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Ch. 7: Compensation & Proportionality in War

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Abstract

Even in just wars we infringe the rights of countless civilians whose ruination enables us to protect our own rights. These civilians are owed compensation, even in cases where the collateral harms they suffer satisfy the proportionality constraint. I argue that those who authorize or commit the infringements and who also benefit from those harms will bear that compensatory duty, even if the unjust aggressor cannot or will not discharge that duty. I argue further that if we suspect antecedently that we will culpably refrain from compensating those victims *post bellum*, then this makes satisfying the war's proportionality constraint substantially more difficult at the outset of the war. The lesson here is that failing to take duties of compensation in war seriously constrains our moral permission to protect ourselves.

1. Introduction

Wars—including just wars—inflict massive casualties on innocent civilian populations. These civilians, I will argue, are owed compensation even if inflicting such casualties satisfies the proportionality constraint. But who bears this compensatory duty? The primary bearer is the war's unjust aggressor, even if it is not they who committed or benefited from the harm imposed on the civilians. But often the unjust aggressor will be unable or unwilling to discharge this compensatory duty *ex post*. The duty then falls, I will argue, upon the just side that committed and benefited from those harms

(even if inflicting those harms satisfied proportionality). But what if it is reasonable to surmise antecedently that the just side in a war will culpably fail to discharge its compensatory duties *ex post*? This is exactly the situation we are typically in; rarely, if ever, do the victors or the vanquished compensate the victims of war. I will argue that this amplifies the weight that those rights infringements ought to receive in the calculation of proportionality. The upshot is that if we know antecedently that civilians will be culpably left uncompensated *ex post*, it will be substantially more difficult to satisfy the proportionality constraint *ex ante*. The lesson is that we need to take compensation seriously in order to wage war permissibly. I will begin with a discussion of compensation in general by focusing on individual rights infringements. In subsequent sections, I will apply the lessons learned to war.

2. Rights Infringements and Compensation

There are circumstances in which acting contrary to an individual's rights can be justified—specifically, when doing so is necessary to avoid catastrophic consequences. For example, it might be morally permissible to grievously harm an innocent if doing so is necessary to prevent a hundred other innocents from being killed. In such a case, the grievously harmed innocent's rights are *infringed*, as opposed to *violated*. A right is infringed when there is an all-things-considered consequentialist justification for acting contrary to that individual's rights. An individual's rights are violated when there is no such justification (or any other).¹

Even when consequentialist considerations make it permissible to act contrary to an individual's rights, that individual is still wronged by that rights infringement. An act that is morally permissible all things considered can still wrong the individuals foreseeably harmed by that act. This is evidenced by the fact that the putatively wronged individuals have a right to

¹ For more on the distinction between infringing and violating rights, see Jeff McMahan, *Killing in War* (Oxford University Press 2009) 10.

compensation. To see this, consider the following emendation of a canonical trolley case.

Trolley 1

An innocent, J, is trapped on one side of a forking trolley track. On the other side, a dozen other innocents are trapped. A trolley is headed toward the dozen and will kill them all unless the switch is pulled, in which case the trolley will head toward J, thereby severing one of her arms.

Suppose the dozen together throw a rock which hits the switch, thereby saving their own lives at the cost of J's arm. Presumably this act is morally justified. Yet J can justifiably demand compensation from the dozen individuals who were saved by the sacrifice they imposed upon her. Moreover, those dozen individuals are morally obligated to compensate J, provided that doing so does not impose disproportionate costs on them. (Some might argue that the community at large owes compensation rather than the individual beneficiaries of the justified rights infringement. But I will abstract from this possibility by stipulating that the individuals in the example exhaust the population of the community.)

If we think that J is owed compensation then this suggests that there is indeed a residual "moral deficit" in having imposed a harm upon her in furtherance of preventing a substantially worse outcome. Put differently: The view that J is owed compensation vindicates the analysis according to which we act contrary to her rights when we inflict an all-things-considered morally permissible harm upon her.

Note, though, that those who owe compensation are not necessarily those who inflicted the harm on J. To see this, consider:

Trolley 2

Just as in Trolley 1, except the dozen trapped individuals do not throw a rock at the switch. Instead, B, a bystander unrelated to J or the dozen other individuals, happens upon the scene; he pulls the switch.

We might ask whether a compensatory duty falls solely upon B, solely upon the dozen individuals he saves, or whether it ought to be divided between the

two groups. Fortunately, we need not answer this question, since the situation most analogous to war (or so I will argue) is one in which the dozen individuals antecedently hire B as a bodyguard; they authorize B to pull the switch in order to save them. In such a case, it seems clear that the dozen individuals owe J compensation even though it is B who pulled the switch. We might think that normally the individual who actually commits the harm bears special compensatory duties over and above those who merely benefited from that harm. But the relevance of this distinction is diminished, if not outright eliminated, when the individual who committed the harm is hired or otherwise authorized to act by the beneficiaries of that harm.

The result is that when B switches the tracks at the behest of the dozen individuals he thereby saves, those individuals (along with B) will owe compensation to J for having (justifiably) infringed her rights, even though they weren't the ones who committed the rights infringement. Their status as beneficiaries who authorized the rights infringement suffices to impose upon them duties of compensation toward J.

But now complicate the example in the following way. Suppose we know antecedently that neither B nor the dozen individuals he will save will compensate J. Moreover, suppose we know that their failure to do so will be abjectly culpable. Does this affect the calculation determining the permission to inflict a harm on J? In one sense, it clearly does; it affects the wide proportionality constraint which determines whether the amount of harm we impose on non-liable parties is outsized relative to the amount of good that imposing that harm does.² But how do we include *future benefits* in the calculation of wide proportionality? I turn to this issue next, since it plays a crucial role in arguing that a failure to compensate *ex post* can affect proportionality calculations *ex ante*.

3. Diachronicity vs Synchronicity in the Proportionality Constraint

² Ibid 40.

We can categorize versions of the proportionality constraint according to whether it allows into its calculation only temporally proximate harms and benefits, or temporally distal ones as well. We can also categorize versions of the proportionality according to whether it allows into the calculation only temporally proximate actions, or temporally distal actions as well. The combination of these two bifurcated dimensions yields four possibilities, categorized in the chart which follows. After making these distinctions more clear, I'll argue in favor of a doubly diachronic interpretation of proportionality.

	DIACHRONIC	SYNCHRONIC
ACT	act-diachronic	act-synchronic
HARM	harm-diachronic	harm-synchronic

Suppose we know that although a candidate's course of action imposes a substantial harm on an innocent right now, next week we will compensate her for half that harm. In calculating proportionality, if we include only the consequences of what we are doing right now, then the future compensatory benefit plays no role in determining whether the candidate act satisfies proportionality. We've thus adopted an act-synchronic version of the proportionality constraint.

If, alternatively, we *do* include in the calculation of proportionality the consequences of what we know we will do later on, then the future compensatory benefit can indeed play a role in determining whether the candidate act satisfies proportionality, by subtracting the compensatory benefits we'll be providing later from the harms we are committing right now. This exemplifies an act-diachronic version of the proportionality constraint.

It is important to note that an act-diachronic version of the proportionality constraint does *not* commit us to the view that it is permissible to impose some harm on a victim provided that we fully compensate that victim later on. Even if the benefit we provide later on is so substantial that the victim herself would have been antecedently indifferent between the options of (a) suffering the harm and accruing the benefit, and (b) nether suffering the harm nor accruing the benefit, forcing the victim to choose (a) still wrongs her insofar as it violates her autonomy. We are not permitted to inflict harms even when we fully compensate the individual afterward, because doing so, in

the words of Robert Goodin, wrongfully “pushes the victim along her indifference curve”; it treats her value-equivalent options as fungible, when in fact she has the right to decide among them despite their being, by her own lights, value-equivalent.³ Someone convinced by this argument can still adopt an act-diachronic interpretation of the proportionality constraint by stipulating that we cannot completely subtract to zero a harm we are inflicting right now by adverting to a future compensatory act, no matter how substantial that compensation is. The compensatory benefit can, however, *partially* discount the disvalue of the current harm.

The act-diachronic/ synchronic distinction should be kept distinct from the harm-diachronic/ synchronic distinction. With respect to the act-diachronic/ synchronic distinction, the issue is whether we include the effects of only current acts in the proportionality calculation, or the effects of future acts as well.

With respect to the harm-diachronic/ synchronic distinction, we look *only* at current acts. The issue, rather, is whether we include in the proportionality calculation just the *immediate* effects of that current act, or the future effects of that current act as well. To appreciate the difference between these two distinctions, consider the following example.

Radiation

We are considering using a radiological weapon in a conflict. That weapon will cause immediate harms (e.g. burns) and future harms (e.g. cancer).

Presumably, the future harms should be included in the proportionality calculation (discounted according to epistemic limitations in predicting such harms). This is just to say that we ought to adopt a harm-diachronic view of the proportionality calculation. But now suppose we plan on providing some degree of compensation for the victims. We’re wondering whether the consequences of that future act—that is, providing the compensation—should be included in the proportionality calculation right now. If so, we ought to

³ Robert E Goodin, “Theories of Compensation” (1989) 9 Oxford J Legal Stud 56– 75.

adopt a harm-diachronic and act-diachronic view of the proportionality calculation.

Alternatively, we might think that the long-term consequences (such as the harm of cancer) of a current act ought to be included in the proportionality calculation, but *not* the consequences of acts we have not yet performed (such as acts of compensation we plan on committing next year). In this case, we've adopted a harm-diachronic and act-synchronic view of the proportionality constraint.

I presume that everyone reading this will agree that we ought to adopt a harm-diachronic interpretation of the proportionality constraint. That is, we ought not to exclude the long-term consequences of the harms we are including right now. There might be disagreement on whether we ought to partially discount the disvalue of those future harms on the grounds that they will occur in future—especially if the victims of those future harms are persons who do not yet exist. There might also be disagreement on whether we ought to treat future harms and benefits symmetrically. And of course, we might discount the disvalue of the harms in accordance with uncertainty about whether they'll occur. But I take it that no one will say, for example, that in the radiation case, the calculation determining the permissibility of using the radiological weapon ought to exclude the harms of causing cancer years from now. That would be absurd.

I will accordingly assume that some version of the harm-diachronic interpretation of the proportionality constraint is correct. But is the *act*-diachronic interpretation of the proportionality constraint also correct? I will argue that when evaluating an act that will infringe the rights of others, whether we will compensate those victims in the future can affect whether that act satisfies proportionality.

Suppose avoiding harm to others requires inflicting a harm on an innocent where doing so infringes her rights. As I have argued, even if inflicting the harm on her is justified insofar as it prevents greater harm to others, the innocent is still owed compensation. But now suppose that inflicting the harm on the innocent does not satisfy the proportionality constraint, but also suppose that we know antecedently that we will partially compensate the victim *ex post*. This diminishes the overall amount of suffering that the victim will have to endure. So, for example:

Broken Arm

Inflicting a broken arm on an innocent is necessary as a side effect to prevent two other individuals from suffering broken arms. We have available \$200,000 in the form of compensation to the innocent should we decide to infringe her right in furtherance of preventing two others' equally stringent rights from being infringed.

Though we are presumably not permitted to break one arm as a side effect of preventing two others from suffering broken arms, inflicting the broken arm, followed by a substantial compensatory payment offsetting some of the suffering that the rights infringement causes, might result in a total amount of suffering satisfying the proportionality constraint. Accordingly, knowing that we will compensate the victim *ex post* can help satisfy proportionality.

But in evaluating whether a current harm satisfies proportionality, what entitles us to look to the benefits that future acts will confer? That is, why believe that the act-diachronic interpretation of the proportionality constraint is correct? The answer is that the *harm*-diachronic interpretation suggests as much. Consider this case:

Poison

Inflicting a harm on an innocent—in the form of a poisoning—is necessary to avoid some equivalent harm to each of many others. Poisoning the innocent will cause her to suffer severe short-term abdominal pains and nausea, but will have the beneficial side effect of extending her life by ten years.

If we think that the future benefit caused by a current act ought to be included in the proportionality calculation, then it is unclear why we ought not to include benefits conferred *by future acts* as well.

We might be inclined to think that the following is a morally relevant distinction between harm and act diachronicity. In *Poison* there's a sense in which it is no longer up to us whether the victim will experience the long-term benefits of the short-term harm once we poison them. In *Broken Arm* we must act at some point in the future in order to ensure that the victim benefits. The compensation in that case depends on our goodwill in a way that the future benefits in *Poison* do not. Insofar as our goodwill is

potentially capricious in a way that the laws of nature are not, this might explain why we might be less inclined to adopt act-diachronicity even once we've accepted harm-diachronicity.

Suppose, though, we know antecedently that there is an $n\%$ chance that after inflicting some harm $h1$ we will compensate the victim by conferring some benefit b next year. We also know antecedently that there is an $n\%$ chance that inflicting some harm $h2$ will itself cause some benefit b next year. We ought to treat $h1$ and $h2$ the same as far as the calculation of proportionality is concerned. It is true that adopting a probabilistic attitude towards one's own behavior involves a sort of gestalt shift from *intending* to *predicting*—from a first-personal to a third-personal standpoint regarding ourselves. This might seem to belie the supposed sovereignty we have over our own decisions and action. There is something disconcerting, after all, about a friend responding purely in terms of probabilities when you ask whether she is going to fulfill a promise. By responding in such a way, she treats herself as if she did not have a say over whether she is going to do what she promised to do.

But, far from undercutting the normative nature of our promises and commitments, adopting a third-person standpoint toward one's self is a *condition* of making such promises and commitments. For if I know that I am not the kind of person who follows through with promises of the relevant kind (e.g. a promise to help a friend move, or a promise to stop drinking next month), then making such a promise is done in bad faith, precisely because I know that there is a low probability that I will choose to follow through. Likewise, if we know that we are unlikely to keep our commitment to provide our victim with compensation, then we cannot felicitously make such a commitment, which in turn means that we cannot include it in the benefits column of the proportionality calculation.

The moral, then, is that the problem worrying those skeptical about the act-diachronic interpretation of the proportionality constraint is self-correcting: The cases in which we ought to harbor significant doubts about our own commitment to providing compensation *ex post* are precisely those cases in which we cannot include that act of compensation in the proportionality calculation. Of course, there are other factors that might diminish our confidence in our ability to follow through with a commitment—we might doubt whether we have access to the funds necessary to compensate the

victim, for example. When the source of the uncertainty comes not from our *will* but from the *world*, we ought simply to do a weighted discounting of the benefit in accordance with the probability of its occurrence, just as we would if the benefit were the downstream result of a non-agential process. The upshot is that we ought to adopt not just a harm-diachronic interpretation of the proportionality constraint, but an act-diachronic one as well. I will call this the “Principle of Diachronic Equivalence.”

4. Culpable Failures to Compensate

So far I have characterized compensatory benefits as something that makes satisfying the proportionality calculation easier. But such a characterization can be misleading. As I claimed at the outset, we are often *morally required* to compensate the victim of a rights infringement. If we are unable to compensate the victim through no fault of our own, compensation plays no role in calculating proportionality. But suppose that the failure to compensate is culpable. Suppose we simply have no intention of compensating our victim, despite knowing or being in a position to know that we ought to do so, and despite having the means to do so. In this case, it is misleading to construe the situation as one in which a potential benefit is removed from the proportionality calculation. Rather, inflicting a harm on the victim while knowing that we will culpably fail to compensate the victim aggravates the rights infringement. I will call this the “Principle of Culpable Compensatory Failure.” In support of this principle, consider the following pair of examples.

Trolley 3

A trolley is heading toward a dozen individuals trapped on one side of a forking trolley track. The trolley will sever all of their arms unless a track is switched, in which case the trolley will head toward a single innocent trapped on that side of the track, thereby severing her arm. A bystander who happens upon the scene is able to switch the track. However, both she and the dozen individuals are destitute; they will never have the funds necessary to compensate the victim.

Trolley 4

A trolley is heading toward a dozen individuals trapped on one side of a forking trolley track. The trolley will sever all of their arms unless a track is switched, in which case the trolley will head toward a single innocent trapped on that side of the track, thereby severing her arm. A bystander who happens upon the scene is able to switch the track. However, she knows that the dozen individuals have no intention of compensating the single victim for the loss of her arm, even though they could easily do so at comparatively little cost to any one of them by pooling together their wealth. They simply do not want to do so. Moreover, the bystander is destitute; she lacks anything close to the funds required to even partially compensate the victim for the loss of her arm.

The harm inflicted and the harm prevented in Trolley 3 and Trolley 4 are exactly the same. In neither example is the single innocent compensated for her loss. The only difference is that in the former case, those who would ideally provide compensation are unable to do so through no fault of their own, whereas in the latter case those who would ideally provide compensation culpably refuse to do so.

This difference explains why we might be more inclined to permit pulling the switch in Trolley 2 than in Trolley 3, even though the harm inflicted and the harm prevented are exactly the same between the two cases. In Trolley 3 the rights infringement is made much worse by the fact that the beneficiaries of that infringement will culpably fail to fulfill their duty to compensate the victim. Doing so manifests an appalling disregard for the victim. Treating a severe infringement of her rights as unworthy of rectification is tantamount to regarding the victim as a disposable object rather than a person with attendant rights. This aggravates the wrong of infringing those rights; hence the amount of good that infringing her rights must achieve in order for doing so to be permissible is substantially higher than it would be if they treated the infringement as they should: as a *pro tanto* wrong necessitating rectification.

Note that a culpable failure to compensate *ex post* does not rule out the possibility of permissibly infringing the victim's rights. Consider this example:

Trolley 5

A trolley is heading toward a dozen individuals trapped on one side of a forking trolley track. The trolley will kill all of them unless a track is switched, in which case the trolley will head toward a single innocent trapped on that side of the track, thereby severing half of her pinky finger. A bystander who happens upon the scene is able to switch the track. However, she knows that the dozen individuals have no intention of compensating the single victim for the loss of her finger even though they could easily do so—they refuse since she is a member of an ethnic minority they detest. Moreover, the bystander is destitute; she lacks anything close to the funds required to even partially compensate the victim.

It is presumably permissible for the bystander to sacrifice half of the single victim's pinky to save the lives of the hundred who culpably refuse to compensate her. This is because the refusal to compensate makes the rights infringement worse, but only up to a point. Given a sufficiently large moral catastrophe, or a sufficiently small rights infringement, a culpable failure to compensate for the rights infringements will not be dispositive, even given the Principle of Culpable Compensatory Failure.

The upshot is that a culpable failure to compensate the victim of a rights infringement *ex post* can affect *ex ante* the proportionality calculation determining the permissibility of inflicting that rights infringement. This assumes that the act-diachronic interpretation of the proportionality constraint is correct, as I have argued. Now I apply what I have argued so far to warfare.

5. Compensatory Duties in War

Wars—even permissible ones—typically involve committing rights infringements against civilians on a massive scale. This includes, of course, the immediate and proximate collateral harms foreseeably but unintentionally inflicted upon civilians when military installations, personnel, and combatants are targeted. But this is just the tip of the iceberg. We also infringe the rights of civilians when we: damage or destroy private civilian property (such as living abodes, businesses, livestock, farms, etc); damage or destroy public sector facilities necessary to maintain the welfare of civilians

(such as health-care clinics, hospitals, schools, power plants, water treatment systems, etc); and traumatize civilians psychologically by exposing them to the horrors of warfare. Warfare also obviously interrupts economic output in ways that have lasting detrimental effects.

As I have pointed out elsewhere,⁴ the compensatory duty owed post-war is not merely a financial duty, but a *life-saving* one (which often can be implemented financially). This is because the majority of citizen deaths due to warfare occur after hostilities are over. 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.”⁵ The Geneva Declaration Secretariat states, based on data from armed conflicts between 2004 and 2007, that “a reasonable average estimate would be a ratio of four indirect deaths to one direct death in contemporary conflicts.”⁶ Consequently, the post-war compensatory duties are not limited to redressing the families of those wrongly killed in the course of the armed conflict; in addition, and more importantly, there is a compensatory duty to prevent misery and death.

These harms count as rights infringements to the extent that the civilians have done nothing to forfeit their right against suffering such harms. Suppose, though, that most of the civilians individually play an active, voluntary, and causally significant role in supporting their government’s unjust military aggression—and they are in a position to recognize that their government’s aggression, along with their own support of it, is unjust. I believe that the civilians, under these circumstances, will be morally (though not legally) liable to some of the aforementioned harms, in which case inflicting such harms upon them foreseeably but unintentionally in furtherance of preventing their state’s unjust military aggression will not

⁴ Saba Bazargan, “Defensive Wars and the Reprisal Dilemma” (2014) 93 *Australasian J Phil* 597.

⁵ Neta Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America’s Post- 9/ 11 Wars* (Oxford University Press 2013) 151.

⁶ Geneva Declaration Secretariat, *Global Burden of Armed Violence* (Cambridge University Press 2011) 32.

count as a rights infringement (provided that the constraint of proportionality is met).

Suppose, though, as is often the case, that we are waging a war in which any given individual civilian contributes little, if at all, to the unjust war that their government is waging. Suppose, further, that the war we are waging against them has a just cause. Though this further supposition obtains less often, my purpose is to show that waging a war that satisfies proportionality is more difficult than is commonly thought. So for this reason it is necessary to take as an example cases in which the war being fought has a just cause. (A war has a just cause if waging that war averts an evil of the right type and of sufficient importance necessary to provide at least a *prima facie* justification for killing liable parties in furtherance of averting that evil.)

So inflicting rights infringements on civilians will be permissible if doing so is the least harmful means of waging a war with a just cause and if the harms we inflict are not disproportionate relative to the wrongful harms we prevent. But even when the rights-infringements we inflict are permissible on these grounds, the victims are owed compensation because the rights infringements, despite being all-things-considered permissible, are still *pro tanto* wrongful. But who has the duty to compensate the innocent civilians whose rights we infringe? The following example suggests it is the wrongful aggressor that owes compensation, even if it is the justified defender that commits the rights infringement.

Individual Defense 1

The only way to prevent an unjust aggressor from killing you is by throwing a grenade that will incapacitate him without killing him. Unfortunately, an innocent bystander is present. Throwing the grenade will injure the bystander as a side effect (perhaps it causes burns, or the concussive force breaks her arm).

You throw the grenade, which it is arguably permissible to do, since (a) the cost to you is much greater than the cost to the civilian, and (b) you do not intend to harm the civilian. Presumably the bystander is owed compensation on the grounds that her rights were infringed, albeit permissibly. But who owes the civilian compensation? You, or the unjust aggressor?

In this case, you both commit the rights infringement, and you are the beneficiary of doing so in that by committing it you save your own life—though you do so by shifting a cost to the bystander. On the standard account of compensation, as both the beneficiary of a rights infringement and the actor who committed it, you would be liable.⁷ Yet it seems unfair—impose the cost of compensation upon you. This is because another party—the unjust aggressor—culpably and gratuitously created a situation in which it became morally permissible and practically rational for you to infringe the rights of the bystander. This makes the unjust aggressor a more appropriate bearer of a compensatory duty than you.

If this is correct, it has implications for duties of compensation in war. Suppose again that we are waging a defensive war against an unjust aggressor; the war satisfies the constraints of necessity and proportionality. In doing so, we ineluctably infringe the rights of millions of innocent civilians who are not liable to be harmed in this way. But insofar as it is the actions of the unjustly aggressing state that made it morally permissible for us to infringe the rights of those civilians as a side effect of preventing much worse harms, we do not owe compensation to those civilians; rather, the unjustly aggressing state does.

Though states—especially economically privileged ones—often undertake reconstruction efforts post-bellum, it is rare that this counts as compensation for the harms inflicted. This is because compensation requires not merely ameliorating the suffering and devastation wrought by war, but in fact bringing the civilians back to the level of well-being they enjoyed antebellum. This will require massive economic resources that a losing state will typically lack. So achieving the aim of winning a defensive war with a just cause will deprive the vanquished of the ability to fully discharge its compensatory duties toward its own civilians—if it ever had that ability in the first place.

What happens, then, when the primary party owing compensation cannot discharge it? It would be premature to hold the compensatory duty in

⁷ See e.g. Daniel Butt “On Benefiting from Injustice” (2007) 37 *Canadian J of Phil* 129– 52; Christian Barry and Robert Goodin, “Benefiting from the Wrongdoing of Others” (2014) 31 *J App Phil* 363– 76; Gerald Øverland and Bashshar Haydar, “The Normative Implications of Benefiting from Injustice” (2014) 31 *J App Phil* 349– 62.

abeyance. Rather, there are secondary parties upon whom the duty falls. In the sorts of cases I have been discussing, the duty would fall on the party who both committed the rights violation and benefited from doing so. To see this, consider a version of the previous example:

Individual Defense 2

The only way to prevent an unjust aggressor from killing you is by throwing a grenade that will incapacitate him without killing him. Unfortunately, an uninvolved bystander is present. Throwing the grenade will injure the civilian as a side effect. The unjust aggressor is destitute; he lacks the funds to compensate the bystander.

Again, it is arguably permissible to throw the grenade since the cost to you is much greater than the cost to the civilian, and you do not intend to harm the civilian. And again, the bystander is presumably owed compensation on the grounds that her rights were infringed, albeit permissibly. But whereas in the first version of the example the compensatory duty fell on the unjust aggressor, in this version he is unable to discharge that duty. In this example, however, there is another party who can be properly called upon to compensate the victim: the party that infringed the victim's rights and who benefited from doing so. These relational properties toward the victim can ground a duty to compensate her for the infringement of her rights, provided that there is no one else who is both (a) more blameworthy for that infringement and (b) capable of providing that compensation—that is, the unjust aggressor himself.

I do not mean to claim that there is a strict lexical ordering of who ought to compensate. There might be factors that make it appropriate for the unjust aggressor and the defender to share the compensatory duty. For example, the unjust aggressor might be capable of only providing some compensation. Or the unjust aggressor might be partially excused, in which case it might be unfair to impose the entirety of the compensatory duty on him. Or it might be that imposing the entirety of the compensatory duty on him will incur disproportionate costs relative to the good that the compensation does.⁸ But

⁸ This point is made nicely in David Miller, "Distributing Responsibilities" (2001) 9 J Pol Phil 453–71.

absent these sorts of circumstances, the status of the proper bearer of the compensatory duty moves from the unjust aggressor first, to the defender second. I will call this the “Principle of Secondary Compensation.”

If this principle is correct, then the justly defending state has a duty to “pick up the slack” by compensating for the harms it permissibly caused in furtherance of defending itself, provided that upon winning the war the unjustly aggressing state is unable to do so. Now, it is quixotic to think that any government would possess the political will and wherewithal required to undertake this sort of economically massive aid towards one’s former enemies in the aftermath of a costly war. Indeed, it is not mere cynicism to say that we can confidently predict the following of any just war fought in the near future: The victorious party will likely fail to discharge its compensatory duties toward the civilians whose ruination enabled that victory.

Recall now the Principle of Culpable Compensatory Failure: If we know *ex ante* that we will culpably fail to discharge our compensatory duty toward those whose rights we infringed in furtherance of defending ourselves, then those rights infringements will receive substantially augmented weight in the proportionality calculation. As I argued in Section 4, it’s much harder to justify rights infringements when we are in a position to know antecedently that (a) we will have a duty to compensate for those harms, and (b) we’ll culpably fail to do so. The upshot is this: It is even more difficult than was previously thought to permissibly wage a war with a just cause, since doing so will often require compensating its innocent victims. If we know antecedently that we’ll culpably refrain from doing so, then it is highly unlikely that the war satisfies proportionality. The following example demonstrates this:

Individual Defense 3

Aggressor is intent on unjustly killing Defender. Defender is unable to personally defend herself, but she has wisely hired Bodyguard, who is capable of defending her. One day Aggressor shows up, leveling a firearm at Defender. The only way for Bodyguard to prevent Defender’s death is by throwing a grenade that will incapacitate Aggressor. Unfortunately, doing so will also sever innocent Bystander’s arm.

Now consider two versions of this example.

Version A:

None of the parties in this example (nor anyone else) is able to compensate Bystander.

In this version, the failure to compensate is *non*-culpable. Is it permissible for Defender to authorize Bodyguard to throw the grenade in Version A? Suppose that it is: Though the loss of an arm is grievous, it is small enough relative to the harm of a lost life to permit imposing the former on an innocent in order to prevent another innocent from suffering the latter. But now consider:

Version B:

Defender is indeed perfectly capable of compensating Bystander (Aggressor and Bodyguard remain unable). However, we know that Defender will culpably refuse to provide any compensation to Bystander *ex post* for the loss of her arm.

In the two versions, the amount of harm inflicted is exactly the same, as is the amount of harm prevented. (Compare with the pair of *Trolley* examples discussed in Section 1). But in Version B, unlike Version A, Defender's failure to compensate is culpable. If the Principle of Compensatory Failure is correct, we must augment the weight that the lost arm receives in the calculation of proportionality. Since it is harder to satisfy proportionality given a culpable refusal to compensate, it might turn out that Defender is not permitted to authorize Bodyguard to throw the grenade unless Defender will compensate Bystander *ex post*.

A state that embarks on an otherwise just defensive war but will foreseeably culpably fail to compensate its civilian victims is in a position analogous to Defender in Version B; its culpable failure to compensate makes the rights it infringes morally worse, to the point that waging the war might not satisfy proportionality.

I have argued in favor of the Principles of Diachronic Equivalence, Secondary Compensation, and Culpable Compensatory Failure. Together, they yield the following result when applied to the morality of war: *It is highly unlikely that*

an otherwise just war will satisfy the proportionality constraint if we will culpably fail to compensate our victims ex post.

6. Strong vs Weak Secondary Compensation

So far I have argued that the defending state that commits and benefits from permissible rights infringement in the course of waging a war has a compensatory duty *only if* the unjust aggressing state is unable to discharge that duty. This follows from the Secondary Compensation Principle that states that the party which authorized or committed the infringement from which she benefited owes compensation only if the culpable party is unable to discharge that duty. In what follows I will argue in favor of a stronger version of that principle: The party which authorized or committed the infringement owes compensation even if the culpable party is able to compensate but culpably refuses to do so. An application of this principle to the proportionality constraint in war yields the view that the defending state has a compensatory duty even if the unjustly aggressing state culpably refrains from assisting its own civilians. To better grasp what the stronger version of the Secondary Compensation Principle claims, consider the following variation of *Individual Defense 2*.

Version C:

Defender is perfectly capable of compensating Bystander (though Bodyguard is not). Aggressor is also capable of compensating Bystander. However, we know that Aggressor will culpably refuse to provide any compensation to Bystander *ex post* for the loss of her arm.

Unlike the previous version of this example, it is Aggressor who culpably refuses to compensate despite being perfectly capable of doing so. The issue, then, is this: Does the duty to compensate fall upon Defender? Those inclined to accept that the compensatory duty falls upon Defender if Aggressor is *unable* to compensate Bystander might demur in cases where Aggressor's failure to compensate is culpable. Perhaps there is a duty of beneficence to "fill in" when others culpably fail to discharge their compensatory duties, provided the victim is left sufficiently badly off. But this is not a case where

a duty to *compensate* falls upon us; rather, we have a Samaritan duty to help anyone who is in dire need through no fault of her own. The strong version of the Compensatory Principle, however, says that the *compensatory* duty falls upon Defender when Aggressor culpably fails to discharge that duty.

One reason to accept the stronger version is that what grounds the weaker version is no less present in cases where Aggressor culpably refuses to compensate. Recall that what militates in favor of the view that Defender can owe compensation when Aggressor is unable to compensate is that Defender authorizes the infringement of Bystander's rights, and benefits from that infringement in that it shifts a harm from herself to Bystander. This relation is also present in cases where Aggressor culpably refuses to discharge her duty. It is, after all, Defender's relation to the victim—the bystander—that grounded her compensator duty, rather than Defender's relation to Aggressor. This suggests that Defender that has a compensatory duty regardless of *why* Aggressor fails to discharge her compensatory duty. Whether it is because she is unable to do so or merely unwilling, the duty can subsequently fall upon Defender, whose relation to Bystander remains unchanged.

I take it, though, that the stronger version of the Secondary Compensation Principle will be more controversial than the original, weaker version. Perhaps one reason is this. We might worry about the publicity of a norm admitting that abjectly flouting a moral duty generates the self-same duty in others. If we adopt such a norm, Aggressor can reasonably surmise that her culpable failure to compensate will not leave Bystander in the lurch, since that duty will pass to Defender. So she need not worry that flouting her compensatory duties will make Bystander worse off. Yet this is certainly not how we want people to reason. Insofar as the stronger version fails a publicity condition, this speaks against it.

But note that if the stronger version is correct, then Aggressor, by culpably flouting her compensatory duty, gratuitously shifts her own compensatory duty to Defender. This clearly is a setback for Defender; after all, she can now be called upon to transfer substantial assets to Bystander by dint of Aggressor's culpable disregard for her own compensatory duty. This means that now Defender has a claim against Aggressor that Aggressor compensate Defender for the amount that Defender was wrongly made to compensate

Bystander. The upshot is this: To the extent that the stronger version of the Secondary Compensation Principle imposes burdens on Defender for Aggressor's culpable disregard of her own duties, Defender thereby has a claim against Aggressor for doing so. Of course, Aggressor might then culpably disregard *that* second-order compensatory duty. But my goal here is to show that when the primary party owing compensation does indeed wrongly and culpably flout that duty, consequently requiring a secondary party (bearing the appropriate relation to the victim) to pick up the slack, the primary party does not thereby escape her moral duty. Rather, what has changed is to whom she owes that duty.

7. Conclusion

I have defended the strong version of the Secondary Compensation principle. But even if only the original, weaker version is correct, it too enjoins us to take duties of compensation in war more seriously than has previously been the case. Even in just wars we infringe the rights of countless civilians whose ruination enables us to protect our own rights. By any standard, that requires compensation. I have argued that those who authorize or commit the infringements and who also benefit from those harms will bear that compensatory duty if the unjust aggressor cannot or will not discharge it. If we suspect antecedently that we will culpably refrain from compensating those victims, then this makes satisfying the war's proportionality constraint substantially more difficult. The lesson here is that failing to take duties of compensation seriously constrains our moral permission to protect ourselves.

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