winner has to give Loser the bicycle—and it just so happens that the best way for Winner to fulfill this duty is by doing nothing at all, since the bicycle is already in Loser's possession.

But this response is grist for my mill—it *admits* that that the best way for Winner to compensate Loser *is by doing nothing at all*. And doing nothing at all (in this case) entails not harming Winner. It is a mistake, then, to think that compensation requires benefitting someone. Rather, compensation requires ensuring that a particular state of affairs vis-à-vis the victim's well-being obtains. And sometimes we can accomplish this by doing nothing at all.

So it is perfectly sensible to say that when Friend attacks Wrongdoer, the latter discharges his compensatory duty to Victim by refraining from imposing a side-effect harm on her—a harm that Wrongdoer would be permitted to impose absent the compensatory obligation. In the same way that Winner compensates Loser by refraining from taking possession of the bicycle that she would otherwise be permitted to take, Wrongdoer compensates Victim by refraining from engaging in harmful defensive action that he would otherwise be permitted to take. If we look just at the moment of crisis—the moment where Friend is culpably attacking Wrongdoer—and if we ignore the fact that Wrongdoer has wronged Victim in the past, then it would seem that Wrongdoer is indeed permitted to break Victim's arm as a

side-effect of defending himself against Friend. But once we take into consideration the fact that Wrongdoer owes Victim for having wrongly broken her arm, and that Wrongdoer has failed to discharge this duty, the situation changes. Victim is owed the equivalent in value of a broken arm—and by *decreasing* the amount of harm that Wrongdoer can permissibly inflict upon Victim *by just that amount*, the former thereby discharges to the latter what is owed. If Wrongdoer elects nonetheless to break Victim's arm in necessary self-defense against Friend's wrongful attack, then he thereby fails to discharge a compensatory duty, which wrongs Victim. This suggests that the Wrongdoer's compensatory duty should be incorporated into the proportionality constraint determining the degree of harm that he can impose on Victim in self-defense.

3.2. Stringency of Compensatory Duties

When an individual is responsible for wronging another, the wrongdoer has a compensatory duty to make the victim no worse off than to which she would be entitled had the wrongdoer not committed the wrong. But this says nothing about the burdens the wrongdoer is required to endure in fulfilling his compensatory duty. As I pointed out, there is a limit to what Wrongdoer can be morally forced to endure in compensating Victim. Suppose that if Wrongdoer does not break Victim's arm in self-defense, Friend will *kill* Wrongdoer. Though refraining from breaking Victim's arm will thereby fulfill the compensatory duty that Wrongdoer owes Victim, doing so comes at too high a cost. In this case, Wrongdoer is permitted to defend himself. In making this determination, I argue that the difference between the victim's well-being in the status quo and the degree of well-being to which the victim is entitled—i.e., 'delta'—partly determines the maximum burden that the *wrongdoer* is morally required to endure in discharging his compensatory duty. Suppose the amount of harm that the wrongdoer will suffer as a result of fulfilling his compensatory duty is substantially greater than delta. Whether the wrongdoer is nonetheless required to endure this harm depends on a variety of factors, including the wrongdoer's degree of culpability. (The wrongdoer might, in addition, be liable to *enforcement* harms if he is responsible for increasing the costs of enforcing his compensatory duties, as with a thief who swallows the priceless artifact she stole).

But I will assume for purposes here that *ceteris paribus* the stringency of a compensatory duty—i.e., an individual's compensatory burden—is limited to *delta*. This does not mean that imposing greater harms on him is *impermissible* when necessary to force him to discharge his duty; doing so might still be justified as the lesser evil relative to the alternative of allowing his victim to remain uncompensated. (I return to this issue in section 4.2).

The moral, then, is that the wrongs we commit in the past can affect the stringency of the proportionality constraint *right now* in acts of self-defense affecting those whom we have wronged. More specifically: if you have committed an egregious wrong in the past against someone and have not compensated her accordingly then the severity of the harm which you can impose on your victim in legitimate self-defense is accordingly diminished by the amount which will thereby discharge your compensatory duty—provided that the harm you suffer is not too great relative to the good achieved by discharging the duty.

One might argue that by forcing Wrongdoer to discharge her compensatory duty in the way I have suggested, we don't merely invite a *harm* committed against her; we invite a *wrong*. An individual owing compensation might be liable to harms at the bar of corrective justice, but she cannot be morally liable to be wronged. Yet this seems to be precisely what I suggest when I claim that we should allow Wrongdoer to be wronged if necessary to force him to discharge his compensatory duty.

But I do not claim, simply, that Wrongdoer is liable to be wronged. Rather, we are in a predicament in which we have to weigh not just competing harms, but competing wrongs. A *wrongful* harm has to fall somewhere: either Friend will wrongly harm Wrongdoer by culpably and successfully attacking him, or Wrongdoer will wrong Victim by failing to compensate her. To adjudicate between these options we have to scale to the meta-level where the right thing to do is what brings about the least objectionable among disjointly inevitable wrongs.

So how do we do adjudicate between these two wrongs? One method is to look at whether and if so, how, the respective wrongs were *avoidable* by the

wronged parties.¹⁴ Wrongdoer could have avoided being wrongfully harmed in the following way. He could have prevented it by compensating Victim from the outset, in that if he had discharged his compensatory duty then he would consequently be permitted to engage in self-defense harming Victim. I am *not* claiming that Wrongdoer could have avoided being attacked by discharging his compensatory duty, or by refraining from attacking Victim in the first place. Rather, the claim is that Wrongdoer could have avoided a situation in which *he is not permitted to defend himself* against such an attack, by discharging his compensatory duty.

But suppose Wrongdoer was not in a position to compensate Victim. If he sincerely intends on compensating Victim for the past wrongs committed against her, and Wrongdoer is able and willing to do so *after* he defends himself against Friend's attack, then he needn't discharge the compensatory duty by refraining from engaging in self-defense. So though there is a straightforward sense in which Wrongdoer is a victim here—a victim of a culpable attack—it is nonetheless his fault that he is relegated to using *this* opportunity to discharge his obligations to Victim.

In contrast, there is nothing Victim can do to avoid the wrong of not being compensated. So Wrongdoer can avoid suffering a wrongful harm, but Victim cannot—she is, in that respect, at Wrongdoer's mercy. This suggests that given the forced-choice between these two wrongs, we should allow it to befall Wrongdoer rather than Victim.¹⁵ The general principle here is that when we have disjointly inevitable wrongs, and we have control over where the wrong should fall, all things being equal it is less wrongful for it to befall the person for whom the wrong was relevantly avoidable.

¹⁴ For more on the relevance of avoidability to moral responsibility, see Tadros [2011: 56–57, 107, 175–80].

¹⁵ The most developed version of this view belongs to Jeff McMahan (see in particular [2005b, 2009]). The view states that if one of two parties is more responsible than the other for bringing about a predicament in which a harm must befall one of the two parties, it is permissible to impose that harm on the more responsible party. But some (see for example Lazar [2009]) have argued that a small difference in responsibility for the 'forced choice' cannot override the agent-relative constraint against inflicting grave harm. I address this challenge in [2014].

The upshot is that though Wrongdoer is liable not to be attacked, it is better for Wrongdoer to be wronged if this is the only means by which he will discharge his compensatory duty and if Wrongdoer could have avoided this simply by discharging that duty before or after the attack. If this is correct, the following principle holds:

The Principle of Forced Compensation in Self-Defense
(i.e., “The Principle”)

If an agent A1 has wrongfully attacked and injured A2 in the past, and *if* A1 has neglected to compensate A2 accordingly, and *if* A1 has not sincerely and believably expressed willingness to discharging that duty in the future, and *if* there is no other way to force A1 to discharge that duty, *then* the severity of the harms which A1 can impose on A2 as a foreseeable side-effect in the course of legitimate self-defense against a third party’s culpable aggression is *limited* in the following way. The harm that A1 can impose on A2 is the amount she would be permitted to impose if A1 did not owe A2 any compensation, *minus* the harms for which A1 has failed to compensate.¹⁶

The Principle can be restated in terms of the stringency of the wide proportionality constraint. In determining whether an act of defense against an unjust threat is morally justified, we have to weigh the relevant moral benefits of undertaking that act against the morally relevant costs. When such an act harms bystanders, the weighted badness of those harms should be augmented *if* the bystanders are harmed by those who owe them compensation. This is because inflicting such a harm not only infringes the bystanders’ rights, but also constitutes a failure to discharge a compensatory duty—a duty that could be discharged by refraining from inflicting that harm.

4. War, Reprisals, and Self-Defense

¹⁶ Though I characterize the Principle in terms of severity of harms, it also applies in terms of the *degree of risk* we impose and accept in the course of self-defense.

The Principle will rarely apply to cases of one-on-one self-defense because there will usually be civil institutions to force those who owe compensation for past wrongdoings to discharge these duties. But the situation is quite different in war, where there are no effective international institutions which a) morally evaluate candidate military conflicts, b) determine whether any of the parties owe compensation for the wrongful use of military force, and c) enforce the compensatory duties by collecting fines against the offending state. As a result, states which have in the recent past engaged in unjust wars (or in wars with both just and unjust aims, or wars with just aims pursued unjustly) owe compensation to the civilians they have wronged—and only rarely are the appropriate reparations paid.¹⁷

4.1. Compensatory Duties of Citizens

Return to the schematic case laid out in section 2. Recall that a regional power, X, wrongly attacked and invaded a peaceful neighboring country, Y, several years ago in the First War. X subsequently and culpably refused to pay reparations for the enormous human and economic toll which the war cost Y. Moreover, the civilian and military leaders of X intend to refrain from discharging this duty for the foreseeable future. In the Second War, Y wrongfully launches an invasion of the former invaders, as an act of retaliation; it is foreseeable that this invasion will not make Y (or anyone else) better off.

I argue that if the Principle is correct, X has to weigh more heavily the lives of *enemy citizens* in their calculation of proportionality than they would otherwise be required, since they have a defeasible duty to discharge their compensatory obligations by sparing harm that X would otherwise be permitted to impose. Since those citizens are *already* owed compensation for

¹⁷ I do not here provide an account of just post bellum in general or an account of post war compensatory obligations specifically. The application of the Principle to the context of warfare is consequently hostage to an account of corrective justice post war. My goal is to explicate the general implications that compensatory obligations will have on the proportionality constraint in war; the specific implications will depend on the theory of jus post bellum we endorse.

having been wronged in the recent past, they are wronged twice over when X harms them: they are wronged in that their rights are infringed, *and* they are wronged in that X has failed to make use of this occasion to compensate the citizens for the wrongs committed in the First War. Put differently, the severity of the harms that X can impose on citizens in Y in the course of defending itself against Y's unjust aggression during the Second War is diminished. According to the Principle, the harm that X can impose on citizens in Y while defending itself is the amount that X *would* be permitted to impose if it did not owe Y compensation for the harms committed in the First War, *minus* the amount equivalent to the harms which X has failed to compensate.

If X forsakes self-defense, then presumably its population will suffer. But what have *they* done to make such suffering permissible? After all, it is their government who authorized the attack on Y in the First War and their military who carried out the attack. Likewise, it is their government that subsequently failed to compensate Y. The people of X were, save their individually paltry contributions to the war-effort, largely bystanders to their state's war against Y. To address this worry, we need to investigate more closely the relation between the government of X and its people (which has so far been elided by referring to both as 'X'). Though various governmental and military officials in X authorized and implemented the war against Y in the First War, the duty to compensate the people of Y for this unjust war extends beyond those governmental and military officials, in two ways.

First, subsequent leaders can inherit the duty to compensate, since this duty attaches to the *office* (i.e., governmental or military role) rather than merely to the individual occupying that office. Accordingly, a subsequent regime can bear that duty if the previous regime failed to discharge it. This is not to say that the duty can be passed from regime to regime and from generation to generation indefinitely; presumably, the stringency of the duty diminishes over time, eventually disappearing altogether. (This is not an issue I address, though I say more in section 5).

Second, the duty to compensate can extend to the citizenry in general. This is because a military functions as an instrument for its people—a very powerful instrument, capable of achieving ends that individuals composing the country typically cannot achieve on their own. In this respect, the

existence of a country's military force often benefits its population. But possessing a military is also a moral risk; it might err in ways that impose unjust harms on others. When a self-serving but morally risky apparatus misfires in a way that imposes unjust harms on others, it makes sense that some of the costs of the blunder should go at least partly to those whom the apparatus serves and protects. It would be unfair to enjoy the benefits of possessing this apparatus while shifting its costs to third parties. Consequently, the citizens of a state whose military embarks on an unjust war can be morally required to bear some of the costs of that war if necessary to spare the victim of those costs. Jeff McMahan makes this point: "Citizens have special responsibility for unjust wars fought by their own state for the simple reason that it is *their* institutions that are then malfunctioning—institutions that operate on the basis of their labor, through their financial support, and ostensibly with their consent and for their benefit" [2009: 215]. Indeed, even if they do not consent or benefit, the fact that the institution is theirs and the fact that they participate in its functioning "give them a special responsibility to ensure that the institutions are not a source of unjust harm to others whom the institutions do not serve" [ibid.].¹⁸ The upshot is that the civilians in X can have a compensatory duty toward the civilians in Y following the First War simply because it is their military that imposed these harms.¹⁹

This does not mean, however, that citizens are morally liable to be killed when their government wages an unjust war. Liability to harms of that magnitude is thought to require a substantial causal contribution to the

¹⁸ But suppose a government uses its military to unjustly attack not only foreign countries, but to victimize its own population. Yet absent this abusive military, a foreign aggressor would invade and subject the population to worse oppression. Does the victimized population thereby bear responsibility for their military's unjust wars given that the abusive military provides a net benefit to its population by deterring foreign aggression? This is just one among a host of related issues that I cannot address here.

¹⁹ Avia Pasternak and Annie Stilz have separately argued that sometimes citizens can owe duties of compensation to the victims of their state's wrongdoing. See [Pasternak 2011, 2013; Stilz 2011].

wrong in question.²⁰ Because individual citizens ultimately have little control over the military and contribute only minimally to its use, the government of Y cannot, in the First War, lethally target citizens in country X, even though Y is waging a just defensive war against X's unjust aggression. Though the responsibility to bear some of the costs of their military's wrongful conduct does not vitiate the right against being killed, it is strong enough to generate a reparative duty *ex post* to compensate the victims of the unjustly waged war.²¹

The government of X has, accordingly, a fiduciary duty to discharge that obligation by taxing its citizens and transferring the funds to the wronged people of Y. But suppose that it fails to do this (perhaps because it is not politically expedient). And suppose there is little individuals can do on their own to discharge their compensatory duty (there are no humanitarian NGOs focusing on alleviating suffering of civilians in Y following the First War). It seems, then, that individual citizens in X are 'off the hook' insofar as there is nothing they can do to discharge their duty. But I argued in section 3.1 that owing compensation imposes constraints on defense against unjust attacks that harm as a side-effect those to whom the compensation is owed. So there *is* a way for the citizens of X to compensate the citizens of Y: by refraining from imposing defensive harms on the citizens of Y to whom compensation is owed. That is, X's military will be morally constrained in the sorts of defensive harms it can impose on behalf of its citizens.

²⁰ I assume this here for the sake of argument, though I have argued against it elsewhere. See in particular [2014].

²¹ "Even fairly minimal forms of responsibility for an unjust war" McMahan writes, "may render civilians liable to contribute to the payment of reparations to the victims of their country's unjust war" [2009: 218–9]. See also McMahan [2008b: 28]. Some might deny that civilians in a non-democratic regime who have no influence over its military owe *anything* to the victims of an unjust war that the regime wages, even if the people benefit from the military's existence and conduct. It is clearly unfair, however, that the people in the regime should derive benefits from an institution that imposes grave harms on others. The issue is whether this unfairness is of the sort that we can permissibly attenuate by shifting some of its costs back to those who unfairly benefit. I submit that we can, though I do not have the space to argue for this here. Readers who demur can restrict the application of my conclusions to those in which X is a democratic country.

4.2. *The Stringency of the Compensatory Duties of Citizens*

If some defensive military operations that would be otherwise permissible are ruled out at the bar of compensation, then this might result in greater civilian casualties on the just side in the war. This might seem to imply that individual citizens in X bear so much responsibility for the wrongs committed by their military that these individuals have forfeited their right not to be killed in furtherance of righting those wrongs. This is deeply implausible.

I do not claim, though, that the compensatory duty of civilians is so stringent that they are *morally liable* to have their lives sacrificed if necessary to fulfill that duty. Recall from section 3.1 that an individual's compensatory liability is typically no *greater than* the severity of the harms she wrongfully caused. But the severity of the harm for which an individual owes compensation is not the only ceiling on compensatory liability. An individual who bears only *partial* responsibility for a wrongful harm of considerable magnitude might owe substantially less than what is necessary to compensate the wrong in question. This describes the position of an individual citizen in X. Though the harm for which she owes compensation is substantial (viz., the wrongful harms caused by her government's unjust war against Y), her individual responsibility for that harm is so diminutive that her duty of compensation will certainly not make her morally liable to be killed even if doing so is necessary to fulfill that duty.

I claim instead that the unpaid compensatory duties can reduce what Frances Kamm calls the "violability ratio" of the citizens in X, in that the value of the lives of the civilians in X is partially discounted relative to the lives of the civilians in Y.²² Citizens in X retain their right not to be killed, even when their sacrifice is necessary to discharge their compensatory obligations to civilians in Y. But since their unfulfilled compensatory duties partially discount the comparative value of their lives in cases where sacrificing them will fulfill that duty, it is harder to justify infringing the rights of enemy civilians in Y in order to avert harms to civilians in X. This means that 'collateral damage' to civilians in Y which might have been

²² See Kamm [2012: 62].

morally acceptable absent a compensatory duty, becomes unacceptable given that duty. This does *not* mean that the citizens in X who are consequently harmed are morally liable to be so harmed—they are still wronged, since they have done nothing to make themselves liable to be *killed*.

So the claim I am advancing is *not* that the compensatory duties that the citizens in X owe are so stringent that it permits killing them (or allowing them to be killed) when doing so is necessary to fulfill such duties. The duty to compensate might, in certain cases, require that we sacrifice the lives of those who owe the duty, but only in cases where the alternative requires *killing* innocents—specifically, the uncompensated victims. So it is not the duty to discharge compensation *alone* that morally permits sacrificing citizens; rather, this duty *in combination with the badness of killing innocent citizens* (to whom we already owe compensation) can tip the balance of reasons in favor of allowing citizens in X to be killed rather than killing uncompensated citizens in Y.

One might raise the following objection. I argued in section 4.1 that individual citizens in X bear some responsibility for their government's unjust war against Y in the First War. It is in virtue of this responsibility that they owe compensation to the citizens in Y; their government's failure to fulfill (or to sincerely and believably promise to fulfill) this duty diminishes the violability ratio of the citizens of X in the Second War. But one might point out that if citizens are partly responsible for their government's unjust wars, then the citizens of Y bear some responsibility for their government's unjust war against X in the Second War. This accordingly diminishes the violability ratio of the citizens in Y relative to the citizens of X in the Second War. This leaves the citizens on both sides with net equal status. And this might seem to undermine the argument that X has to weigh more heavily the value of the lives of enemy civilians.

But the claim I am making is not that X has to weigh the lives of enemy civilians more heavily than the lives of domestic civilians. Rather, the claim is that it has to weigh the lives of enemy civilians more heavily than it would if the people of X did not owe compensation. The point can be put differently: in any just war, the just side is permitted to weigh the lives of its own citizens more heavily than the lives of enemy citizens if only because enemy civilians bear some responsibility for the unjust actions of their

government. But if the citizens on the just side owe compensation to the people on the unjust side for a previous unjust war, then the special discounting of civilians on the unjust side is nullified.

It might seem that these two moral considerations ‘cancel out’ in the way I suggest only if they have precisely the same moral weight. Yet we have no particular reason for thinking that they do. All we know is that i) the value of the lives of citizens on the unjust side ought to be discounted by some indeterminate amount because they bear some responsibility for what their government does, and ii) the value of the lives of the citizens on the just side ought to be discounted by some indeterminate amount because their government owes compensation for the previous unjust war. But unless further theorizing reveals that the discount rate in (i) or (ii) is greater, we should treat those discounts *as if* they were equal, even if the probability that they *are* equal is quite small.²³

Against the application of the Principle to the morality of war, one might argue that a *financial* duty—such as a duty to compensate—can never combine with other moral considerations in a way that would tip the balance in favor of allowing the party owing the duty to be unjustly killed. It might be thought that the value of financial goods is incommensurable with the value of human lives. But the compensatory duty owed post-war is not a mere financial duty—it is a *life-saving* duty. This is because the majority of citizen deaths due to warfare come from post-combat conditions, rather than directly from the use of armaments. Neta Crawford has concluded that “although it is difficult to estimate the number of those killed indirectly by war with confidence, it is safe to say that indirect deaths outnumber direct deaths” [2013: 151]. And based on data on armed conflicts between 2004 and 2007, the Geneva Declaration Secretariat suggests that, “a reasonable average estimate would be a ratio of four indirect deaths to one direct death in

²³ To see that it can be rational to treat values as equal even when we know it is quite unlikely that they are equal, consider this case. Imagine that we must choose between the deaths of n innocents and m innocents. All we know is that n is between 10 and 1000; ditto for m . Beyond that we know nothing regarding the options. Suppose we want to minimize the number of innocent deaths. Should we choose n or m ? Clearly, we have no reason to choose one over the other, even though the probability that $n = m$ is quite small (1/990).

contemporary conflicts” [2011: 32]. This means that even *after* the war is over—indeed, up to years later—many civilians will suffer debilitating diseases and die preventable deaths resulting indirectly from the war. Consequently, the post-war compensatory duties will not be limited to redressing the families of those wrongly killed in the course of the armed conflict; in addition, and more importantly, the compensatory duty will be to prevent misery and death. Given this, there is no incommensurability in forcing those who owe compensation that would be used to decrease excess morbidity and mortality to forsake defensive action that would otherwise impose *further* harms on those to whom compensation is owed.

So far I have referred to “the citizens” of X as if they constituted a uniform block of individuals. This is obviously an idealization. Some citizens will have discharged their compensatory duty via private donations to the relevant humanitarian organizations. Others will have had their rights justifiably infringed in the First War by Y’s military forces in the form of foreseeable but unintended injuries during justified attacks on X’s military infrastructure; it is perverse to claim that in addition to the suffering they have endured that they are also liable to further deprivations to compensate the victims in Y. The violability ratio of these citizens is unaffected by their government’s failure, on the behalf of the citizens who *do* owe compensation, to compensate the victims of Y after the First War. But I am assuming (realistically, I believe) that only a small percentage of X’s citizens (in addition to children, and the mentally handicapped) are in the category of those who either do not have or have already discharged their compensatory duties. Forestalling or constraining defensive action at the bar of corrective justice will wrong the relatively few citizens who do not have or have already discharged their compensatory duty. And this, as far as possible, should be included in the calculation of proportionality determining whether forestalling defensive action is morally required.

4.3. Force Protection

The argument so far has specific implications for what is known as ‘force-protection’—the practice of protecting one’s own combatants in war by

putting enemy civilian lives at greater risk than they would otherwise be.²⁴ Suppose, for example, that a small squad of Y's combatants is firing RPGs from within a village at a platoon of X's combatants pinned down outside the village. The platoon is under a substantial and imminent threat so long as the squad continues firing. The platoon has two ways of eliminating the threat. The first option is to radio in a request for air-support from helicopters. Such an airstrike would be precise: it would target and likely kill the RPG squad without collaterally injuring anyone. But it would take time for the helicopters to arrive, during which the platoon would continue to receive fire. The second option is to call in an artillery strike, the benefits of which would be immediate (unlike an air-strike) and equally effective, thereby diminishing the risk to the platoon. The drawback, however, is that the bombardment from artillery is substantially less precise than an air-strike; the former is likely to injure civilians. The issue, then, is whether the platoon is morally permitted to diminish the risk to itself by effectively shifting that risk to enemy civilians.

The Principle affects the issue of force-protection. Suppose that, absent considerations of compensation for past wrongs, the platoon would indeed be permitted to infringe the rights of the civilians that would be endangered by an artillery strike. But suppose these civilians are owed compensation for the wrongs from the First War. And suppose that sparing them the harms that it would otherwise be permissible to inflict on them discharges this compensatory duty. Since the people of country X have hitherto culpably failed to compensate the citizens of Y, and has manifested no intentions to do so in the future, the Principle will require that we augment the disvalue of harming those civilians in our calculation of proportionality, which can 'swing' the calculation against force-protection as a morally viable option. In such a case, the platoon might be morally required to take on the additional risk resulting from calling in an air-strike rather than artillery-support.

Note that the combatants are morally constrained in their defensive options even if they themselves do not owe compensation to the citizens of Y. So, for example, even if the combatants are foreign mercenaries hired by X, their

²⁴ For recent discussion on this burgeoning topic, see in particular [Blum 2010; Luban 2011b; Bohrer and Osiel 2013].

defensive options are still constrained in the way I have suggested. This is because some of the constraints on permissible *self*-defense—including constraints resulting from failed compensatory duties—also constrain the defensive actions of *other*-defense from third parties who have agreed to lend defensive assistance.

To see why this is the case, return to the example from section 3 involving Wrongdoer, Victim, and Friend. Suppose that Wrongdoer hires a bodyguard. Friend, in her wrongful attempt to attack Wrongdoer, must first attack that bodyguard, which she does. The bodyguard has two ways of defending herself, and ipso facto, her employer. One of these two options involves imposing a harm on Victim as a side-effect, to whom Wrongdoer has culpably failed to discharge a compensatory duty for a past wrong. The bodyguard is not the one who wronged Victim—yet the bodyguard, in determining whether she can defend herself and her employer by collaterally harming Victim, has to weigh Victim’s life from the standpoint of her employer’s relation to the Victim rather than from her own standpoint. This is because she is acting *at the behest* of the Wrongdoer, which allows us to characterize what the bodyguard does as partly belonging to Wrongdoer. If we deny this, anyone who owes compensation can avoid being forced to discharge it in contexts of self-defense by simply ‘outsourcing’ self-defense to a third party. Compensatory duties should not be so easily avoidable.

So combatants who themselves have no compensatory duties can nonetheless be constrained in their defensive options by the compensatory duties of those for whom they fight. It follows, then, that a mercenary (or a bodyguard) has an interest in ensuring that their employer’s compensatory duties are met prior to any defensive action that might require harming those to whom the employer owes compensation.

5. The Reprisal Dilemma Redux and Remaining Issues

I have argued that the wrongs our country has committed in the recent past can affect the stringency of the wide proportionality constraint in the pursuit of *just* military aims against unjust aggressors. This makes it more difficult for us to permissibly wage a war—even a defensive one—against an enemy if doing so will foreseeably harm civilians to whom we already owe substantial

compensatory duties. Of course, it will sometimes be prohibitively difficult to wage a just war without inflicting substantial collateral harms on civilians. Consequently, there will be times in which the only way to justly wage a defensive war is by first discharging our compensatory duties. Otherwise the candidate defensive war will be unjust on the grounds that it violates the wide proportionality constraint.

In articulating and dissolving the reprisal dilemma, I focused on unjust wars in which the aims of the unjust party are wholly retributive. But the reprisal dilemma—and, concomitantly, the Principle of Forced Compensation in Self-Defense—apply not only to wars with solely retributive aims, but to wars with potentially just corrective aims as well. Suppose, for example, that in the First War, state X wrongly attacked state Y with the aim of annexing a portion of Y's territory. X succeeds in this aim. X consequently owes Y not only the annexed territory, but reparations for the destruction it caused. A year later, Y launches a war aimed at recovering the lost territory and liberating its former nationals. Determining whether such a war is just requires (among other things) determining whether it satisfies the constraint of proportionality. And in making this determination, the Principle applies: the moral weight of harm imposed collaterally on X's population in the course of reclaiming the lost territory is partially discounted because imposing such harms is a way to force X and its people to discharge its compensatory duties. The upshot is that the Principle affects not only the severity of the harm that a past wrongdoer can impose in otherwise justified self-defense, but also the severity of the harm that an otherwise justified aggressor can impose in furtherance of a reparative or corrective goal.

In expanding JWT theory so that it is responsive to duties of compensation, there are a host of other important issues that I have not addressed. For instance, what *kinds* of past wrongs generate duties of compensation stringent enough to strengthen the wide proportionality constraint in war? Is only wrongful aggression committed in the past relevant? What about economic wrongs or contract-violations incurring a tremendous human toll? Also, I have not considered whether, and if so, what sort of compensation is owed for wrongs committed *generations ago* (an issue for which there is a voluminous literature). Can failing to discharge this sort of obligation strengthen the wide proportionality constraint in the way I have suggested?

But my goal here is not to provide a comprehensive account of compensatory liability as it applies to states. Rather, my goal is to dissolve the Reprisal Dilemma, thereby forestalling the criticism that JWT is structurally incapable of looking beyond the ‘moment of crisis’. Applying the Principle to warfare dissolves the Reprisal Dilemma by imposing restrictions on X’s response to Y’s unjust aggression—restrictions derived from X’s treatment of Y in the recent past. With each iteration in a cycle of uncompensated reprisals, the proportionality constraint is correspondingly strengthened, eventually to the point that the only way for a country to permissibly defend itself against an unjust reprisal is by first discharging its compensatory duties. This is an appealing result—more so than the JWT’s ahistorical approach which effectively ignores each country’s past actions in determining whether and how each country is permitted to engage in self-defense against an unjust reprisal.

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