

COMPENSATION AND NECESSITY IN WAR

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1. Introduction

The US has disbursed “condolence payments” to at least some of the foreign civilians harmed in every significant military operation the US has conducted since the Korean War. This includes foreign civilians that Coalition forces harmed during the US-led wars in Afghanistan and Iraq. These payments were intended as “symbolic gestures” and “expressions of sympathy”, rather than as “an acknowledgment of any moral or legal responsibility” for the civilians US-led forces maimed and killed.¹ The US under-secretary of defense issued a memorandum further describing the purpose of such payments: to “help authorized commanders obtain and maintain friendly relations with and the support of local populations where US forces are operating.”² Consequently, a vast swath of civilians harmed by US-led combat operations did *not* receive payments. For example, the US conducted countless airstrikes on Mosul in Iraq, on Raqqa in Syria, and in northwest Pakistan. But the scarcity or absence of US ground troops in those areas meant most civilians harmed by US strikes received no condolence payments.³ To make matters worse, a recently uncovered Pentagon archive of the US air war in the Middle East reveals that the Defense Department massively under-counted civilian deaths since at least 2014.⁴ So, the fraction of civilians US-led forces collaterally harmed who received condolence payments is even smaller than what the Defense Department indicated.

Why is this important? I argue that military strikes *during* a war will often have an indeterminate deontic status until *after* the war, when the time comes to compensate collaterally harmed civilians. This is because *in bello* military strikes on the one hand, and *post bellum* compensation on the other, are each part of a morally interdependent com-

1. (Crawford N., 2013, p. 470)

2. (Under Secretary of Defense, 2020)

3. DoD payments present only a small fraction of what the US provides. In particular, USAID assists a broader cross-section of the population in Iraq and Afghanistan. I return to this point in section 4.

4. See Khan, Azmat (2021, December 18).

bination of acts. A military strike now can become impermissible later on if at that point we fail in our duty to compensate the innocent victim of that strike. This argument, if correct, has profound consequences. It suggests we are mistaken in regarding compensation as an ancillary concern, relegated to the post-war environment. These duties are instead central to the possibility of waging a war justly—i.e., satisfying *jus in bello*.

The argument proceeds in three stages. First, I argue that civilians whose rights are permissibly infringed over the course of a war are generally owed compensation. Second, I argue that this compensatory duty does not necessarily fall on the party that inflicted the collateral harm; it instead might fall on the party whose unjust aggression necessitated the infringement. But if they cannot discharge that compensatory duty, it can under certain circumstances fall on the party that inflicted the harm. Third, I argue that a military strike will violate the *jus in bello* necessity constraint if we later fail in our duty to compensate the innocent victims of that strike. This is because an attack-with-compensation is overall less harmful than an attack-without-compensation. Given the availability of the former, the latter violates necessity. In making this point, I present reasons why we should evaluate candidate attacks diachronically—that is, in a way that mereologically conjoins the *ex ante* attacks with *ex post* compensation.

Three clarificatory points. First, the issue of compensation for rights-infringement in war falls partly under *jus post bellum*.⁵ But my focus is not on what constitutes a just post-war state of affairs, but on whether and how our post-war compensatory obligations (which partly constitute *jus post bellum*) affect *jus in bello*. Second, I focus on the compensatory duties of the victorious rather than the defeated parties in an armed conflict. This focus side-steps worries that a victor, by dint of their superior strategic position, might overburden the defeated party

5. *Jus post bellum*—the norms governing a just postwar state of affairs—can be distinguished from *jus ex bello*—the process by which belligerents cease fighting and sue for peace. See (Moellendorf, 2008). For discussion, see (Fabre, 2017).

with excessive compensatory demands, thereby planting the seeds for future conflict.⁶ Third, I focus on the relevance that compensation has on the constraint of necessity rather than on the constraint of proportionality.⁷

Before I begin, though, I will briefly clarify what I mean by compensation, and by the necessity constraint. Corrective justice specifies what parties owe one another in the breach. Compensation is part of what might be owed; its function is to redress a harm. Compensation typically applies where it is impossible to give back what was lost—i.e., where restoration is impossible. Instead of restoring what was lost, compensation provides a benefit roughly equivalent in value to what was lost.⁸ This value is typically measured by reference to its effects on wellbeing. Depending on the view in question, full compensation will either return the victim's wellbeing to the *status quo ante* or improve wellbeing to what it would have been absent the harm.⁹

I distinguish compensation from rectification which focuses not on redressing harms but on redressing wrongs.¹⁰ Consequently, wrongdoers who owe redress will often owe not just compensation, but rectification as well. That being said, my focus throughout is on compensation only.

Of course, many harms—especially those inflicted in war—are so egregious that they cannot be fully compensated.¹¹ Even so, the victims or their families are still owed, at the very least, what will partially compensate them. And though I will assume throughout that compensation is best discharged through a transfer of funds, I leave open the

6. See (Lazar, 2012) who articulates this worry, and (Fabre, 2017) who responds to it.

7. For discussion of its relevance to proportionality, see (Bazargan-Forward, 2017).

8. See for instance (Nickel, 1976), (Goodin, 1989), (Gaus, 1991), (Coleman, 1992), and (Boxill, 2005).

9. See (Goodin, 1989), (Lomasky, 1991), (Gaus, 1991), (Coleman, 1992, ch. 16), (Boxill, 2003), (Boxill, 2005), and (Boxill, 2013).

10. For more on this distinction, see (Hull, 2015).

11. See (May, 2012, pp. 200-216).

possibility that other modes of compensation might be more appropriate, especially when monetary compensation might be perceived as gauche or insulting.¹²

Moving on to the necessity constraint, its purpose is to ensure that we inflict minimum harm in furtherance of averting unjustified threats.¹³ Even if all the other criteria for the permissible use of force are met, the resort to force is unjustified if there is some other less harmful means available. In the law of armed conflict, Article 57 of the first additional protocol to the Geneva Conventions imposes necessity as a constraint on the selection of objectives in military conflicts, and on the selection of the means and methods undertaken in furtherance of those objectives.¹⁴

However, the necessity constraint as it is often construed (including in the Law of Armed Combat) fails to constrain harms that the justified defender inflicts on uninvolved bystanders.¹⁵ Imagine that an unjustified aggressor will wrongly kill a justified defender unless she fights back. She has two options. Option A disarms the unjustified aggressor but has the side-effect of breaking a bystander's leg. Option B kills the unjustified aggressor and leaves the bystander unscathed. Both options satisfy the proportionality constraint: if either of the two options

were the only one available, the harm inflicted would not be excessive relative to the harm averted. But which options satisfy necessity?

To answer this, we must compare the additional morally weighted harm to the bystander in Option A, to the additional morally weighted harm to the aggressor in Option B. In comparing the two options, we must determine which harm "counts as less", given the good afforded. According to Lazar, a harm is unnecessary if there is a less harmful option where the effectiveness of that option is morally sufficient in that the more harmful option produces no sufficiently valuable additional benefit.¹⁶ Whenever we consider a defensive option that will inflict more morally weighted harm, the additional marginal harm must be justified by a commensurate reduction in harm to the prospective victims (or by commensurate goods conferred upon others).¹⁷ This account of necessity is what I use in what follows.

2. Compensation for Permissible Rights-Infringements

Sometimes we harm innocents in ways that are permissible all-things-considered. Such innocents can be owed compensation. Consider the following case.

Necessary Bomb

A culpably wrongful **Aggressor** will shoot and kill **Defender** unless she throws a bomb at **Aggressor**, which she consequently does. Doing so foreseeably kills **Aggressor**, eliminating the threat he poses. However, next to **Aggressor** is **Bystander**—an uninvolved innocent whose arm foreseeably breaks in the ensuing explosion.

Throwing the bomb is presumably permissible. This is not because (or not only because) we have an agent-relative permission to give extra weight to our own wellbeing.¹⁸ Rather, it is because throwing the

12. For example, though the Pakistani government has offered limited compensation to some civilians victimized by the US drone program in that country, the Waziris in particular rejected the payments on principle. In a 2012 interview in Islamabad, a local government employee said regarding a recent attack that "after the strike, we lost an entire community of elders, so we did not take these three lakh rupees and we didn't take compensation because we thought we were more than that." A father whose son had been killed in a drone attack in Peshawar said in an interview "We don't need any financial benefit. I don't want to sell my son." See (International Human Rights and Conflict Resolution & Global Justice Clinic, 2012, p. 80).

13. For a comprehensive discussion of necessity and its relation to liability, see (Frowe, 2015, pp. 88-120).

14. Some argue that these constraints are too permissive; they allow military advantage to rationalize excessive carnage. See (May, 2007, pp. 190-210), (Blum, 2010), (Lazar, 2012, p. 41), (Zohar, 2014, pp. 158, 160), (Haque, 2017, pp. 32-34), and (Benbaji & Statman, 2019, pp. 144-147).

15. (Lazar, 2012, p. 6)

16. See (Lazar, 2012, p. 15). Also see (McMahan, 2018, pp. 435-437).

17. See (Lazar, 2012, p. 44).

18. See (Quong, 2009) and (Quong, 2012).

bomb prevents a significantly worse outcome, impartially construed. The harm thereby satisfies the *wide* proportionality constraint.¹⁹ This is a constraint on harming those who are not morally liable to be harmed. According to wide proportionality, the good we achieve in harming someone who is *not* liable to be harmed must be sufficiently weighty to warrant that harm. In particular, such good must be substantial enough to outweigh or override a right not to be harmed. In such a case, the rights in question are infringed rather than violated. This describes Defender's situation: she infringes but does not violate Bystander's rights.²⁰

Factors such as the doctrine of double effect and the doctrine of doing and allowing might be relevant to the wide proportionality calculation. One such factor supports the verdict that Defender satisfies wide proportionality: Defender harms Bystander merely foreseeably. Though this by itself does not permit Defender to harm Bystander, it makes it easier for Defender to satisfy wide proportionality than it otherwise would be.

Though harming Bystander is all-things-considered permissible, she is nonetheless owed compensation. In general, the loss or injury which compensation addresses need not be a wrong.²¹ Thus, Bystander can be owed compensation if harming her was all-things-considered morally permissible. Why? Though Bystander is harmed permissibly, she retains the right not to be harmed. This extant, *pro tanto*, rights-based reason against inflicting the harm provides a basis for compensating Bystander *ex post*.

Does this view suggest that there is nothing *pro tanto* wrong with

collaterally harming bystanders so long as we compensate them afterward? No, for two reasons. First, there are many permanent harms difficult or impossible to make good. Even post-compensation these victims will suffer uncompensated harms. Second, even if a victim is fully compensated to the point that she would be indifferent between a) being harmed then compensated, and b) being neither harmed nor compensated, she retains the right to choose between these options. In choosing for her, we violate her autonomy by forcibly pushing her along her indifference-curve.²² This, again, means we cannot permissibly go around harming others even if we fully compensate them.

Bystander, then, is owed compensation. But from whom? Ideally, we would compel Aggressor to compensate Bystander. After all, it was Aggressor who morally necessitated Defender's course of action. And unlike Defender, Aggressor acted wrongly and culpably. But by hypothesis Aggressor cannot pay because he is deceased.

We are faced, then, with a choice: either allow Bystander to remain uncompensated or force some other party to pay. One candidate is Defender. After all, she infringed Bystander's rights.²³ Though Defender might argue that it is unfair that she should have to compensate Bystander given that Aggressor is the ideal candidate, the alternative would be more unfair: it would mean Bystander is forced to suffer the burdens Defender shifted upon her. When we protect ourselves in a way that puts innocent people in danger, those innocent people have a fairness-based complaint against us. We have, in effect, shifted part of the harm we would otherwise suffer from us onto them. In doing so, we thereby make *their* lives go worse in order to prevent *our own* lives from going worse, even though they have done nothing to make themselves morally liable to suffer such harms. This is unfair. Compensation ameliorates this unfairness.

Against this, one might point out that Defender is a victim of bad

19. See (McMahan, 2009, pp. 21–31).

20. See (McMahan, 2009). As an alternative to the infringement model, specificationist models foreclose the possibility of permissible infringement; see (Shafer-Landau, 1995), (Oberdiek, 2004), and (Draper, 2016, pp. 237–249). See also (Walen, 2019, pp. 101–103) for a novel alternative to the rights-infringement model, which also accommodates the claim that the victims in question are owed compensation.

21. See (O'Neill, 1987, p. 75), (Rodin, 2012, pp. 75, 86, 107, 109), and (Goodin, 2013, p. 482).

22. (Goodin, 1989, p. 61)

23. (Feinberg, 1978, p. 102) and (Thomson, 1980) argue that permissibly inflicted harm can necessitate compensation. See also (Hosein, 2014, p. 88). But see (Klepper, 1990), (Wigley, 2009), and (Oberdiek, 2004).

brute luck. As such, a luck egalitarian might maintain that the cost of that luck should be shared by all. That is, the state or the community should bear the cost. There is no moral reason for Defender, as opposed to anyone else, to suffer that cost. Ideally, then, everyone—rather than just Defender—would compensate Bystander, leaving Defender responsible for no more of the overall burden than anyone else. (In addition, spreading out the cost in this way ensures no single individual will have to bear the burden in its entirety). So, it seems that Defender’s compensatory duties to Bystander would be miniscule at best, given luck egalitarianism.

But Defender’s compensatory duties then depend on whether the others act on theirs. What happens in the absence of an enforcement mechanism ensuring their compliance? In such a case, a luck egalitarian might maintain that these duties should be shared at least between Defender and Bystander. Bystander can do this by foregoing half of what would fully compensate her, leaving the remaining half for Defender to provide. Suppose this view is correct. If so, it will still turn out that Defender owes Bystander substantial compensation, viz., for one half of the damage she inflicted. The upshot is that even assuming luck egalitarianism, Defender can owe quite a lot in compensation to Bystander—in the absence of enforcement mechanisms necessary to socialize compensation.

So, if Defender shifts a harm from herself to Bystander, then Defender owes Bystander compensation for at least half of that harm, provided that a) Defender is able to compensate, b) Aggressor cannot be made to compensate, and c) the rest of society cannot be made to compensate. Consider, though, a case in which Defender infringes the rights of a bystander in the course of averting an attack against *someone else*:

Other Defense

A culpably wrongful **Aggressor** will shoot and kill **Victim** unless **Defender** throws a bomb at Aggressor, which she consequently does. Doing so foreseeably kills Aggressor, eliminating

the threat he poses. However, next to Aggressor is **Bystander**—an uninvolved innocent whose arm foreseeably breaks in the ensuing explosion.

Bystander is owed compensation for the same reasons as before. And like before, Aggressor would be morally liable if he weren’t deceased. But in contrast to the previous version of this example, I do not claim that Defender owes Bystander. This is because Defender is not shifting a cost from *herself* to Bystander. Rather, she is shifting a cost from *Victim* to Bystander. Provided Defender does so with Victim’s consent,²⁴ Victim is thereby morally liable to pay compensation (given that Aggressor cannot pay).

I mention this sort of case only to set it aside, as I will focus throughout on compensation for self-defensive infringements. This is because compensation for other-defense raises additional difficulties in cases where Defender responds to a request for aid from Victim. In such cases, Defender might be construed as acting at Victim’s behest. Or the two might be construed as joint actors in a common endeavor. Adjudicating compensatory duties in these contexts is important, but requires delving into issues surrounding fiduciary liability, joint action, and complicity, which is beyond the scope of this paper. For this reason, I focus throughout on compensation for self-defensive infringements which proves difficult enough and serves as a necessary first step to make sense of compensation for other-defense.²⁵

3. Effects of Violating Compensatory Duties

Here I argue the following. Infringing the rights of others, when followed by a failure to compensate, can violate the necessity constraint. (To be clear, a party counts as *failing* to compensate only if that party is *able* to compensate).

The first step was to argue that, on a rights-infringement model, victims of permissible rights-infringements are owed compensation—and

24. I return to this issue in section 4.

25. In section 4.2, though, I consider cases of *involuntary* other-defense.

that absent the culpable aggressor's ability to pay, the rights-infringer should do so. (I assume throughout that the rights-infringing party is among those that the culpably aggressing party would have otherwise harmed.) None of this is terribly controversial (at least among those who accept the rights-infringement account of defensive violence).²⁶ In what follows, though, I argue for a novel view: failing to compensate affects the deontic status of the prior rights-infringement.

3.1 *Infringing and Compensating as Complex Acts* Consider the following case.

No Compensation

A culpably wrongful **Aggressor** will shoot and kill **Defender** unless she throws a bomb at Aggressor, which she consequently does at **T₁**. Doing so foreseeably kills Aggressor, eliminating the threat he poses. However, next to Aggressor is **Bystander**—an uninvolved innocent whose arm foreseeably breaks in the ensuing explosion. At **T₂**, Defender violates her compensatory duty toward Bystander by gratuitously refusing to compensate him.

The deontic status of what Defender did at **T₁** remains indeterminate until **T₂**. Her refusal at **T₂** to compensate resolves the deontic status of her earlier action at **T₁**. To be clear, the claim is *not* that her refusal at **T₂** *retroactively* determines the deontic status of what she did at **T₁**. Rather, it is only from **T₂** onward that what she did at **T₁** has the deontic status that it does. More specifically, Defender's refusal to compensate at **T₂** means that her actions at **T₁** now violate the necessity constraint. To see why a wrongful failure to compensate affects necessity, we need only compare the actions available to Defender:

- a. a. attack-and-then-fulfill-compensatory-duties
- b. b. attack-and-then-violate-compensatory-duties

26. See note 21.

Option 'a' results in less harm to Bystander than option 'b'. Given the availability of option 'a', option 'b' violates necessity.

One might point out the following. In assessing necessity, harms to Bystander aren't the only harms that count. The harms to Defender matter as well. (If not, then necessity would prohibit Defender from throwing the bomb regardless of whether she compensates Bystander. After all, refraining from defending herself is the most effective way of preventing Bystander from suffering harm).²⁷ Though options 'a' and 'b' both avert the harm that Aggressor would otherwise inflict on Defender, option 'a' results in *some* harm to Defender: the deprivations that compensation causes her. But because Defender owes compensation, that harm is 'moralized' in that we partially discount that harm in the necessity calculus. The result is that opting for 'b' violates necessity even when including the harmful deprivations that compensation causes Defender.

The claim that the deontic status of what we do at one point in time can depend on what we do later on is an utterly banal feature of the moral landscape. There are many acts which can be properly evaluated only in tandem with other, subsequent acts. Consider this mundane case: it is permissible for me to eat a meal at a restaurant (at **T₁**) only if I subsequently pay for it (at **T₂**). The deontic status of the decision to eat there depends on whether I pay. The two events morally interdepend.

The point might be put like this: if I dine-and-dash, what I have done wrongly is not *dining* by itself (it is permissible to dine so long as I pay) nor is it *dashing* by itself (it is permissible to dash if I did not dine), but rather the two in combination. The same goes when Defender compensates at **T₂** for a rights-infringement she committed at **T₁**. As a result, we might not know until **T₂** whether what she did at **T₁** is indeed part of a deontically permissible whole.

Still, it might be alleged that I have engaged in a kind of mereological gerrymandering in my description of the actions available to De-

27. I thank Helen Frowe for making this point.

fender. According to this criticism, I have inaptly conjoined two distinct actions—one at T₁ and one at T₂—into a single, diachronically-described act. This move might be thought inapt for the following reason. When we descriptively conjoin multiple acts only one of which is wrongful, any moral evaluation of the conjoined act will be procrustean. Suppose I go to the gym, eat dinner, and then drive home intoxicated. We might ask whether what I did is permissible. More specifically: is it permissible to exercise-then-eat-then-drive-intoxicated? Presumably doing *that* is wrongful. But this negative verdict on the deontic status of a complex act obscures the moral status of its constituent parts. Clearly, the exercising and eating are permissible; drunk driving is not.

It might, then, be alleged that I have committed the same legerdemain in my descriptions of the actions available to Defender. In each of 'a' and 'b', I referred to a pair of distinct actions by describing them as a diachronically conjoined whole. This speciously suggests that what Defender does *ex post* can affect the deontic status of what she does *ex ante*. It might seem, then, that Defender's refusal to compensate does *not* mean that her earlier actions now violate necessity. Rather, Defender's decision to inflict defensive violence was permissible, and the subsequent decision to refrain from compensating Bystander was impermissible. Or so it might seem.

But I think the mereologically conjoined, diachronically described action-combinations in 'a' and 'b' are indeed morally apt. The short explanation is this: what Defender does at T₁ and what she does at T₂ morally interdepend in a way warranting evaluating these discrete acts together.

To see why, take the following candidate evaluation of Defender's conduct: what she did at T₁ was permissible and what she did at T₂ was impermissible. This evaluation, though, is arbitrary. Consider an equally acceptable alternative evaluation: what she did at T₁ was impermissible and what she did at T₂ was permissible. After all, if Defender had opted against self-defense and thereby refrained from infringing Bystander's rights, there would have been nothing wrong with subsequently refraining from compensating Bystander. In evalu-

ating Defender's conduct, we can either i) "hold fixed" the decision to inflict defensive violence and then evaluate her decision to refrain from compensating, or ii) "hold fixed" the decision to refrain from compensating and then evaluate her decision to inflict defensive violence. There is nothing privileging the first option over the second.

We might think that we should hold fixed the decision to inflict defensive harm rather than the decision to refrain from compensation, because inflicting defensive harm is justified. But that's precisely what's at issue: whether inflicting the harm is justified absent compensation. A non-arbitrary evaluation of Defender's conduct would look like this: she ought to have attacked *only if* she was going to compensate. Or put differently, a particular combination of acts is verboten: Defender ought to either attack-and-then-compensate or not attack at all. But note that the first option is just the mereologically conjoined, diachronically described action-combination mentioned in 'a' above.

The moral is that the complex description is apt after all, because the deontic status of the constituent acts morally interdepend. Defender's choice—to attack without compensating—is a more harmful option relative to the alternative of attacking with compensating. This means the first option violates the necessity constraint. Since it violates the necessity constraint, that complex action is unjust.

Whether Defender violates necessity depends on whether she compensates Bystander for infringing his rights. How, then, do we evaluate what Defender has done, *after* she infringes his rights but *before* she can compensate him? During that interim, given an indeterminate future, there might be no fact of the matter as to whether Defender violated necessity. Until the compensatory window closes, the deontic status of what Defender has done might remain indeterminate. This result is not infelicitous, though. This is because, again, Defender's actions are in an important sense incomplete until such time as she decides whether to compensate. Before then, the deontic status of what she has done is indeterminate for the rather unremarkable reason that incomplete acts can have indeterminate moral status.

To briefly recap: in *No Compensation*, we cannot just say that the de-

fensive attack was permissible and the failure to compensate was impermissible. That evaluation is arbitrary given the following equally acceptable alternative evaluation: the defensive attack was impermissible and the decision not to compensate was permissible. A non-arbitrary evaluation of her conduct would proscribe a particular combination of acts: infringing-without-compensating.

This analysis might seem relevant to the decades-long debate between *actualists* and *possibilists*. Put roughly, actualism is the view that the moral status of some act depends on how an agent *would in fact* act were she to perform. Possibilism is, put roughly, the view that the deontic status of an act depends on how an agent *could* act were she to perform.²⁸

So, according to actualists, whether it is permissible for Defender to infringe at T₁ depends on whether she will *in fact* compensate at T₂. According to possibilists, whether Defender is permitted to infringe at T₁ depends on whether she *could* subsequently choose to compensate at T₂. Here is where the views come apart in practice: if at T₁ it is a foregone conclusion that Defender will choose not to compensate at T₂, then actualism forbids infringement whereas possibilism allows it.

But contrary to appearances, the debate between actualism and possibilism is largely orthogonal to the view I'm defending. Actualists and possibilists reach different verdicts about whether Defender's conduct at T₁ is wrong, depending on how Defender *would* (according to actualists) or *could* (according to possibilists) subsequently act at T₂. But on the view I defend, a particular *combination* of acts is wrong: infringing-without-compensating. When that combination occurs, it's not specifically the infringing that's wrong. Nor is it specifically the compensatory failure that's wrong. Rather, the duty Defender violates is disjunctive: a duty to *either* a) refrain from infringing *or* b) compensate for the infringement. Because Defender could satisfy the duty either by performing 'a' or 'b', a failure to perform just one of the two options does *not* foreclose the possibility of satisfying the duty.

28. For discussion, see e.g., (Timmerman & Cohen, 2016).

To see this, suppose Defender fails in her disjunctive duty by performing neither 'a' *nor* 'b'. Even then, we cannot isolate either the infringing or the failure to compensate as the specific wrong. This is because Defender could have satisfied her duty in a way consistent either with infringing *or* with refraining from compensating. If she infringes, the subsequent failure to compensate affects what she has done in this sense: the decision to infringe-without-compensating is wrongful.

How do we translate this into a claim about Defender's moral liability? I turn to this issue next.

3.2 Preventing Compensatory Violations

I have argued that infringing-without-compensating violates necessity, given the alternative of infringing-and-compensating. That is, Defender has a disjunctive duty: to either compensate or to refrain from infringing. What are the implications for Defender's moral liability? Generally, an individual who will otherwise violate a duty is morally liable to be treated in adverse ways that will prevent that violation. This is provided that the adverse treatment in question is a) the least harmful means available of preventing the violation, and b) is not too severe when weighed against the importance of preventing the violation. These just describe, in rudimentary form, the constraints of necessity and proportionality.

Because Defender's duty is disjunctive, the force to which she is liable is disjunctive as well. That is, she can be liable to force necessary to compel her *either* to compensate or to refrain from infringing. But *when* does Defender violate necessity? Does it occur at T₁, or at T₂, or at some other point? What is proscribed is a combination of two acts; does this mean both acts need to occur for the violation to occur and for Defender to be liable for that violation?

Not necessarily. To stymie a wrong, we don't always need to wait until it commences. There is a rich debate in war ethics and the ethics of defensive violence as to whether and when a party—who will commit a wrongful harm at some point in the future—is liable to preventive force

now, given that the party has not yet commenced with that wrongful harm.²⁹ I presume that this would-be wrongdoer can indeed be liable to preventive force *if* waiting makes it impossible or significantly more difficult to stop the wrong, and *if* the would-be wrongdoer has made it clear through his own responsible agency that he will so act. (I take these to be jointly sufficient rather than jointly necessary conditions for liability to preventive force). The upshot is that though Defender commits a wrong only once she infringes *and* refrains from compensating, she can be liable to preventive force *if* there is no way to compel compensation from her afterward, and *if* she has made it clear through her own responsible agency that she will violate her compensatory obligations.

One might point out, though, that by forcibly stopping Defender at T₁, we prevent her not only from violating her compensatory duties at T₂, but also from defending herself against Aggressor. Isn't this something Defender has a right to do? Why believe that Bystander's compensatory rights are more important than Defender's right to self-defense? Recall, though, that the deontic status of what Defender does at T₁ will ultimately be determined later on, by whether she fulfills her compensatory duty at T₂. Defender has a right to self-defense *only if* it satisfies necessity—and it satisfies necessity *only if* Defender fulfills her compensatory duties afterward. The moral here is this: what licenses preventive force is not that compensation is more important than self-defense, but rather that Defender does not have a right to defend herself in a way that will ultimately violate necessity. *By violating necessity, Defender impermissibly harms an innocent, which can license defensive force.*³⁰ But this view faces a challenge, which the following exemplifies.

29. See for example two edited volumes on this topic: (Shue & Rodin, 2007) and (Chatterjee, 2013) which focuses on the ethics of preventive war; see also (McMahan, 2012) which focuses on liability to preventive force.

30. Put differently, Defender can be liable to preventive force because she will violate necessity. I follow McMahan in assuming that necessity is internal to liability. (McMahan, 2009, p. 9) For extended discussion and a preliminary defense of this view, see (Frowe, 2015, pp. 88–94).

Unnecessary Bomb

Aggressor will culpably inflict five units of harm on **Defender** unless Aggressor is stopped. Defender could forcefully stop Aggressor at no harm to anyone else, by using a taser. But she instead recklessly opts to stop Aggressor by throwing a bomb, which will inflict one unit of harm on **Bystander** as a foreseeable side-effect.

Because Defender violates necessity, she has made herself liable to defensive force. Since the basis for Defender's liability is agent-neutral, Defender is morally liable to be forcibly stopped by just about anyone.³¹ But what about Aggressor? Is Aggressor now permitted to counter-defend himself against Defender, on the grounds that successful counter-defense against Defender will prevent her from inflicting unnecessary harm on Bystander?

If so, this would be bad news for my account. But Defender is not liable in this way after all. If Aggressor defensively attacks Defender to prevent her from inflicting unnecessary harm on Bystander, then Aggressor would himself be violating the necessity constraint. This is because there is, by hypothesis, a less harmful way for Aggressor to prevent injury to Bystander: by ceasing his own unjust attack against Defender. By doing so, Defender would have no reason to defend herself against Aggressor, and no reason to act in a way that collaterally harms Bystander. It turns out, then, that Defender is liable to be attacked, but *not* by Aggressor—which is a welcome result.

The force to which Defender is liable must not only satisfy necessity but proportionality as well. If Bystander stymies Defender, Aggressor will succeed in inflicting five units of harm on Defender. We need to determine whether this satisfies the *narrow* proportionality constraint.³² This is a constraint on the severity of the harms we can inflict on *liable* individuals. The harm we inflict cannot be too great relative to the

31. Other parties might be morally *required* to stop Defender. See (Frowe, 2018). But see (Pummer & Gordon-Solomon, 2022).

32. See (McMahan, 2009, pp. 20–25).

good we achieve by preventing the harm for which she is liable. Suppose a culpable aggressor is intent on maliciously pinching you; the only way to stop him is to kill him. Doing so would be impermissible in that the aggressor is *not* liable to be killed since it would violate narrow proportionality.

Many factors might enter into the narrow proportionality calculation, such as the doctrine of double effect, the doctrine of doing and allowing, the culpability of the liable party, and so on. To keep things simple, assume narrow proportionality permits inflicting on a culpable aggressor a harm no more than five times the severity of the harm that the aggressor's attack will otherwise cause. It turns out, then, that stopping Defender satisfies narrow proportionality. (Of course, adjusting the stringency of the proportionality constraint results in different permissions. If narrow proportionality permits inflicting on Defender no more than *twice* the harm that she would otherwise culpably inflict, then stymieing Defender would be impermissible).

A further reason for thinking that stymieing Defender satisfies narrow proportionality is that in doing so Bystander does not intend the harm that Aggressor will consequently inflict. Even if stymieing Defender means that Bystander must *intentionally* harm her, the harm that Aggressor consequently inflicts on Defender is harm that Bystander merely foresees rather than intends. Though this by itself does not permit us to "write off" those harms, the moral relevance of intentions and the doctrine of double effect mean that, arguably, those harms count as unintended rather than intended in Bystander's proportionality calculus.

There is another, closely related reason for thinking that stymieing Defender satisfies narrow proportionality. The harm to Defender comes not from Bystander, but from Aggressor. Because this harm is agentially mediated, it arguably ought to receive discounted weight in Bystander's proportionality calculus. Indeed, this suggests Bystander can stop Defender even if doing so means Bystander has to harm Defender, in addition to the harms that Aggressor will inflict. But for simplicity's sake, I set aside the relevance of intervening agency.

The upshot is that narrow proportionality permits Bystander to act in a way that results in harms to Defender that she would otherwise be permitted to defend against if she acted within the bounds of necessity. By needlessly harming Bystander, Defender might morally open herself up to the harms she was trying to prevent.

Violating necessity, then, can serve as a basis for moral liability to defensive force. Recall that an individual can make herself liable to *preventive* force for violations that have not yet occurred, *if* she has made it clear through her own responsible agency that she will commit the violation, and *if* waiting makes it impossible or significantly more difficult to stop the wrong. Recall also that infringing-without-compensating violates necessity, given the alternative of infringing-and-compensating. This entails the following. An individual who defends herself against a wrongful aggressor by infringing a bystander's rights, makes herself liable to necessary and proportionate preventive force *if* there is no way to compel compensation from her afterward, and *if* she has made it clear through her own responsible agency that she will otherwise violate those compensatory obligations.

Thus, in cases like "No Compensation", Defender can be liable to preventive force at T₁ even though what she is doing at that point won't qualify as a violation until T₂. Whether an individual acting in defense will compensate those whose rights she infringes, is of moment not only after the defensive engagement, but during it. The prospect of compensatory failure later on can permit others to stop her now. I now turn to the practical consequences of what I have argued so far.

4. Application to War Ethics

As noted at the outset, the US-led wars in the Middle East have collaterally maimed and killed many civilians. Many of these harms and losses cannot be fully compensated. But this doesn't mean nothing is

owed. Nor does it mean that what is owed is limitless.³³ Clearly, these collaterally harmed victims are owed something.

If what I have argued is correct, whether the victims are permissibly harmed ultimately depends on whether they are compensated *ex post*. In such cases, various states and non-state actors against which US-led forces were fighting—including the Taliban, various Iraqi insurgent groups, the various regional incarnations of Al Qaeda, and later, ISIL—would share in the duty to compensate those civilians. This is a duty that we can, at least in principle, permissibly enforce *post bellum*. The problem, though, is that these groups, once routed, lack the financial means to compensate civilians for the harms that they indirectly caused by waging unjust wars.

In such cases the compensatory duty will often fall upon the US and its allies.³⁴ This is because presumably some of the strikes the US and its allies conducted had the ultimate purpose of preventing attacks upon civilians from US and allied countries.³⁵ These attacks are potentially justified as acts of self-defense but only if they meet the constraints of necessity and proportionality.

To be clear, a vast number of US-led strikes in the Middle East lacked even the *potential* justification of self-defense. This included strikes aimed solely at advancing strategic aims that the US harbored in the region, such as the occupation of Iraq which self-defense did not justify. These strikes are largely irrelevant to this paper since the arguments presented in the previous two sections pertain only to the compensatory duties that otherwise justifiable *in bello* infringements incur.

33. This is because compensatory duties are ultimately *pro tanto* duties, subject to the constraint of proportionality. See (Hecht, 2021, p. 42), (Karhu, 2022), and (Slavny, 2023, pp. 46–49).

34. See section 2. Cecile Fabre makes a similar point, but within a discussion of *ius post bellum*. She says that even *justified* rights infringements yield duties of redress (Fabre, 2015, p. 638). On my view, though, whether infringements are justified depends on whether the infringer compensates the victims.

35. For brevity's sake, I focus solely on the duties the US in particular bears, though the arguments apply to US allies participating in these conflicts.

For these reasons I focus solely on attacks US-led forces conducted which self-defense can potentially justify. I argue that even in these cases, Coalition states owe compensation *post bellum* to civilians whose rights were otherwise permissibly infringed.³⁶ Moreover, I argue that by violating these *post bellum* compensatory duties, the US violates the *in bello* necessity constraint with respect to the collateral harms inflicted. The deontic status of those attacks remains indeterminate until such time as compensation is ultimately paid or not; if not, those attacks are then made impermissible. To prevent this outcome, Coalition members need to provide the victims with what they are owed after the war.

Crucially, the claim is not merely that the Coalition members owe compensation to those victims. Rather, the claim is that a compensatory failure affects whether Coalition forces violate *in bello* necessity. *The result is that many military strikes infringing the rights of civilians count as unjust, no matter how much good the strikes afford, unless and until Coalition members compensate the victims.*

The good news is that these states have the power to avoid violating *in bello* necessity by providing what is owed *post bellum*. It remains in their power, then, to make just the past rights infringements which will otherwise be made unjust by dint of their inaction.

To be clear, the claim is *not* that compensating civilians will “make just” the military strikes that *violated* their rights. A rights-violation

36. In the cases of one-on-one violence discussed earlier, Defender was responding to imminent violence from Aggressor. But Coalition forces were typically responding to the threat of violence that would otherwise occur at some indeterminate time and place. To address this disanalogy, we can amend the cases discussed earlier so that a) Aggressor's attack was not imminent but instead would occur at some indeterminate time and place in the future, b) Defender's attempt to stop Aggressor when the attack becomes imminent is much less likely to be successful or is morally much more costly, and c) Aggressor has made it clear, through his own responsible agency, that he will attack Defender in the future. Given these amendments, I presume both that Defender is still permitted to defend against Aggressor and that Defender still owes compensation to Bystander; *mutatis mutandis* for Coalition forces.

cannot be made permissible through compensation. Rather, the point is that a rights-infringement ultimately fails to satisfy necessity if the requisite compensation is not rendered. But we cannot wait indefinitely—doing so unnecessarily exacerbates the harm done and thus adds to what is owed, ultimately making compensation impossible.

What is at stake here is not limited to the status of past conflicts. Recall from the previous section that though Defender commits a wrong only once she infringes *and* refrains from compensating, she can be liable to preventive force *if* there is no way to compel compensation from her afterward, and *if* she has made it clear through her own responsible agency that she will violate her compensatory obligations. (Again, these are jointly sufficient rather than jointly necessary conditions). The same goes for states; the US, for example, has so far refused to acknowledge the extent of its *post bellum* compensatory duties. So, if at some point the US wages an otherwise just conflict in self-defense without credibly demonstrating a commitment toward meeting its *post bellum* compensatory duties, US forces are thereby potentially made *preventively* liable to necessary and proportionate attack (albeit not by those whose unjust aggression necessitated the conflict in the first place). The US must adopt the policy of meeting its compensatory duties, not just for the sake of its victims, but for the sake of American combatants who are otherwise morally diminished by engaging in combat operations which will eventually violate the necessity constraint.

In what follows, I address three potential difficulties in applying these lessons to war.

4.1 Who Exactly Owes Compensation?

In discussing who owes compensation, I focus on state and non-state actors, as opposed to individual combatants.³⁷ So, suppose a country

37. When a country owes compensation, does the average individual citizen of that country owe anything? Some answer 'no'. See (Crawford & Watkins, 2010, p. 290). But see, (Stilz, 2011) and (Collins, 2019).

we'll call 'Defender' is waging an otherwise just defensive war against Aggressor, a paramilitary non-state actor operating out of a foreign country, Bystander. Aggressor, once defeated, cannot compensate the victims in Bystander for the otherwise justified collateral harms that Defender inflicts. Thus, the compensatory duty falls to Defender. Or so I have argued.³⁸

But what about countries uninvolved in the conflict? Do they have compensatory duties? In discussing *jus post bellum*, Alex Bellamy argues that we should not focus solely on belligerents.³⁹ This is because, often enough, peace settlements are supervised by international institutions and enforced by multinational peacekeeping forces which might not include belligerents in the conflict. Similarly, James Pattison argues that those best capable of assisting with reconstructive efforts should take on that burden, regardless of whether they were party to the conflict in the first place.⁴⁰

We should indeed encourage multilateral, multinational efforts at reconstruction following war. But Defender, by shifting harms from itself to Bystander, incurs a stronger and more stringent duty than others do. But suppose that Defender, by warring against Aggressor, shifts harms from *other* countries onto Bystander as well. Consider a case where Defender is the sole party fighting a justified defensive war against Aggressor which is attacking *multiple* countries. In this sort of case, there are other countries who are left better off than they otherwise would be, but who do not participate in the fighting. Do the compensatory duties fall solely on Defender in such cases?

Several authors argue that those who owe compensation for permissible rights-infringements include those who are left better off as a

38. The *in bello* administration might not know for certain whether its *post bellum* successor will comply with the inherited compensatory duties. An estimate of the probability that the succeeding administration will fulfill its compensatory duties can affect the evidence-relative permissibility of authorizing the attack.

39. (Bellamy, 2008)

40. (Pattison, 2015)

result of the rights-infringement than they otherwise would be.⁴¹ They would have to pitch in, *post bellum*, perhaps in accordance with a) the severity of the harms shifted from them onto Bystander, and b) their ability to pay. But there is an important exception to this rule. As noted earlier, a party cannot be asked to pay for the costs of helping them avoid harms when we imposed such help upon them involuntarily. Suppose that the party explicitly requested of Defender that they refrain from fighting. They might not want to feature in the justification of the harm that the war causes.⁴² This presumably relieves them of any enforceable compensatory duty toward the civilians whose rights Defender permissibly infringes.

So, for example, suppose in 2005 Coalition forces attack Al Qaeda terrorists in Iraq; the attack maims civilians nearby. Suppose further that these terrorists would otherwise have attacked either New York City, or London, or Paris. Where they would have attacked matters to compensation, since the US and the UK were Coalition members whereas France was not; preventing an attack upon civilians from Coalition-countries would qualify as self-defense, whereas preventing an attack on non-coalition countries would qualify as other-defense.

Given this uncertainty, does this mean France owes some probability-weighted percentage of full compensation? No; again, those who did not ask for or want assistance typically cannot be made to pay for it. The same goes for strikes that prevent attacks against civilians in the region. Those saved by such interventions might owe compensation to those whose rights were collaterally infringed in the course of that intervention, but only provided that they asked for or wanted such assistance and that they are able to compensate.

41. See (Bazargan-Forward, 2017), (Lazar 2018, p. 853), (McMahan, 2014, pp. 118-23), (Hecht, 2021, p. 38), (Montague, 1984), (Zimmerman, 1994, p. 447).

42. See (Parry, 2017) on the rights we have against others that they refrain from waging war on our behalf.

4.2 Do 'Condolence Payments' Erode Civilian Immunity?

One might worry that requiring compensatory payments will erode respect for civilian immunity. Governments might adopt more permissive attitudes toward collateral harm on the grounds that they can just "pay off" the civilians (or their families) afterward.

As a moral matter the argument I have presented does not open up civilians to more attacks. It wouldn't permit doing what is impermissible under the current norms of warfare. In fact, the argument introduces a *restriction* rather than a permission: it will often be the case that we cannot permissibly infringe the rights of civilians in war without compensating them afterward (provided we *can* compensate them).

That being said, the worry, I take it, is this: once we normalize compensatory payments, such a policy will make it easier to spuriously rationalize collateral harm to civilians, on the grounds that whatever harms we inflict will at least be partially compensated later on. This more indulgent attitude toward collateral harm, it might be argued, will make things worse relative to the status quo, even when we factor in the good that the resulting compensation will do.

But I suspect the opposite is true. If anything, a policy of compensating collaterally harmed civilians will further disincentivize such harms. This is because such a policy will, in effect, attach a monetary cost to such harm. For each civilian immiserated or maimed, for each whose family member is killed, we will have to render compensation in return (provided that the unjust aggressor cannot be made to pay). Indeed, this is probably the most effective, feasible way to discourage collateral harms in war since such expenses are unlikely to be viewed upon kindly by administrative and bureaucratic officials who must financially account for them.

So, far from encouraging a more lenient attitude toward collateral harms to civilians, the recommended policy will likely do the opposite by encouraging caution and forbearance. This is badly needed in a culture where foreign civilians are often seen as expendable. Though

battling such a culture isn't the policy's purpose, it is nonetheless a salutary side-effect—one which speaks further in favor of adopting a policy of compensating victims of rights-infringements in otherwise just self-defensive wars, lest we violate the *in bello* necessity constraint.

A related worry is that requiring compensation—combined with liability for compensatory violations—increases what each side believes to be justified in furtherance of winning the war. The thought might go like this. Inflicting rights-infringing harms on civilians *in bello* will be justified only if we compensate *post bellum*. But we will be able to compensate our victims only if we win, which makes it that much more important we win. Otherwise, we violate *in bello* necessity; *mutatis mutandis* for the other side. The result is that wars become bloodier—or so it might be argued.⁴³

But this worry is misplaced. It is strange to think that the victorious side will refuse compensation from the vanquished side. Perhaps the worry is instead that the vanquished side will be unable to compensate. But in that case, they have no duty to compensate, given that 'ought' implies 'can'. So, either losing a war is compatible with satisfying our compensatory duties, or it cancels those duties. Either way, our compensatory duties will not yield perverse incentives in favor of prolonging war, even if satisfying those duties is a requisite of satisfying *in bello* necessity.

4.3 *Do We Compensate Individuals or Nations?*

If what I have argued is correct, compensation for collateral harms is owed to innocent victims and their families. But what if Defender cannot locate them after the war? Or what if gaining access to them is prohibitively difficult? Given the difficulties of discharging individually owed compensatory duties, maybe it is better to treat the people as a whole—the country—as the party owed compensation. On this view, Defender discharges their compensatory duties by funding schools, hospitals, roads, and infrastructure in general.

43. I thank an anonymous referee for raising this worry.

Funds aimed at reconstruction might indeed be required where we degrade or destroy civilian infrastructure. But by funding such projects we do not thereby fulfill the compensatory duties we have to the individual civilians we have maimed in the course of the war. They remain wronged even if we confer benefits on their co-nationals.

Case in point: the Department of Defense's *ex gratia* payouts are only a small fraction of the payments the US government provided to civilians harmed during the wars in Iraq and Afghanistan. This is because the US distributes most of its assistance through the United States Agency for International Development (USAID) rather than the Department of Defense. In fiscal year 2019, Congress allocated via USAID \$10 million for Afghanistan and \$7.5 million for Iraq, which is about 65 times and 30 times what the Defense Department distributed that year in *ex gratia* payments to those countries, respectively. Unlike the payments issued by the Defense Department, USAID payments do not have the purpose of facilitating the cooperation of local populations, and thus benefit a broader swath of civilians. These funds, for the most part, are directed not to particular individuals who have suffered harm during the war, but instead facilitate projects to assist Afghan and Iraqi civilians who suffered physical, economic, and psychological harm during the war.

The USAID distributions are a modest but laudable humanitarian effort. Still, they fail to satisfy the *directed* duties the US and its allies have toward the victims of collaterally inflicted harm. We do not fulfill our compensatory duty toward someone who has lost a house or a child by funding a hospital in their community, no matter how badly it's needed. Of course, such community-oriented projects might confer benefits that ultimately redound to the advantage of those owed compensation. But it is only to this extent that such projects satisfy our compensatory duty to that victim in particular.

What of the logistical difficulties involved when it comes to locating the individuals we have harmed? If we are in operational control of the relevant territory *post bellum*, tracking down victims and their families ought not to be prohibitively difficult. Even absent operational control,

the US and its allies have over the past few decades developed the institutions, the intelligence apparatus, and the technology necessary to track down individual high-valued terrorist targets *striving to remain hidden*. Given these abilities, it is disingenuous to claim that we just can't locate civilian victims and their families *post bellum* when they *want to be found*.

Finding victims of war is presumably easy. But identifying victims of Coalition strikes—distinguishing them from victims of violence committed by terror groups—is much more difficult. Nonetheless, investigative journalists have shown remarkable success at identifying specific victims of specific Coalition strikes, despite the limited resources at their disposal.⁴⁴ State-funded institutions should be able to achieve this sort of success at a much greater scale.

But even once the relevant victims are found and identified, challenges remain. Providing these victims with cash will do little good—and indeed, might do harm—if criminals, bandits, and corrupt government officials subsequently rob them. Ideally, Coalition forces would provide the requisite security apparatus, but history has shown this to be prohibitively difficult. Under these circumstances, compensation might instead take the form of voluntary relocation to more hospitable environments where personalized social services, as well as other forms of compensation (including but not limited to cash payments), can be safely made.

5. Conclusion

If what I've argued is correct, there are far-reaching consequences for failing to compensate civilians whose *in bello* rights were infringed. These consequences are not limited to *jus post bellum*. A failure to compensate can also have profound effects on *jus in bello*. The US and select allies are in a position, even now, to affect the moral status of some of the military operations undertaken in the Middle East over the past two decades, by deciding whether to compensate those civilians whose

rights were infringed.

Moreover, whether we adopt a policy of compensation determines whether, in future wars, our combatants are preventively liable for infringing the rights of civilian bystanders—specifically in cases where there will be no way to force compensation *post bellum* and where the unjust aggressor cannot be made to pay.

It is hard to overstate the moral importance of compensation in war ethics—it touches all other aspects of warfare and accordingly deserves more serious consideration than it has been given so far. I hope this paper is a step toward amending that trend.⁴⁵

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44. See in particular the work of Pulitzer Prize winning journalist Azmat Khan (2022).

45. I thank Helen Frowe for comments on an earlier draft, which I presented at: the 2024 Workshop on Harming, Rescuing, and Rights at USC, the 2023 Conceptual Foundations of Conflict Project workshop at USC, and at the 2021 Ethics of War and Peace Conference at West Point Military Academy.

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