

COMPENSATION AS THE MORAL FOUNDATION
OF JUS POST BELLUM

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Chapter 1 – Introduction and Background

1.1 Introduction

Given how much harm can be done to a great number of people after the fighting part of war is over, and given recent failures to secure lasting peace after conflicts (cf. Afghanistan and Iraq), developing a detailed account of a just peace, or *jus post bellum*, is crucial.¹ Unfortunately, the just war tradition has historically focused on *jus ad bellum*, the conditions for justly entering a war, and *jus in bello*, the conditions for justly fighting a war, with some recent developments in *jus ex bello*, the conditions under which justice requires that one stop fighting. The conditions for a just peace have long been largely ignored.

In this dissertation, I argue that the requirements of *special jus post bellum*, the arrangements that parties formerly at war owe each other in virtue of having fought each other, are really instrumental claims about how best to discharge the duty to compensate for war-related wrongs. I call this the compensation theory of *jus post bellum*. One of its virtues is that it is clear on the moral foundation of *special jus post bellum*, which is important in order to get the practical requirements of a just peace rights, and in order to settle any conflicts between such requirements. This is not to deny that a just peace is everyone's concern – there might well be universal duties to help or prevent harm after war, or to ensure that compensation for wrongs is given (Neff, 2008, p. 77). But the

¹ Orend (2000a) raises similar points in defense of the importance of *jus post bellum*.

compensation theory of special jus post bellum gets us most of what we want from just peace from only compensation.

My argument for the compensation theory of jus post bellum proceeds as follows. In this chapter, I discuss some background assumptions. In Chapter 2, I show that theories of jus post bellum are typically just lists of practical requirements given without any explicit moral foundation. The main exception, Brian Orend's rights-vindication view of jus post bellum is, I argue, inapplicable to many real conflicts. Instead, I propose that if one violates the principles of just war theory, one owes compensation to one's victims. In Chapter 3, I argue that the most commonly proposed principles of jus post bellum can then be explained as the most cost-effective ways to discharge this duty to compensate one's victims, and in Chapter 4, I argue that the need to reform a state after it mistreats its own members during war is also explained by this duty of compensation. Lastly, in Chapter 5, I illustrate the compensation theory of jus post bellum by applying it to the Bosnian War.

1.2 Background

I will be making a few assumptions in this dissertation. First, I will be assuming *individualism*, the claim that the rights and duties of states or communities are reducible (rather than analogous) to the rights and duties of individuals. I make this assumption mainly because the view that individuals have irreducible rights and duties is widely accepted, whereas the view that states and communities have irreducible rights is much more controversial. While some of my claims depend on individualism, the core of the compensation theory of jus post bellum can survive without this assumption.

Second, I will be assuming a rights-based view of morality with rights-forfeiture when one infringes the rights of others. This forfeiture then makes it morally permissible to treat rights-infringers in ways that would otherwise be morally impermissible. I will understand justice to be about not infringing these rights, so that actions that do not infringe rights are just, and actions that do are unjust. I wish to remain neutral on whether rights accurately describe fundamental morality, or whether they are only mid-level principles that are in turn grounded by something else (e.g., rule-consequentialism).

Third, I will be assuming that when one harmfully infringes the rights of another, one owes them compensation for the harm. One compensates someone by increasing their wellbeing or promoting their interests to a degree that is equal to the harm of the wrong one inflicted on them. I take wellbeing to be the things that makes someone's life good *for them*, whether that is pleasure, desire-satisfaction, or something more objective. By someone's interests, I mean whatever that person fundamentally cares about. So someone's interests will typically include not only their own wellbeing, but also the wellbeing of others, as well as other things like reputation, justice, etc.² In this dissertation, I will be assuming that compensation is about promoting interests, not increasing wellbeing, although I do not think this assumption is crucial to the success of the compensation theory of jus post bellum. I motivate this assumption below.

When something is wrongfully damaged or destroyed, it is natural to think that the wrongdoer has a duty to compensate the owner by repairing or replacing the object. I, however, deny that this is the only way to compensate victims. It seems to me that repair and replacement are natural ways to compensate victims simply because they are

² True egoists, of course, will not care about others or about justice. However, these things will often be instrumental in achieving their interests.

typically good ways to compensate victims. For example, suppose I break your car's windshield, which hurts your interests by some amount. I hold, controversially, that what I owe you is to promote your interests by that same amount. Repairing or replacing the windshield myself is a natural way of doing this, but there are other ways. I could instead pay you whatever it would cost you to do the same, or do anything else that promotes your interests by the same amount. This is important because sometimes repair or replacement is impossible. Suppose that instead of breaking your windshield, I instead cause you to lose your arm. Currently, it is impossible for me to replace that arm. On the view of compensation I am assuming, I can compensate you in other ways, as long as those ways promote your interests to the same extent that having your arm back would. If instead I break your windshield, but I do not have enough money to cover the costs of repairing it, or you cannot use money to repair it (e.g., because of no access to banks, or because you live in a barter economy), I can compensate you by giving my time and labor, and by repairing the windshield myself. The degree to which you are compensated, or (which I will take to mean the same) the amount of *compensation credit* that I accrue for my action, depends on how much benefit you, the victim, gain from my action.

Note that what matters for compensation is how much the victim benefits, not how much that benefit costs the compensator. Thus, given a set of options that give the same benefit to the victim, it is morally permissible (and rationally recommended) for compensators to choose the most cost-effective option. Of course, it is in the victim's interest that their wishes be fulfilled, and so compensating victims in their preferred way increases the cost-effectiveness of the compensation arrangement. I return to this issue in Chapter 3. While giving money to the victim is usually a cost-effective way of

compensating them, as the costs of delivery are small and money can promote many interests in many different ways, this will not always be the case.³

It's important to keep in mind that if the right-infringement for which compensation is owed involved taking possession of something one has no right to, then justice independently requires the return of that object. This return, as it is independently required by justice, does not count as compensation. It merely reflects the fact that one possesses an object that belongs to another. If I steal your car, returning the car does not compensate you for my original theft. Justice (specifically, restitution) requires that I return your car *as well as* compensate you for however much the theft hurt your interests.

Compensation, then, is narrowly focused on undoing wrongful losses of wellbeing or interests. Note that whenever I mention a duty to compensate a victim, I mean this in the sense of a duty owed to the victim (as opposed to a duty owed to someone else or to no one). I thus mean there to be a corresponding right to compensation held by the victim against the compensator, and vice versa.

My goal in this dissertation is not to present a general theory of compensation, and so I will restrict the discussion to compensation in the post-war context and elaborate when needed. Two important issues of compensation that, while not unique to the post-war context, are prevalent when thinking about war, are compensation of those wrongfully killed, and third-party rights to compensation. I shall briefly comment on these before beginning my argument.

³ My use of "compensation" thus differs from how it is used in tort law, where A can owe B financial compensation for doing something to B that B didn't care about. Varuhas (2014) argues that this legal use of "compensation" relies on a notion of objectively assessed harm, which he calls "vindication", that is independent of the subjective damage to the victim. In this dissertation, I will not appeal to this objective understanding of harm or compensation.

There are two main problems with considering compensation for those wrongfully killed. First, is compensation even possible? Since the victim is dead, it is unclear where their compensation should go. Suppose I want to compensate someone I killed, and paying some sum of money is in this case sufficient compensation. Who should I give the money to? I shall assume, controversially, that the compensation payment is owed to the victim's estate. After all, the compensation owed to the victim is a kind of debt payment, and as such gets taken over by their estate, or by their inheritors through their estate, after death. In this way, compensation debts are no different from other debts, which I assume are not automatically forgiven on the death of the creditor. Moreover, assuming that the right to compensation gets taken over by the estate, or through it by the victim's inheritors, avoids the controversial question of whether the victim can have a right to compensation after death. Instead, the wrongdoer's duty to compensate remains, although it is now directed not at the victim, but at their estate or inheritors.

Note that if we reject my assumption of individualism, then the fact that victims of wrongful killings are dead does not matter as much for compensation, as the compensation is at least partly owed not to the direct victim, but to the community. As the community typically persists after the direct victim's death, the wrongdoer can compensate the victim's community without complications.

Second, what is the amount of compensation owed for wrongful killing? Can anything fully compensate for a wrongful killing?⁴ This is especially problematic if compensation is meant to increase wellbeing, as opposed to interests, by the amount that the killing reduced it. A number of solutions present themselves. One possibility is that wellbeing is about desire-satisfaction or some objective measure, in which case the

⁴ I here discuss only compensation to the direct victim. I deal with the matter of third-party rights to compensation for wrongful killing below.

wellbeing of a person can be affected by events after her death (Bruckner, 2013).⁵ For example, suppose that my family living prosperously increases my wellbeing. Then helping make my family better off will increase my wellbeing, even if I am dead.

A second possibility is that no compensation will make any difference to the wellbeing of the dead person, and thus that no compensation is required. I reject this, as I view the duty of compensation as the main post-war duty of rectification and it would be absurd to hold that there is no duty of rectification for wrongfully killing people in war.

A final possibility is that infinite amounts of compensation are required for wrongful killing, since no finite amount will fully compensate the victim. This is not too implausible given the great harm of wrongful killing. Note that accepting this last option does not necessarily commit us to requiring compensators to give up so much that they starve. Ought implies can, I assume, and so compensators are only required to give as much as they *can* give. That “can” can mean either physical possibility, or it can mean anything other than what is required for some minimal standard of life. On the first interpretation of “can”, it is true that compensators should give up everything they have in an attempt to give infinite amounts of compensation, even if doing so leads to their death. On the second interpretation, however, compensators can never be required to give up something that is necessary to some minimal standard of life, including food necessary for subsistence.

The problem is less acute on the interests-based account of compensation. While the wellbeing of dead people may be static, their interests can more clearly be affected. For example, typically I will desire that my family be successful, or that my reputation

⁵ I here take desire-satisfaction to not require awareness that one's desires have been satisfied.

remains good, even after my death. Thus, payments to my estate that promote my family's success or my reputation can promote my interests. While the interests-based account of compensation is controversial, it is simple, and alternative accounts will probably have to include some form of interest-satisfaction to be plausible. For these reasons, and for the sake of simplicity, for the rest of this dissertation I will assume that the interests-based account of compensation is correct. However, I believe that many conceptions of wellbeing could replace interests without undermining the compensation theory of *jus post bellum*.

A second important issue concerns third-party rights to compensation. For example, if I am wrongfully harmed, and my wife suffers emotionally because of this, is my wife owed compensation for this suffering, and how much? Does she, in other words, have a right to compensation for suffering due to me being wrongfully harmed? While we are not typically owed compensation simply for being witness to something that we disapprove of, the bonds that develop between close family members so deeply alter the personal identity and fundamental interests of those concerned that having a close family member die is a great harm to their close kin. Thus, there is a strong intuitive pull to the idea that close family members are owed compensation for the wrongful killing of their family members, and I will be assuming that close family members have third-party compensation rights.

While I am assuming both that the dead can be compensated by the promotion of their interests, and that there are third-party rights to compensation, both assumptions are not strictly necessary for the success of the compensation theory of *jus post bellum*. That theory depends on unjust killings, one of the main war-related wrongs, generating a duty to compensate. As discussed above, there are at least three ways in which we can

make sense of such a duty: it can be a duty owed to the person unjustly killed understood in terms of wellbeing, the same understood in terms of interests, or it can be a duty to third parties deeply affected by the person's death. Any combination of these views will suffice for present purposes.

Chapter 2 – The Moral Foundations of Jus Post Bellum

Having discussed my background assumptions, I now turn to discussing the moral foundations of jus post bellum. Getting clear on what the wrongs of war that jus post bellum is concerned with is crucial to reaching a good theory of jus post bellum. In this chapter, I argue that current theories of jus post bellum lack an explicit moral foundation, and that the most prominent exception, Brian Orend's rights-vindication theory of jus post bellum, is not applicable to real-world conflicts. Instead, I propose that infringing the rights protected by the principles of just war theory, whether permissibly or impermissibly, grounds a right to compensation for the person(s) whose rights were infringed.

2.1 Overview of Jus Post Bellum

That unjust wars, or acts of war, can generate a duty of compensation (or reparation) is commonly accepted.⁶ My aim in this dissertation is to show that the commonly proposed principles of jus post bellum are really just the best ways to fulfill the duty to compensate after war, and that there is no need for other moral rectification principles in *special* jus post bellum (i.e. the part of jus post bellum that deals with what we owe former adversaries in virtue of having fought them). While there are many duties of rectification,

⁶ For example, see Banta (2011, pp. 297-299), Orend (2000a, p. 123), and Williams & Caldwell (2006, p. 317).

namely punishment, apology, compensation, and restitution, I will argue that compensation and restitution are the only *special* post-war duties of rectification.⁷

One might be tempted to say that *jus post bellum* simply requires a return to the status quo ante bellum, but that cannot be. After all, it is the status quo ante bellum that led to the war in the first place.⁸ Instead, the condition for a just peace must be a *more* just peace than existed before the war (if possible).⁹ There have been several proposals for what a more just peace requires. Michael Schuck (1994), in a paper which marked the beginning of modern scholarly discussion of *jus post bellum*, requires that the victors be repentant and humble, institute non-degrading peace terms, and reconstruct and restore both infrastructure and environment. Michael Walzer (1977/2006, p. 61), who revived just war theory in modern times, claims that a just peace requires that the victors respect civil rights and promote the common good in their treatment of the losers. For Brian Orend, a just peace requires respect for subsistence rights, political reform and demilitarization proportional to the severity of the war (Orend, 2002, p. 47), proportional and public peace terms, discrimination between those responsible for war and those not responsible, rights-vindication, punishment of war criminals, and compensation (Orend, 2008, pp. 40-41). Gary Bass (2004, p. 392) adds that reconstruction of a defeated country should happen only with their consent.

Unfortunately, these authors rarely discuss what grounds these special post-war arrangements. This has resulted in many scholars providing loosely, if at all, connected lists of *jus post bellum* principles, but no arguments for why the parties to a war are

⁷ In Chapter 3 I argue that the practical post-war compensation arrangements are in practice very similar to these other duties of rectification.

⁸ A point made by McCready (2009, pp. 72-73), Walzer (1977, p. 119), and Stahn (2008, pp. 106-107).

⁹ Both Orend (2000a, p. 123) and Walzer (1977/2006) use similar formulations.

morally required to follow them.¹⁰ Being clear on what grounds jus post bellum is important in order to get the practical requirements of a just peace right, and in order to settle any conflicts between such requirements. For example, the supposed post bellum duty of promoting the common good can easily come into conflict with the supposed duty to respect civil rights, in cases where the citizenry of a defeated country do not want their system of government reformed in a way that would (at least in the eyes of the victors) promote the common good. Without a deeper moral basis for these principles, adjudicating between them will be very difficult.

Orend (2000a, pp. 123, 128) is a notable exception to this trend of simply giving lists of principles, as his suggested jus post bellum principles are explicitly meant to be justified by rights-vindication. I will now briefly motivate my rejection of his view, and then turn to arguing for the compensation theory of jus post bellum.

2.2 Brian Orend's View of Jus Post Bellum as Rights-Vindication

Unfortunately, proposals for what makes a peace more just all too often lack any clear grounding in deeper moral claims. Brian Orend's influential view is a rare exception. I will now briefly sketch his account of jus post bellum, and then argue that it depends too heavily on jus ad bellum, and is not applicable to real-world conflicts.

For Orend (2008, p. 39), jus post bellum is fundamentally about rectifying the wrong of unjustly going to war. Since jus ad bellum is the part of just war theory that describes when going to war is unjust, jus post bellum is, on Orend's view, tightly linked with jus ad bellum. Indeed, for Orend the link is so tight that an ad bellum just party winning the war is a necessary condition for a just peace:

¹⁰ Clifford (2012, p. 42) and McCready (2009, p. 72) both make a similar accusation, but also fail to escape it.

“This is to say, importantly, that when or if an aggressor wins a war, the peace terms will necessarily be unjust. The injustice of cause infects the conclusion of the war.” (Orend, 2008, p. 38)

“[F]ailure to meet jus ad bellum results in automatic failure to meet jus in bello and jus post bellum. Once you are an aggressor in war, everything is lost to you morally.” (Orend, 2008, p. 38)

Because of his claim that jus post bellum requires an ad bellum just victor, and because he develops his view of jus post bellum against the view that there is a “victor’s justice” (i.e. that anything goes for a victor in war) (Orend, 2008, pp. 35, 38), Orend’s discussion is limited to the case when the victor is ad bellum just, and the defeated side is ad bellum unjust. This limitation is present, and rarely discussed, in most of the jus post bellum literature.

Unfortunately, Orend’s view raises several problems for the development of jus post bellum. First, it lacks general applicability. As Orend himself points out, meeting jus ad bellum is very difficult.¹¹ Thus, any theory of jus post bellum that is limited to cases where one side is ad bellum just will be too idealized for general use. What we need is a theory of jus post bellum that applies generally, to all or most post-conflict peace settlements.¹²

Second, and most importantly, it is clearly false that unjust victors cannot institute a just peace. It is possible (although unlikely) for an unjust victor to give back all the territory or resources it unjustly gained by winning the war, help rebuild the infrastructure it unjustly destroyed, compensate the victims of its unjust violence, and so on. If an unjust victor did all this, would the peace not be just? Conversely, if the unjust victor failed to do this, would they not be acting unjustly? Orend thinks not:

¹¹ “Mistakes are possible, and made frequently, during each of the three phases. It is, indeed, difficult to fight a truly just war.” (Orend, 2008, p. 36).

¹² Bellamy (2008) makes a similar point.

“It is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of rights and duties, of both victor and vanquished, at the conclusion of armed conflict.” (Orend, 2008, p. 38)

But this cannot be. Unjust victors clearly have duties of justice to those they have defeated. Indeed, in virtue of being *unjust* victors, they have more stringent duties than they would otherwise have. At the very least, they must return anything they have unjustly taken. This follows from Orend’s claim that there is no “victor’s justice”. Mere military victory does not itself give the victors rights over the spoils of war, and mere military defeat does not mean that the defeated have lost any claims to territory or resources. Moreover, justice seems to require that the unjust victors compensate the defeated for their losses. Perhaps this is easier to see in the analogous individual case.

Suppose someone violently attempts to rob me. If I successfully defend myself, there is indeed no “victor’s justice” – I do not gain a right to do whatever I want with my attacker. For example, I do not have a right to take advantage of his weakened state to rob him in return. But if instead the robber overpowers me and steals my wallet, there should also be no “victor’s justice” – the simple fact that he overpowered me does not suddenly give him a right to the contents of my wallet, or the right to keep hitting me. After the fight, the unjust robber has a duty to return anything he stole and to compensate me for the attack. Likewise, an unjust victor has duties to the defeated, such as compensation and return of stolen territory. It is very unclear why the post-war distribution of rights and duties over parties to a war should be fundamentally different from the post-altercation distribution of rights and duties over individuals. The justice of a peace, then, should depend not on whose military proved strongest, but on what the peace terms are. Thus Orend is wrong to claim that the military victor being *ad bellum*

unjust entails an unjust peace. Orend's picture, then, cannot be a full account of jus post bellum.

2.3 Different Kinds of Rectification

Having discussed alternative theories of jus post bellum, I now turn to arguing for the compensation theory of jus post bellum. In this section, I provide my negative argument for why special jus post bellum is concerned with compensation, as opposed to other forms of rectification like punishment or apology. In Section 4, I give a positive picture of why compensation is relevant to post-war rectification.

Recall that in this dissertation, I am focusing on *special* jus post bellum, by which I mean what we owe each other in virtue of having fought each other. As such, I will be discussing compensation, and not other forms of rectification like punishment or apology, because these other kinds of rectification do not seem to be owed (only) between rights-infringer and victim. While post-war punishment may well be appropriate for war-related injustice, and is a common occurrence after war (e.g., the Nuremberg trials), it has several features that suggest that it is a matter of *universal*, not *special*, jus post bellum. This is because the relevant rights and duties of post-war punishment do not exist only between the war criminal and his victims. For one, war crimes-tribunals have, since World War 2, often been international (e.g., the International Criminal Court, and the various tribunals for Sierra Leone, the former Yugoslavia, Rwanda, Cambodia). This means that the sentencing and the punishment has at least partly been performed not by the victims or their representatives, but by third parties.

Second, if the moral authority to punish was *special*, the victims of war crimes would have the moral power to forgive their transgressors, eliminating any moral authority of others to punish. But victim forgiveness does not seem to play this role in war crimes. This is incompatible with a special right to punish, but compatible with a general one.

Third, the values that punishment is meant to promote, be it deterrence, moral education, just deserts, etc., are in everyone's interest, not just the victim's. This also suggests that any duty of the wrongdoer to submit to punishment is owed to the community, not only to the direct victim.

Furthermore, consider punishment for ordinary, domestic crimes. In these cases, the community intervenes on behalf of the victim, paying for (1) the law enforcement necessary to find and arrest the criminal, (2) the judiciary that tries them, and (3) the institutions of punishment that punish them. Crucially, the victim forgiving the criminal is usually not enough to end (or prevent the initiation of) criminal proceedings, just as it is not in war crimes-trials. Whatever the criminal "owes" (in the widest sense of the term) for his crimes, he owes it to the community, not just to the (direct) victim. The punishment of violations of criminal law, then, seems to be a general right held by certain people selected by the community, not just by the direct victim, and the criminal is liable to punishment from the community, not (only) from the victim. But if the punishment of domestic criminals is a general right, this suggests that the punishment of war criminals is too. For these reasons, I will be assuming that the punishment of war criminals is a matter of universal, not special, *jus post bellum* (i.e. that it is everyone's concern, rather than a matter between the victim and transgressor), and thus outside the scope of this dissertation.

As for apologies, they seem to me to be a kind of compensation. Rights-infringers owe their victims apologies to the extent that, and because, doing so promotes the interests of those victims. Thus, apologies are required for war-related wrongs if compensation is (as I suggest is true below). This reductive view of apologies is admittedly controversial. However, the consequences of the existence of an independent duty to apologize for post-war settlements would be minimal, as the duty to compensate will be far more demanding and far more difficult to discharge. For simplicity's sake, then, I will not be discussing the issue of post-war apologies.

2.4 The Wrongs of War

So far, I have argued against the claim that punishment (and apology) is a special obligation owed to one's victims for war-related injustice. But that does not establish that compensation is owed for such injustices. I now turn to supporting that claim.

First, consider *jus ad bellum*. In the individual case, unjustly starting a fight with another person, or defending oneself when one has no right to do so, surely gives rise to a duty to compensate one's victim. At the very least, one is obligated to cover the costs one imposed on one's victim. Similarly, by going to war unjustly, and so infringing one's victims' rights to peaceful existence and forcing them to defend their rights, one acquires a duty to compensate one's victims. Those who go to war unjustly should at least cover the costs they imposed on others by doing so, such as the social and economic costs of mobilizing defenses and having to move people from more productive enterprises to the military, as well as the loss in security and autonomy due to the threat of force posed by the war.

To go to war unjustly, then, infringes rights and so grounds a duty to compensate.¹³ But to go to war unjustly just is to violate the principles of jus ad bellum.¹⁴ So violating the principles of jus ad bellum must also give rise to a duty to compensate. Historically, the idea that the ad bellum unjust party (it is usually assumed that there is only one) should cover the costs of the war has been one of the justifications for post-war reparation demands.¹⁵ This view also seems to be the standard in the jus post bellum literature.¹⁶

Second, consider fighting a war unjustly (regardless of how one entered the war). Suppose I commit war crimes such as indiscriminate killing or torture during a war, and once the war concludes, I am tried and imprisoned. Surely this is not enough. I should also have a duty to compensate my victims, to try to restore their interests to what they were before I infringed their rights by committing these atrocities. To say that justice is satisfied simply because I rot in a cell seems perverse – my victims, not me, should be the main focus of post-war justice. At least part of post-war justice, then, should be about requiring war-criminals (and whatever superiors were responsible or negligent) to compensate their victims. So fighting a war unjustly, which is to say violating jus in bello, grounds a duty to compensate.

But there is another category of in bello injustice that grounds compensation: that of in bello unjust but permissible harm. In the personal sphere, proportionality is often said to allow slightly harming innocent bystanders if doing so will save one's life. Saving

¹³ By “going to war”, I mean taking steps that actually do infringe rights. I omit abortive attempts at going to war, such as starting an attack and then quickly canceling it, because they are of lesser moral concern.

¹⁴ I here intend to capture all the ways in which one can violate the principles of jus ad bellum, be it by lacking a just cause, by war being disproportionate or not necessary, etc. All of these violations mean that the rights of the other side are infringed.

¹⁵ Perhaps the most famous example of this is the War Guilt Clause of the Versailles Peace Treaty. On this, see Neff (2008).

¹⁶ For example, see Bass (2004), Boon (2009), and McCready (2009).

a life provides a justification that overrides the bystander's right not to be harmed. But as the bystander has done nothing to forfeit this right, they are still wronged. It would seem odd to say that the bystander lost the right not to be harmed simply because someone in their vicinity was in need of aid. After all, that is not the bystander's fault. And if that right not to be harmed is to mean anything, the bystander should be owed something when his right is infringed.

Likewise, on standard just war theory, *jus in bello* allows for the harming of non-combatants, as long as this harm is not intentional, necessary to the achievement of some military goal, and is widely proportional to the good gained by achieving that goal. But, as both the innocent bystander and the non-combatant are in these cases exposed to harm to which they are not liable, they are wronged and thus are owed compensation. Their right to not be harmed was overridden, not removed or undercut. Thus, such harming of non-combatants, though *in bello* permissible because proportionate,¹⁷ is still *in bello* unjust, because the non-combatants were not liable, and so is grounds for compensation.

Third, let's consider when one ends a war, or *jus ex bello*. Just as one owes compensation for unjustly starting a war, and so forcing others to have to defend their rights, so continuing to fight a war when justice requires that one stop (e.g. because one's just aims have been achieved) also grounds a duty to compensation. If justice no longer allows me to fight but I continue to do so, then I have no just reason for harming others, and so I am infringing their rights and should compensate them.

Consider the personal case, where it is plausible that even if violent resistance to an attempted robbery is justified, continuing to use force after one knows that the

¹⁷ Specifically, I here mean *wide* proportionality, which governs how much harm may be inflicted on those who are not liable (traditionally non-combatants, or innocent bystanders). *Narrow* proportionality, on the other hand, governs how much harm may be inflicted on those who are liable (traditionally, all combatants).

aggressor no longer poses a threat seems unjust, and would ground a duty to compensate the robber (at least beyond some point). Attempting a robbery involves forfeiting some rights, but once one is no longer a threat, one is not liable to everything. As jus ex bello is severely underdeveloped, I will refrain from addressing jus ex bello wrongs in detail. Suffice it to say that any violations of jus ex bello ground a duty to compensate.

Lastly, violating special jus post bellum duties also grounds a duty to compensate. If a party to a war refuses to adhere to the special principles of jus post bellum, then that side infringes the rights of the other side, and so owes compensation to those negatively affected. Suppose, as I argue below, that special jus post bellum is only concerned with compensation. Then not paying this compensation (i.e., not abiding by jus post bellum) means that the original duty to compensate remains, and moreover that the amount of compensation owed might have increased. To see why, suppose that the original duty, one year ago, was to compensate by paying \$1 million towards security. Had the compensation been paid then, the money would have at least accrued interest. Moreover, one year later, the cost of providing security might be much higher. After all, preventing lawlessness is typically cheaper than removing it. Thus, one can owe compensation for violating jus post bellum.¹⁸

2.5 Implications

The compensation theory of jus post bellum, then, holds that perpetrating any war-related injustice, whether permissible or impermissible, and whether ad bellum, in bello, ex bello, or post bellum, grounds a duty to compensate. I now wish to note a few

¹⁸ Orend (2000a, p. 129) also argues that failure to abide by jus post bellum should be rectified.

consequences of adopting this theory. First, this theory entails that defeated parties may be owed compensation by the victors, even if the victors are *ad bellum* just. After all, victors are not guaranteed to have gone into war justly, fought the war justly, stopped fighting justly, and instituted a just peace. This might seem obvious, but the *jus post bellum* literature almost universally discusses the justice of peace only in the standard case of a *jus ad bellum* just victor and a *jus ad bellum* unjust loser. As mentioned above, the *jus ad bellum* conditions are hard to meet, and so the standard *jus post bellum* case where one side is *ad bellum* just and the other unjust is hardly representative of real-world conditions. Both sides are often *ad bellum* unjust.

Second, if *in bello* permissible but unjust harm grounds a duty to compensate, as I hold, then attempts to overpower the enemy with superior firepower (which has a higher risk of collateral damage) carries with it the risk of owing great debts of compensation to that enemy, even if that firepower is used permissibly. Thus, the compensation theory of *jus post bellum* has the benefit of imposing additional restraints on the use of overwhelming force, as such actions will tend to increase one's post-war compensation debt.

Third, since on the compensation theory of *jus post bellum* post-war compensation is owed for much more than is usually thought, war becomes a (morally) very expensive business. This is a benefit of the theory, I think. While wars are sometimes justified, even required, they do involve massive amounts of human suffering. If the realization that going to war will typically generate substantial debts of compensation restrains agents and states from going to war, this will generally be for the better. Moreover, as both sides to a war will typically infringe on the rights of the other, the compensation theory of *jus post bellum* entails that both sides to a war typically owe compensation to the other. Thus, justice requires that post-war negotiations and

settlements not be one-sided. Instead, they should focus on accurately accounting for war-related injustices, and on giving *all* parties what they are owed for those injustices. Given the temptation that the victor will face to impose favorable peace terms, it is beneficial for a theory of jus post bellum to clearly advocate for a multilateral peace settlement.

Finally, the compensation theory of jus post bellum is compatible with both orthodox just war theory (as discussed throughout this dissertation) and revisionary just war theory. For example, consider the jus in bello proportionality requirement, which demands that a military action be undertaken only if its harm to non-combatants is not excessive when compared to its direct military benefit (ICRC, Proportionality in Attack). Orthodox just war theory holds that the military benefit to be weighed against harm to non-combatants is completely separate from jus ad bellum. However, McMahan (2004) and Rodin (2008, p. 62) have argued that anything that militarily benefits the ad bellum unjust is not a moral benefit, and so cannot be weighed against harm to non-combatants. After all, an action that makes it more likely that the ad bellum unjust will win the war is not morally beneficial. Thus on their view, only ad bellum just combatants (with some exceptions) can ever meet the in bello proportionality requirement.

If one accepts both their view on in bello proportionality and the compensation theory of jus post bellum, then any ad bellum unjust party will owe massive amounts of compensation, because effectively (with some possible exceptions) all the military actions of ad bellum unjust parties will be unjust. Going to war ad bellum unjustly, then, would result not only in owing compensation for violating jus ad bellum, but also for violating jus in bello. This fits with the revisionary impulse to give jus ad bellum paramount importance in just war theory. If, instead, one holds the orthodox view of in bello proportionality, then the compensation theory of jus post bellum evaluates any ad

bellum unjust party's in bello actions the same way as those of any ad bellum just party. The compensation theory of jus post bellum, then, has the advantage of working well with both revisionary and orthodox views of jus in bello.

Chapter 3 – Special Jus Post Bellum as Duties of Compensation

3.1 The Duty to Compensate After War, and its Distribution

Having considered the common war-related wrongs, I now turn to how we can best discharge our duties to compensate for these wrongs, and show that the compensation theory of jus post bellum ends up recommending the kinds of arrangements that are commonly proposed as requirements of jus post bellum.

Before I discuss each post-war arrangement, however, some preliminary remarks on post-war compensation are in order. One might ask: if jus post bellum really just requires compensation, then why bother with things like reconstruction or political reform, instead of simply compensating victims by individually giving them money? Well, war is messy, and because of this messiness, less straightforward arrangements will typically be much more cost-effective at minimizing uncompensated debt. Cost-effectiveness is relevant because, as I mentioned in Chapter 2, compensation is focused on the benefit to victims. Thus, compensators are free to choose the least costly (to them) way of compensating their victims, as long as those victims get compensated.

There are at least two aspects to this messiness. First, war presents *epistemic* difficulties to simple, individual-to-individual compensation. It is often unclear who exactly we are harming in war. If I am responsible for the unjust bombing of a residential area (as I will argue some soldiers are, to some extent), it will be difficult for me to know who exactly lived there and was wronged by the bombing. Matching victims to

wrongdoers can also be difficult. Suppose that the bombing of the residential area was done by several aircraft. Then, because of the dispersed nature of bombing, it would be very difficult to tell which particular aircraft-crew member was responsible for what harm, even if we did know who the victims were and who gave the orders. Finally, wars often force great numbers of people to move, and finding them can be difficult because records get destroyed. Thus, there are great epistemic difficulties with simple, individual-to-individual compensation.

Second, war presents *practical* difficulties to individual-to-individual compensation. Even with full knowledge of who owes what to whom, the cost of delivering such individual compensation can be very high, due to remoteness or lack of security. This is especially true if there is uncertainty about how best to get to the victim, often through an uncertain or insecure post-war environment. Moreover, the epistemic gaps mentioned above will be costly to fill, so delivering compensation individually to specific victims will in practice often be very costly for the compensator.

Because of these difficulties, discussions about what morality requires after war *relative to the facts* about who owes what to whom are of little practical value, because after war such facts will typically not be known. Instead, I will focus on what morality requires of compensators after war *relative to their evidence*. Because of this sensitivity to evidence, after war we will usually have to settle for more complicated ways to compensate victims. Typically, we will have to compensate the communities that we have reason to believe our victims are in, in ways that we have reason to believe will benefit those victims, for example by rebuilding roads or providing security. The practical difficulties alone suggest that compensating communities will often be most cost-effective. For example, suppose the war has left some community difficult or dangerous to reach. Making all those who owe compensation to the members of that community

group their compensation together, and use it to make that community safer, will typically be a more cost-effective way to compensate them than making every compensator reach their victim and compensate them individually.

Furthermore, the epistemic difficulties make compensating communities much more likely to benefit the actual victim than individual-to-individual compensation.¹⁹ Suppose that in the above example, compensation is owed to the community's members because of use of in bello unjust tactics against them. Then, as in the bombing example above, individual compensators will typically lack full knowledge of which individual member of the community they owe compensation to, but they will know that they owe their debt to someone in that community. Filling in this epistemic gap will be expensive, and so relative to the evidence, compensating the unknown victim by benefiting their community as a whole will be much more cost-effective. In this way, even though special jus post bellum is fundamentally about compensation, typically the most cost-effective way to discharge the duty to compensate will be through things like demilitarization, reconstruction, a compensation fund, and the other measures discussed in this chapter. Because of their cost-effectiveness, these compensation arrangements will be rationally recommended for the compensator, and as such, the most promising ones for victims to demand.

But how are these duties to compensate typically distributed? As I have argued above, wars will usually involve debts of compensation on both sides. Does this mean that post-war debts of compensation usually cancel each other out? Suppose that both sides, in aggregate, owe each other the same amount of compensation. Such debts will typically not cancel each other out, because those on one side who have a duty to

¹⁹ Of course, if we discard individualism and instead aim to compensate wronged groups and communities, not individuals, then compensating communities might well be the first-best option. See Chapter 6 for a short discussion on this topic.

compensate are probably not the ones who have a right to compensation. For example, elites tend to have more influence over whether a country goes to war, and how it fights that war, than the general population does. Democracies might be the exception to this, and I return to them shortly. But members of the general population are more likely to be victims of war-related injustice. So, typically, side A's elite will tend to owe compensation to members of the general public on side B, and side B's elite will tend to owe compensation to members of the general public on side A. As the individuals who owe compensation are often not the ones who are owed compensation, sides owing equal compensation to each other cannot always cancel out that debt. Moreover, if elites owe more compensation than the rest of the community, then it is important that they also bear more of the cost of post-war compensation. Compensation measures should thus be chosen accordingly.²⁰

There are, of course, transaction costs associated with side A compensating side B and vice versa. For this reason, it can be preferable for both sides to compensate their own population. But this is an acceptable way of discharging duties of compensation only if it best provides compensation. If side A has reason to believe that side B is unlikely to compensate their own, perhaps because their elites are loath to stick to the deal whereby both sides agreed to compensate their own population instead of each other's, then side A must itself compensate the population of side B, to whom they owe compensation, and then demand compensation for its own population.

Lastly, it is not always the case that only the elites owe compensation. In democracies the level of shared responsibility is usually high, and compensation is owed in accordance with one's level of responsibility for injustice, whether one is just a citizen,

²⁰ In Section 3, I propose that members of the elite can do so by using their influence and power to more effectively support compensation measures than the general population can.

a military or political leader, or a soldier. Thus, citizens of democratic states, and especially citizens involved in the war effort, will usually share in the duty to compensate victims.²¹ The exact level of shared responsibility depends, of course, on the details of the particular country, and the specific individual's role within it. After all, even democracies go to war against the wishes of their citizens, and even authoritarian regimes can go to war in response to public pressure.

It is important to note that by "responsibility" here and throughout this dissertation, I mean not mere causal responsibility, but agent-responsibility. One is agent-responsible for the outcome of an action to the extent that the action was autonomous, the outcome was foreseeable, and the action was not coerced (or was otherwise easy to resist). Agent-responsibility differs from mere causal responsibility, for example, in the case when a gust of wind blows over my body into you, which pushes you over a cliff. While my body was part of the causal chain that led to your death, my body doing so was not the result of any autonomous action on my part, and so I was not agent-responsible for your fall. Plausibly, compensation is only owed for harmful rights-infringements that the rights-infringer was agent-responsible for.²² After all, why should I owe you anything for being knocked into you by the wind?

Note that agents can be agent-responsible for some, but not other, aspects of a given action. For example, a soldier in a war who willingly shoots their enemy, with the intention to harm them, is agent-responsible for that harm. But suppose that the soldier mistakenly believed that the enemy had forfeited their relevant rights, and that this belief was justified. If so, then the soldier is agent-responsible for the harm inflicted on

²¹ This has the consequence that equal debts of compensation between two well-functioning democracies are more likely to cancel each other out than if one or both countries were not well-functioning democracies.

²² Although this is a controversial issue.

the enemy, but is not agent-responsible for the infringement of the enemy's rights. While the harm to the enemy was foreseeable, the rights-infringement was not.

Indeed, diminished levels of agent-responsibility for soldiers are common during wartime, because of lack of information, and because military action is typically coerced. Disobedience and desertion are, after all, typically heavily punished.²³ But does this mean that there is little compensation to be owed for wartime harmful rights-infringements, since so many of the actors might not be agent-responsible for the rights-infringement or the harm? I think not, for two reasons. First, foreseeability and coercion (and perhaps autonomy) come in degrees, and thus so does agent-responsibility. Being coerced into infringing the rights of another only reduces one's agent-responsibility for the rights-infringement to that degree. Similarly, the rights-infringement that results from one's actions being unforeseeable only reduces one's agent-responsibility for that rights-infringement to the degree that the rights-infringement was unforeseeable. But anytime one harms another in a way that could infringe their rights (had they not forfeited or waived that right), there is a risk that the relevant rights have not been forfeited or waived, and thus that one is harmfully infringing the right of another. This risk is clearly foreseeable. If one harms another, then, and it turns out that in so doing, one infringed their rights, in almost all cases one will owe them some compensation, as the rights-infringement will not have been completely unforeseeable. By harming them, one took a risk that doing so would not infringe their rights, and the risk did not pay off. One should owe them at least some compensation for this, as this was a risk one knew one was taking when deciding on harming them.

Second, soldiers are not the only agents in war who owe compensation for harmful rights-infringements. Military commanders, political leaders, and anyone supporting

²³ I am grateful to Crystal Gunasekera for stressing this point.

those leaders (including voters in a democracy) can also be agent-responsible for the harmful rights-infringements caused by military action, and so owe compensation for it. Military commanders give the orders to shoot, station soldiers where they are likely to shoot, and enforce the discipline that potentially coerce soldiers to shoot. Political leaders can be responsible for wars, and through propaganda, a climate in which soldiers unknowingly infringe the rights of their enemies. To the extent that military commanders and political leaders do so autonomously, can foresee that someone's rights will be infringed, and are not coerced to do so, they are to that degree agent-responsible for the resulting rights-infringements, and so also owe compensation to the victims. As making one's nation go to war, especially *ad bellum* unjustly, or commanding one's soldiers to shoot at the enemy carries with it a clear risk of causing harmful rights-infringement, politicians and military commanders are at least to some extent agent-responsible for the wartime rights-infringements perpetrated by their side, and so owe compensation for them.

As for those who support those politicians or commanders, the question of foreseeability is a bit more complicated, as elections (in democracies) or backroom power struggles (in non-democracies) do not always give clear information about how the politicians or commanders will act in the future. Thus, the harmful rights-infringements that follow from for example voting for candidate A, as opposed to B, are typically only slightly foreseeable, if at all. Some people, of course, will have more information and so be more agent-responsible, but ordinary citizens will typically be only minimally agent-responsible for the harmful rights-infringements of their politicians, and so only owe minimal compensation for any such infringement. As typical wars will result in a great many such infringements, however, citizens will still owe some compensation. In some cases, of course, politicians will run on a platform of aggression

or even war, in which case voting for them will clearly lead to harmful rights-infringements. On the other hand, if the political system makes it impossible to vote for anyone not likely to go to war, the agent-responsibility and compensation of individual voters will be decreased.

So, many individuals will share in the duty to compensate victims. But individuals typically cannot, for example, demilitarize or politically reform their countries on their own. So how can individuals compensate their victims (i.e. accrue compensation credit) through such compensation measures? They can do so by supporting these measures, and the amount of compensation credit accrued will depend both on the general benefit of these measures as well as how effective the individual's support is in bringing these measures about. Voting, demonstrating, writing in support of these measures can make a difference. Putting a bumper-sticker on one's car, less so. Using one's position in society, whether formal or informal, to support these measures can count for a lot. So how much compensation credit an individual accrues will depend on how effective their support of compensation measures is in bringing those measures about (and so benefiting victims), and on how effective the compensation measures themselves are (as discussed below).

3.2 How to Choose How to Compensate

So after a war, we will typically have to compensate our victims by supporting compensation arrangements like reconstruction or political reform. But there are many such compensation arrangements. How do we choose between (combinations of) them? There are two general factors that have to be taken into account when deciding how to compensate after war: (1) what would most benefit the victims; and (2) the cost to the

compensator. In the following subsections I will argue that what most benefits victims are the frequently proposed special post-war arrangements.

However, first I wish to discuss a general issue that strongly affects how much any practical post-war arrangement benefits victims, namely asking victims or their representatives for input. This is important for two reasons. First, the victims will typically know better than compensators what would benefit them. Thus, it is good epistemic practice to ask victims what kind of compensation they need. Second, providing compensation without consulting victims (or even worse, despite their wishes) typically breeds resentment, which directly (through decreased happiness) and indirectly (through resistance to the compensators, as seen in e.g., Afghanistan and Iraq) decreases the benefit to victims. Thus, not asking, or going against the wishes of victims typically decreases the benefits they gain from compensation. A public and inclusive peace process is thus highly recommended by compensation.²⁴

The second general factor that will determine which compensation arrangement to choose is the cost to the compensator. As I mentioned above, it is morally permissible for compensators to choose the least costly, to them, way of fully compensating their victims. For example, suppose that our victims would benefit equally from our reconstruction of their infrastructure and from the demilitarization of our military, that their legitimate representatives have said so, and that doing either one is sufficient to fully exhaust our duty of compensation. If so, then it does not matter which of these two ways of compensating our victims we choose. Suppose, however, that there is a third country that has been itching for (unjust) war with us, and who we have reason to think has refrained from attacking us only because of the strength of our military.

²⁴ Recchia (2009) also stresses the importance of the post-war settlement being collaborative, although he arrives at this position on the basis of sovereignty, not compensation.

Demilitarizing our military, then, would be of great cost to us, as it seriously increases our risk of unjust invasion. Reconstructing the destroyed infrastructure poses no such risk, and so choosing reconstruction over demilitarization is a better choice. In general, given a set of ways to fully compensate their victims, compensators are free to choose the option that is cheapest for them.

Finally, post-war compensation will typically have to take more than one form. Some combination of reconstruction, reform, demilitarization, and others might all have to be undertaken, often by both sides, to make sure all wrongdoers compensate their victims. Moreover, given the epistemic and practical difficulties in finding out who exactly owes what to whom, community-wide considerations of cost will sometimes have to suffice.

3.3 Commonly Proposed Special Post-War Arrangements

With these preliminary remarks out of the way, I now turn to listing commonly proposed special post-war arrangements, and discussing how they can be grounded in duties of compensation. Recall that by special post-war arrangements, I mean the *special* arrangements that the parties formerly at war should institute in virtue of having fought each other. I thus omit any *universal* duties that may be owed (including by third parties) to formerly warring parties, like the provision of food or shelter to those in extreme need.

The proposals for theories of jus post bellum mentioned in Chapter 2 include a number of arrangements as requirements for a just peace. I list them, and two others I wish to add, below:²⁵

- Proportionality
- Discrimination between those responsible for war and those not responsible
- Respect for civil and subsistence rights
- Reconstruction of infrastructure and restoration of environment
- Political reform and demilitarization
- Security
- Individual compensation fund

For the remainder of this chapter, I will argue that all these special post-war arrangements can be grounded in compensation, and are instrumental claims about how best to discharge the duty to compensate (for the many kinds of wrongs discussed in Chapter 2). In other words, I will argue that the duty to compensate is in practice typically best discharged by aiding reconstruction, demilitarization, reform, and so on. Restitution, which requires the return of whatever was taken during the war, is plausibly also a requirement of jus post bellum, but is not grounded by compensation because it is an independent requirement of justice, as discussed in Chapter 1. Restitution thus does not count as compensation.

Before I continue, a note on terminology is in order. These special post-war arrangements are in the literature often referred to as principles, requirements, or obligations of jus post bellum. I will argue that they are really the most cost-effective

²⁵ Punishment is not present on this list, as it is not a matter of special jus post bellum, as discussed in Chapter 2.

practical arrangements for discharging one's duty to compensate after war. As such, they are neither principles, requirements, nor obligations, as the only principles or obligations of jus post bellum are, I claim, compensation and restitution. Thus, for the rest of this dissertation, I will refer to these as special post-war, jus post bellum, or compensation *arrangements*. I now turn to justifying the jus post bellum arrangements listed above as the best ways to compensate the victims of war.

3.3.1 Proportionality, discrimination, and civil and subsistence rights

The list of commonly proposed special post-war arrangements includes a requirement that any peace arrangement be proportionate to the wrongs of war.²⁶ Compensation can account for this proportionality very easily. Justice does not require that one compensate for more than the wrongful harms one actually imposed. So if special post-war arrangements are simply the best way to discharge the duty to compensate for war-related wrongs, then special post-war arrangements will extract compensation from rights-infringers proportionally to their rights-infringements.

Similarly, compensation can account for the jus post bellum principle of discrimination between those responsible for war-related wrongs and those not responsible. As one owes compensation only if one has wronged someone, peace terms based on compensation will demand compensation from those responsible for injustice and nothing from those not responsible.

Furthermore, the typical distribution of the duty to compensate can also account for why special post-war arrangements should respect civil and subsistence rights. These

²⁶ Note that proportionality here, and discrimination below, refer to concepts within jus post bellum (namely, only imposing burdens of peace that are proportional to one's past rights-infringements, and discriminating between those responsible and those not responsible for the harms of war), not to the related concepts within jus ad bellum and jus in bello.

are rights to, respectively, some control over one's political environment, and rights to food, shelter, etc. The dispersed nature of responsibility for war-time injustice means that individuals typically will not owe enough compensation to justify threatening their civil and subsistence rights in extracting that compensation. Moreover, there are pragmatic concerns to consider: endangering the subsistence of the compensator threatens their ability for continued compensation, and endangering civil and subsistence rights risks creating resentment that will make them refrain from future compensation, and perhaps lead to revanchist policies like war.²⁷ The best way to extract compensation, then, will typically be to do so while respecting civil and subsistence rights.

3.3.2 Reconstruction and restoration

War tends to cause massive destruction of infrastructure and environment. After a war one will typically not know who exactly was affected by this destruction, and thus who one owes compensation to, but one will typically know what communities the victims are in (as I argued above). One way of compensating affected individuals, then, is to help pay for, or perhaps even participate in, the reconstruction and restoration that is likely to benefit them. Given one's evidence, contributing to reconstruction that maximizes expected benefit to victims will minimize uncompensated debt. Expected benefit to victims is, of course, maximized by increasing, relative to one's evidence, the number of victims affected and the benefit they gain.

None of the above depends on which side won the war. As long as victims are likely to benefit from assistance in the reconstruction and restoration of their

²⁷ Consider the German reaction to the Versailles peace treaty.

infrastructure or environment, the duty to compensate them can be discharged by rendering such assistance. How much compensation credit is accrued by aiding in reconstruction and restoration will depend, most importantly, on what the quality of the infrastructure and environment in the relevant country is after the war. The lower this quality is, the more benefit will be gained from building or rebuilding it, and thus the more compensation credit will be accrued by those who aid in the reconstruction. Indeed, the benefits of good infrastructure and clean environment can be huge. Thus, reconstructing infrastructure or environmental restoration can lead to massive benefits to large segments of society, and so can give very large amounts of compensation credit. Importantly, once the amount of compensation owed has been determined, it does not matter whether the poor quality of infrastructure is due to the war or not. What matters is how much rebuilding it would benefit victims. Reconstruction and restoration are, then, typically cost-effective ways of compensating victims for war-related wrongs (instead of special obligations), given the epistemic and practical difficulties with post-war compensation.²⁸

3.3.3 Political reform and demilitarization

Wars also tend to result in insecurity, and so another way to discharge one's duty of post-war compensation is to support domestic political reform and demilitarization aimed at making violence and war-related abuse less likely in the future. Actual peace settlements often require parties to undergo political reform or to demilitarize.²⁹ In some cases, this is because the political system to be reformed is so militaristic that it infringes the rights

²⁸ Lazar (2012) criticizes theories of jus post bellum that emphasize compensation over reconstruction. As we can see, the compensation theory of jus post bellum I articulate avoids this worry, by making reconstruction a key part of compensation.

²⁹ Consider the de-Nazification of Germany and the demilitarization of Japan after WW2.

of others. If so, then such political reform and demilitarization is independently required by justice, and cannot be a form of compensation. However, such measures are also not *special* post-war obligations, and so are outside the scope of this dissertation. For an obligation to be a special post-war obligation, it must be a duty to one's adversaries in virtue of having fought a war with them. But impermissibly militaristic states owe a duty of reform to every potential victim, not only to actual adversaries, and owe this duty not because they fought a war, but simply because their militarism is impermissible. Of course, the citizens of impermissibly militaristic states are morally responsible for this militarism only to the degree that they voluntarily adopted it. Typically, this responsibility will be shared with previous generations.

But not all post-war reform is independently required by justice. Political systems that sometimes allow war-related abuses do not always infringe the rights of citizens of other countries, just as bellicosity does not always infringe the rights of those around the bellicose individual. Similarly, having a large military does not in itself infringe the rights of neighbors, although it makes war-related abuses easier. The possession of these traits is not always unjust. Indeed, there is a wide spectrum of possible levels of bellicosity and sizes of the military, and while there is a duty not to be too far towards the militaristic end of the spectrum, justice does not require everyone to be a pacifist with no army.

But even states and persons with a permissible tendency towards violence or a permissibly large military (whatever those permissible levels are) will have a higher probability of committing injustice to those around them than do more peaceful states and individuals. Having a large military makes war-related abuses easier to perpetrate, and having a less than perfect political system makes war-related injustice more likely. Thus, the victims of such states may benefit from that state instituting political reform and demilitarization that decreases the capability and tendency for future war-related

injustices. This is especially true if, as is likely, the victims of the offending state remain in close proximity to that state, and so remain likely targets of future abuse.

To illustrate this, consider the following example: suppose I'm a schoolyard bully who has made your life hell for years. Suddenly, I realize the error of my ways. Is my promise not to beat you up anymore a form of compensation for all the times I did beat you up? Surely not, because justice independently requires that I stop beating you up, since it infringes your rights. My decision to stop harming you does not compensate you for past harms. However, going to the gym to maintain muscle mass, or taking medication that might make me more aggressive, does not infringe your rights (apart from extreme cases, like drinking alcohol when one thinks one is dangerous when drunk), even though it makes me more capable of, or more likely to, infringe your rights by beating you up. These activities decrease your security, but do not infringe your rights. Thus, me not doing them anymore benefits you by increasing your security, and so can at least partly compensate you for past injustices. Of course, full compensation for years of bullying will require much more than that. Analogously, reducing the size of a state's military and reforming its political system increases the security of its neighbors by reducing the ability and tendency of the state to violence, and so can be a form of compensation, as long as the state in question is not currently impermissibly militaristic. Again, full compensation, especially of those severely harmed during a war, will typically require more than just demilitarization. But demilitarization can go some way towards compensating victims.

Another cost-effective way to compensate one's victims after war, then, is to support domestic political reform and demilitarization aimed at making violence and war-related abuse less likely (as long as such measures are not independently required by justice). Note that both sides to a war can compensate the other in this way. Both

sides can compensate their victims by instituting or supporting reforms that decrease the likelihood of them being its victims again. For example, reforming education to focus more on the harms of past wars, rather than on the heroism they created, can make a country less prone to violence in the future, and a better neighbor in general.³⁰ Reducing the size of a state's military makes it less capable of war-related injustice. If war-related injustices occurred at least partly because of an unaccountable military, then increasing civilian oversight and control over the military might help prevent this, and so compensate victims. Other forms of political reform that could compensate victims include increasing representation for minorities, opening up to foreign peoples and cultures, and democratization. Note also that some forms of political reform can benefit victims in ways other than through increasing their security. Opening up a country to foreigners, for example, can increase the economic wellbeing of victims through increased trade and migration.³¹

The reform or creation of international institutions can be also justified on similar grounds, if the failure or non-existence of such international institutions made war-related injustices more likely. Perhaps a stronger United Nations, or stronger regional organizations like the African Union or European Union, could have helped prevent or ameliorate the war. If so, then creating, supporting, and strengthening such organizations can help compensate the victims of war. Thus, any kind of political reform that is not independently required by justice, and benefits victims, is a cost-effective way of discharging duties of post-war compensation, given one's typical post-war evidence.

The amount of compensation credit accrued from supporting political reform and demilitarization, then, will depend mainly on two factors. First, how prone to violence is

³⁰ Orend (2008, p. 47) suggests educational reform as an important part of post-war political reform.

³¹ See Chapter 5 for a historical illustration of these measures.

one's state currently? If it is overly prone to violence, reform and demilitarization is anyway required by justice and so is neither compensation nor a *special* post-war obligation, as discussed above. If the state in question is permissibly militaristic, then large reductions in the tendency to or capability for violence result in big increases in security, which is very beneficial to victims and is worth a great deal of compensation credit. The returns are diminishing, however, as making an almost impermissibly militaristic country half as threatening benefits victims much more than reforming an already very peaceful country. In the latter case, the victims probably have much more pressing concerns that could be addressed more cost-effectively by their compensators.

Second, the relative strength and threat of the country to be reformed or demilitarized is important. If our victims are not threatened by our military, because theirs is much more powerful or because we are far away, then making our country more peaceful or reducing the size of our military is of limited benefit to them. As winners in wars between two countries tend to be militarily superior to the losers (at least once the war is over), this means that demilitarization and political reform (to a lesser extent, because of its non-security benefits) is typically a good way for winners, and a bad way for losers, to compensate their victims. Of course, many wars involve more than just two countries. Still, the relative strength of the involved parties must be considered. For example, suppose for the sake of argument that Japan's and Germany's pre-WW2 systems of government were permissibly militaristic (which seems extremely unlikely). Then their post-war political reform and demilitarization could be a good form of compensation to citizens of China and Korea, and France and Poland (respectively). These were countries that both before and after the war had legitimate worries about Japanese and German expansionism. But the United States, given its relative strength (especially after the war), had much less to worry about, especially from Germany (due

to geography). So political reform and demilitarization of Japan and Germany benefited, and so compensated, the United States much less than it did other countries, because Japan and Germany were less of a threat to the United States than to those other countries.

3.3.4 Security

As mentioned above, wars tend to lead to a breakdown of law and order, especially in defeated states. Such states are also often weakened, and so at increased risk from third-party aggression. Thus another way of compensating victims after war is to help provide them with security. While similar in motivation to political reform and demilitarization, it is less frequently discussed in the literature, and so I discuss it separately. Providing security can range from providing basic law enforcement to dealing with insurgents and defending against external threats. As security is crucial to promoting the interests of individuals, compensators can accrue great amounts of compensation credit by providing security to their victims. Providing post-war security can thus be a very cost-effective way to compensate one's victims.

It is very important, however, both that the provision of security not *be* oppressive, and that it not *appear* oppressive to its intended beneficiaries. Once assistance with security turns into oppression, the benefit of security is overtaken by harms like reduced autonomy, suppression of political activity, reduced accountability of law enforcement, etc. Moreover, even non-oppressive provision of security is of little overall benefit to victims if they see it as oppressive, if only because apparently oppressive regimes increase crime and violent resistance via increased resentment. Thus it is crucial that victims, whether directly or indirectly, consent to being provided with

security, remain involved at all levels of the process, and retain the option to refuse further assistance. Seeking consent will minimize resentment and related harms, and is also a good way of finding out whether providing security will benefit victims, where such security will provide most benefit, and when the security no longer is of much benefit.

3.3.5 Individual compensation fund

I now turn to the last item on the list of practical post-war arrangements, namely the individual compensation fund. The practical arrangements discussed above will typically benefit victims, but they are not guaranteed to do so. It is thus important that victims who aren't benefited (enough) through such measures be compensated in some other way. A cost-effective way of ensuring this is for compensators to set up a fund to which victims dissatisfied with existing compensation measures can come forward.³² If the victim has a legitimate claim for compensation and a legitimate case for not having been benefited enough by the other measures, the fund will use its money to compensate them individually. In cases where the fund can determine the identity of the victim's wrongdoer, the fund can recover money from that wrongdoer, although given the epistemic difficulties present after war, this will be rare.

Such a compensation fund will typically be a cost-effective way to compensate victims for two reasons. First, it reduces the number of uncompensated victims. Victims will typically be compensated through the arrangements discussed above, but there is no guarantee that they will. Some such victims can probably instead be compensated

³² Something akin to the compensation sometimes paid out by the British Ministry of Defence for harms to civilians in Afghanistan (Evans, 2011; Quinn, 2013). I am grateful to Crystal Gunasekera for pointing this out.

directly.³³ Furthermore, some victims (e.g., victims of death or dismemberment) will be owed more compensation than the above arrangements can provide, and the remaining compensation can be paid out from the compensation fund. Thus, an individual compensation fund can be an effective way to compensate. Second, the individual compensation fund enlists victims to help overcome the cost of overcoming the epistemic and practical difficulties with post-war compensation. When victims make their claims to the fund they provide information that can help determine how much compensation they are owed, how they would like to be compensated, and sometimes who owes them that compensation. This can reduce the cost (to the compensator) of compensation.

Finally, for such a fund to be a cost-effective way to compensate victims, it is important that claims made to the fund be evaluated without bias. Thus, typically, third parties (i.e. the international community) should be in control of the fund. This would also have the practical benefit of making the collection and international dissemination of the truth about the war easier, which is valuable independent of *jus post bellum*. Similarly, the decision as to whether the fund's resources should be increased, or diverted to other compensation arrangements, would also benefit from third party oversight. It should be noted, however, that given the substantial benefit (and wide distribution) of the other compensation arrangements to victims, those other arrangements will typically form the bulk of post-war compensation.

³³ I am grateful to Crystal Gunasekera for suggesting this point.

3.4 Peace Negotiations and Peace Settlements

So far, I have discussed what, according to the compensation theory of jus post bellum, we owe each other after fighting a war, namely to fully compensate our victims, relative to the evidence. When all parties agree on the empirical and normative facts, there is little need for anything else. They can just implement what jus post bellum requires, perhaps writing it down for future reference, and in order to enable coordination and enforcement. There is little need, in cases of such agreement, of an actual peace settlement.

Unfortunately, belligerents rarely share agreement on such matters. When there is disagreement about empirical facts (e.g., how many people were killed) or normative facts (e.g., which actions were unjust), an agreement or peace settlement between the parties will be very useful in settling their differences. Mere disagreement, of course, does not change the fact that the parties owe each other compensation for whatever injustices they actually imposed on one another.

However, post-war compensation claims, just like any other compensation claims, can be waived. Thus, an agreement is possible whereby parties agree to waive certain claims in return for other belligerents to waive their claims. Note that the parties do not need to agree that the claims being waived by other parties are morally valid claims. All that is required is that the parties recognize that the claims being waived are of some value to those waiving them. For the waiving of the compensation claims, and thus for a peace settlement, to be morally valid, it must be entered into freely by the victims (whose compensation rights are being waived), or by their proper representatives. If these conditions are met, the peace settlement takes precedence over the pre-existing compensation claims.

What does it mean for a peace settlement to be entered into freely, or for compensation claims to be waived freely? This is a controversial topic, but for the rest of this section, I will attempt to outline some uncontroversial minimum conditions for free consent to peace settlements. First, the consent must not be coerced, which at a minimum means that no one can make credible threats to do something independently wrong unless the peace settlement is agreed to. This requirement has three important ramifications. It means that threats with extremely low credibility do not render consent to a peace settlement morally invalid. This is reasonable, as any threats made by, for example, individuals with no capacity for violence, such as heavily guarded prisoners or young children, cannot be said to exert undue influence on peace negotiations. Furthermore, threatening to do something that is not independently wrong, even if it involves violence, does not for present purposes count as coercion. Just international intervention into a war, for example, can thus force belligerents to the negotiating table without undermining the moral validity of those negotiations. Lastly, note that withholding compensation that is owed is independently wrong, as compensation claims are only waived once free consent has been given to the peace settlement, not before.

At first glance, this might seem to make any reasonable negotiation strategy impossible, as no party can attempt to gain the concessions it wants by threatening to withhold concessions to the other side. However, there are other ways to negotiate than with threats. Diplomatic horse-trading can instead be done on the basis of mutual respect for the value other parties attach to their claims, whether one believes that they are valid or not, and with mutual recognition of the political realities that make peace settlements without mutual concessions impossible. Moreover, the threat or use of force in international relations is already forbidden by the UN Charter (U.N. Charter art. 2, para. 4).

Second, free consent to a peace settlement requires, at a minimum, that no party knowingly misrepresents material facts. Fraud, in other words, renders consent invalid. It does so because it gives the more knowledgeable party an advantage, making the negotiations fundamentally unfair.

A third requirement sometimes put on free choice is that it not be chosen simply because there were no acceptable alternatives (Olsaretti, 1998). In other words, consent to a peace treaty is free only if (1) one really likes the peace treaty, regardless of whether there are alternatives, or what they are like, or (2) there are acceptable alternatives to the peace treaty, even if one does not really like any of them. This is a very controversial requirement on voluntary choice, but it has at least some intuitive appeal, and so I will briefly discuss its implications on peace negotiations.

In the simple case, peace negotiations result in a peace settlement that all parties really like, and so consenting to that settlement is free. Things get more complicated, but more realistic, when at least one party is faced with a peace settlement that they do not really like. Perhaps they conceded more than they would have liked, or perhaps they received too few concessions from other parties. In these cases, the quality of the alternatives to consenting to the peace settlement becomes relevant. There are, I think, two sets of relevant alternatives to consider.

First, an alternative to negotiating a peace settlement is a return to the pre-negotiation conflict. If this means a resumption of hostilities, it is not an acceptable alternative to consenting to the peace settlement (especially for the militarily weaker party). If, on the other hand, a cessation of negotiations results simply in a cold peace (cf. the Korean War), this might be an acceptable alternative to consenting to the peace

settlement (depending on the details of the cold peace), and so could render consent to a peace settlement morally valid.³⁴

But when evaluating whether consent to a peace settlement is free, one should also consider the other possible peace settlements that could have been reached through negotiation. If, for example, the final treaty involves one trading some land for some reparations, but one could have easily made the opposite trade, and (crucially), both the actual treaty and the treaty one could have arrived at are acceptable, then one's consent to the actual treaty counts as free. There is a sense, after all, in which one had acceptable alternatives.

3.5 Implications for International Law

All the so-called special post-war obligations, I have argued, are really cost-effective practical arrangements for post-war compensation. So morally speaking, special *jus post bellum* is only a matter of compensation (and restitution). I now turn to briefly sketching the implications of this for morally permissible international law.

First, the idea that a just peace requires compensation for violations of all parts of just war theory, not only *jus ad bellum*, should be incorporated into international law. Knowing who is to blame for the war (i.e. who is *ad bellum* unjust) is important for settling on just peace conditions, but it is not the only important thing.

Second, given that victors will be easily tempted to focus only on their demands for compensation, and indeed into making such demands up, international law should allow, or perhaps demand, international oversight of peace negotiations. Moreover, the

³⁴ Perhaps a stronger requirement, e.g. that the cold peace involve respect for the basic rights of all victims, should be added.

international community is well placed to make sure that the terms of any peace settlement are followed, or that the proper amounts of compensation are given and that the compensation arrangements are run without bias. Permanently establishing such institutions would have the added benefit of making them predictable and (potentially) more independent.

Finally, thinking of special post-war obligations as best practices for compensating victims after war also sheds light on when the defeated are permitted by justice, and should be permitted by international law, to resist a peace. This is an important and largely ignored issue, and once we reject the idea that *jus post bellum* comes into play only when an *ad bellum* just party won the war, as I have, then developing it further becomes even more pressing. If the defeated are owed a substantial debt of compensation, but the victors refuse to pay it, the defeated have a right to forcibly demand this compensation. They also have a right to refuse to give more compensation than they owe. This is true even if the defeated were *ad bellum* unjust. In both cases, this right to resist the peace can amount to a just cause for war, and should be recognized as such by international law. Of course, that unpaid compensation can be a just cause for war does not guarantee that going to war to extract that compensation will be *ad bellum* just, as going to war over unpaid compensation might not be proportionate to the harms that will likely be inflicted on innocent bystanders, or might not be necessary to successfully extract the compensation.³⁵

Note that there is some precedent in international law for compensating victims non-financially, including through guarantees of non-repetition. The UN General Assembly considers restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as remedies for victims of human rights or humanitarian

³⁵ I am grateful to Crystal Gunasekera for suggesting this last point.

law violations (General Assembly resolution 60/147). Article 34 of the International Law Commission's Articles on Responsibility of States for International Wrongful Acts requires restitution, compensation, or satisfaction, alone or together for such acts. Finally, the Commentary to Article 91 of Additional Protocol 1 to the Geneva Conventions states that financial compensation or compensation through services is required if restitution or restoration of the situation to what it was before the wrongful act are impossible.³⁶ Thus, the suggestion that victims of war-related wrongs should be compensated through reform or through reconstruction is not as radical as it may seem.

3.6 Conclusion

In this chapter, I argued that if we think of rights violators as owing compensation to their victims, then wars will involve many individuals (or communities) owing compensation to each other, for violating the rights protected by *jus ad bellum*, *jus in bello*, *jus ex bello*, and *jus post bellum*. But because of the practical and epistemic problems posed by war, individual-to-individual compensation will be difficult or impossible. Thus, more complex compensation measures, such as reconstructing victims' countries, reforming or demilitarizing one's own country, and so on, will typically be the most cost-effective way of compensating one's victims after war. In other words, the commonly proposed so-called special *jus post bellum* obligations are just (typically) cost-effective ways to fulfill one's moral duty of compensation after war. Since all special *jus post bellum* obligations (apart from restitution) can be accounted for as compensation,

³⁶ See Weizmann (2014) for a more in-depth discussion of this topic in the context of torture.

there seems to be no need for any moral principles in special jus post bellum other than compensation (and restitution).

Chapter 4 – Compensation for Violations of Internal Jus in Bello

4.1 Internal Jus In Bello

Typically when we think of post-war settlements, we think of rectifying the injustices done to members of states against whom the war was fought. Given the atrocities that we often inflict on our enemies in war, this focus is understandable. But this overlooks the all too common practice of infringing the rights of compatriots during war. As Orend (2005) points out, history is full of domestic atrocities committed under the pretext of wartime emergency (such as the imprisonment or execution of political enemies, or the suppression of legitimate protests). Surely a just peace requires that individuals (or states) settle not only the war-time injustices that they inflicted on foreigners, but also those they inflicted on their compatriots. In this chapter, I show how compensation also underlies settlements of domestic or internal injustice.

It is important to be clear on what exactly these domestic injustices are. At first glance, domestic atrocities do not seem to fall under the purview of just war theory. They are not violations of *jus ad bellum*, which deals with conflict between states, nor of *jus ex bello*, which deals with when the fighting should stop, nor of *jus post bellum*, which deals with what should be done once the fighting has stopped.³⁷ They are closest to violations of *jus in bello*, which most generally deals with the principles of just wartime actions. However, the *jus in bello* literature has mostly focused on the justice of actions against

³⁷ Domestic injustices might fall under these categories in cases of civil wars, but are then best dealt with as injustices between state-like entities (and thus as external injustices).

enemy combatants and innocent bystanders. Let us call this *external jus in bello*. As mentioned above, this focus on what we do to our enemy is understandable. But there is another, less discussed part of *jus in bello* that is relevant to post-war compensation, namely *internal jus in bello*.³⁸ This part of *jus in bello* deals with what justice permits or requires states to do to their own population during a war.

Internal *jus in bello* violations, and compensating for them, is the focus of this chapter. I discuss this issue separately from the external war-related rights-infringements (as discussed in Chapter 3) for several reasons. First, the compensation arrangements that prove most cost-effective in compensating for internal *jus in bello* violations are, as we shall see, somewhat different from the arrangements that are most cost-effective in compensating for external war-related injustices. Second, internal *jus in bello* is severely underdeveloped, and given the unique vulnerability of people to their own state, it deserves more consideration. Lastly, internal *jus in bello* violations are unfortunately quite common, and many of them are horrific. Thus, any theory purporting to specify the conditions of a just peace should handle them. I now turn to a general discussion of internal *jus in bello*, before discussing how violations of internal *jus in bello* should be rectified. As my focus is on rectification, I will avoid taking controversial stances about the substance of internal *jus in bello*.

Domestic wartime atrocities are, then, violations of internal *jus in bello*. But what is internal *jus in bello*? Internal *jus in bello* must answer whether, and to what extent, the necessities of war justify wartime measures such as limitations on speech and press, suspension of elections, or the internment of inhabitants with ties to the enemy. Just as with external *jus in bello*, domestic wartime measures can be evaluated on two moral

³⁸ This distinction and nomenclature is due to Orend (2005).

dimensions: whether they infringe rights (i.e. whether they are unjust), and whether they are morally permissible.

Let us start with the former, which is perhaps easier to evaluate. For example, individuals clearly have rights against detention unless they pose a threat. Thus, broad campaigns of detention undertaken with scant evidence, as was the case with the internment of Japanese-Americans in the 1940s, violate the rights of most, if not all, of those affected, and so are unjust. To take another example, the freedom to move around at night is generally considered a right, and so wartime curfews can infringe on individual rights and so be unjust.

An interesting exception is the case where the rights are waived by those affected, as is the case in the ideal democracy, where internal wartime measures are consented to by all affected individuals. Such cases will be rare, however, given that real democracies are not ideal. For example, typically not all residents of a state who will be affected by internal wartime measures will have the right to vote, nor will votes typically directly translate into state action. The details of such shortcomings will depend on one's theory of democracy, representation, and consent – issues that space prevents me from dealing with. Nevertheless, in typical democracies part of the population will have consented to, or be knowingly and intentionally responsible for, the domestic wartime measures, and as such will not have had their rights infringed.

On the other hand, the right to freely move about does not protect for example spying on the ad bellum and in bello just side (if any) of the war, and so security measures within and around military bases and other strategic locations that restrict movement only to authorized personnel do not necessarily infringe that right. Furthermore, enforcing the covering of all windows at night, as was done during WW2, so that no light that can aid enemy aircraft spills out, is plausibly not unjust. Individuals

do not have a right to light public places in such a way as to endanger others. Not all domestic wartime measures, then, are unjust. The focus of this chapter will be unjust internal measures, as according to the compensation theory of *jus post bellum*, compensation is owed for harmful injustice (i.e. harmful rights-infringement – see Chapter 2).

However, the justice or injustice of domestic wartime measures does not exhaust their moral status. The moral permissibility of domestic wartime measures must also be evaluated, and may not depend solely on the justice of those measures. There are many views on what, if anything, can make an injustice permissible, but a relatively uncontroversial case would be when the unjust harm is small, and the overall moral benefit is very large. In such cases it is plausible that the other moral considerations outweigh the individual rights being infringed. Consider again wartime curfews. As they infringe on the right to move about freely, they are typically unjust. But they can nevertheless be morally permissible if they are necessary for the protection of public order and the prevention of violence. In other words, the protection of life and public order, both of which are typically under threat during wartime, can be of enough moral importance to outweigh the right to walk freely at night. Even though perhaps unjust, measures meant to make espionage more difficult, like restricting international communications, closing borders, etc., can also be permissible if the threat averted by them is great, and thus the good the measures produce outweighs the rights they infringe.

Of course, this applies only if the public order being defended is itself permissible, and the violence being prevented is impermissible. For example, the imposition of curfews by authoritarian states to suppress legitimate dissent is not permissible, and neither is the suppression of legitimate protests against impermissible wartime working

conditions. The same will be true of other unjust but permissible domestic wartime measures. As they are permissible only because they promote some good that is morally important enough to justify infringing people's rights, unjust domestic wartime measures that do not promote any such good, or do not promote such goods sufficiently, will not be permissible. This is comparable to the self-defense case mentioned in the context of external *jus in bello* in Chapter 2, where it is commonly held that some harm to innocent bystanders is permissible to save a life, even though those bystanders, being innocent, are not liable to such harm. Both cases involve the weighing of on the one hand infringing individual rights, and on the other promoting some other moral values, and in both cases the infringement of certain rights seems permissible if the benefits of doing so are large enough.

But not all unjust domestic wartime measures are permissible. Indeed, a great many of them are impermissible, which is why the lack of discussion on this topic in just war theory is regrettable. An example where other moral considerations do not typically outweigh the infringement of individual rights is a state that uses wartime propaganda to demonize the enemy while itself having members who are of the same ethnic group as that enemy. At best, propaganda can increase military enrollment and morale, and so increase the chance of winning the war. On the other hand, dehumanizing propaganda will promote mistreatment of the enemy, thus encouraging external *jus in bello* violations. Furthermore, it will have similar domestic effects on compatriots who happen to be connected to the enemy (by ancestry, skin color, language, religion, etc.). As a result of this propaganda, such compatriots will tend to have their rights infringed. As the moral goods promoted by such dehumanizing propaganda are not typically important enough, or not promoted enough, to override the rights of those negatively

affected, such propaganda is typically an unjust and impermissible domestic wartime measure.

Determining whether a domestic wartime measure really is important enough to justify infringing rights will, of course, be difficult. There are different views on what exactly is required, and I shall not attempt to resolve this issue here. On any plausible view, however, great care must be taken to avoid error when instituting such measures. However well-intentioned such measures start out being, there are several risks involved. In a war, those in power might come to put undue weight in their own interests, and not enough in others', when determining what rights can permissibly be infringed. They can also come to believe that their interests are exactly the same as those of everyone else affected by the wartime measures, and so not realize that some measures infringe on more rights than previously thought, or obstruct important values. Lastly, domestic wartime measures will tend to restrict life when compared to peacetime, usually by increasing the power of the state. Some individuals will thus be tempted to pay to restore their freedoms to peacetime levels, and some agents of the state will be tempted to use their new powers for personal gain or to further morally impermissible agendas. The harms of such corruption and uneven enforcement must be considered when determining whether a given domestic wartime measure would infringe rights or be permissible, and the measures themselves should be designed to minimize the potential for corruption and uneven enforcement.

4.2 Rectifying Morally Impermissible Internal Injustices

Having introduced internal *jus in bello*, I now turn to motivating the claim that victims of internal *jus in bello* violations (i.e. of internal injustices) are owed compensation by those who infringed their rights. I begin by considering rectification for impermissible internal injustices, and ask whether acting impermissibly in order to defend against an unjust attack reduces the amount of compensation one owes to ones victims. While I will also discuss permissible injustices in the following section, it is great domestic wartime atrocities that motivated this chapter, and thus they will be its focus.

Suppose that a country instituted unjust and impermissible domestic wartime measures. An uncontroversial example of such measures would be a state creating concentration camps for some ethnic group supposedly linked with the state's adversary in war. Just as for external *jus in bello* violations, punishing the rights-infringers is surely not enough, for two reasons. First, someone who lost years of their life, their health, or perhaps their family members in concentration camps is not made sufficiently better merely by their camp guards going to prison. Surely rights-infringers have a duty to compensate their victims, and mere imprisonment will typically not do so.³⁹ This is so even if the state instituting the impermissible measures does so while fighting an *ad bellum* just war. Consider the analogous individual case: someone is attempting to rob me, and I defend myself by throwing my brother at the robber, where I know that doing so has a high chance of harming my brother and that there are other ways of defending myself that do not harm my brother. In this case, I have a just cause for my action (i.e.

³⁹ One could argue that internal injustice does not require compensation if one believed that such injustices protect strong group or state rights. However, my assumption of individualism rules out such an appeal to strong group rights. Moreover, many real internal wartime injustices rarely prove necessary for the survival of the state or group, and so even without individualism, many internal injustices would be difficult to defend.

self-defense) but the means I choose to use are unjust, because they infringe my brother's rights. Clearly, I owe my brother compensation for inflicting harm on him.

Second, by focusing on individual rights-infringers, and ignoring the systematic nature of wartime domestic atrocities, mere punishment is unlikely to decrease the likelihood of such atrocities reoccurring in the future. Mere punishment of responsible individuals does not in itself fix the systematic issues that lead to such people being put into positions of power and allowed to commit such atrocities. Reform of the system will typically be needed, and punishment of individuals cannot justify such reform. Indeed, sometimes the system is in such a bad state that even criminal punishment of the rights-infringers is unlikely. As I argued in Chapter 3, systematic political reform can be a cost-effective form of compensation, especially when evidence is lacking, and so requiring compensation for domestic in bello violations can explain the need for reform.

At first glance, then, compensation seems appropriate for impermissible internal injustices. But some internal wartime injustices occur only because the state that perpetrates them is involved in a just defensive war against unjust attack. In such cases, one might argue that the compensation is owed not by the perpetrators of the internal injustice, but by those who unjustly went to war with those perpetrators, and so made them act unjustly. Suppose, for example, that Japan entered World War 2 unjustly (i.e. Japan was *ad bellum* unjust), and that the US entered it justly (i.e. the US was *ad bellum* just). Suppose further that in response to the Japanese *ad bellum* unjust attack, the US instituted the internment of Japanese-Americans (without consent), an impermissible internal injustice. Then, one might argue, Japan, not the US, is responsible for any internal injustices suffered by residents of the US as a consequence of World War 2, and so Japan owes compensation for those injustices, not the US. Indeed, similar objections

can be raised against compensation for all the other kinds of war-related injustices, although it perhaps seems most plausible in the case of internal in bello violations.⁴⁰

This argument faces two problems. First, it fails to take into account the moral agency and responsibility of the perpetrators of the internal injustice. Regardless of what Japan did, Americans still had a choice, and chose to unjustly and impermissibly intern Japanese-Americans. The rights of the victims were infringed not by Japanese individuals, but by fellow Americans. Thus, the Japanese cannot owe compensation to the victims of the internment of Japanese-Americans. Instead, the Americans who instituted or supported the internment owe compensation to its victims. They are the ones who chose to infringe the rights of their compatriots.

Perhaps the claim is instead that Japan's actions count as coercion, and thus that the Americans who infringed the rights of their compatriots did something wrong, but are not responsible for doing so. But cases of impermissible internal injustice in response to unjust attack are not typically cases of coercion. The Japanese unjust attack may count as coercion for the American soldiers defending against that attack, but it cannot plausibly count as coercing the decisions of American politicians, far removed from battle, to institute wide-ranging internal injustices. There might be some exceptions, perhaps when the politicians themselves are at extremely high risk of attack, but generally, leaders will not have diminished responsibility for their internal injustices on account of coercion.

This brings me to the argument's second problem. According to the compensation theory of jus post bellum, compensation is owed for infringing someone's rights. The Japanese individuals responsible for Japan going to war ad bellum unjustly infringed the

⁴⁰ It is important to note that such cases are rare, as jus ad bellum is very stringent, and so many wars have no ad bellum just side. Thus, internal injustices will often be perpetrated by states that are themselves ad bellum unjust.

rights of Americans, and thus owe them compensation. If they are also to owe special compensation to the victims of internal American injustice, over and above what they already owe all Americans for unjustly attacking them, then these Japanese individuals must have infringed the rights of the victims of internal American injustice more than they infringed the rights of other Americans. But the unjust attack on Pearl Harbor did not infringe the rights of Japanese-Americans more than it did the rights of other Americans. More generally, going to war *ad bellum* unjustly against a country does not infringe the rights of the victims of that country's internal injustices any more than it infringes the rights of everyone else living in that country. Thus, *ad bellum* unjust parties do not owe special compensation for the internal injustices of other countries.⁴¹

To clarify, consider again the individual case discussed above, where someone attempts to rob me, and I defend myself in an impermissible and unjust way, by putting my brother at risk despite having better options. In this case, while the robber is responsible for attempting to rob me, I am responsible for how I respond to that attempt, and my choice to respond in an impermissible way is on me, not the robber. I am a moral agent, and I chose an unjust and impermissible action. Because I infringed my brother's rights, I owe him compensation.

4.3 Rectifying Morally Permissible Internal Injustices

Compensation, then, is required for *morally impermissible* internal in bello injustices.

Such injustices are the main motivation for this chapter, and its main focus. However, it

⁴¹ There is also a more pedantic point to be made, namely that an internal wartime measure is a wartime measure only if there is a war, and it is the *ad bellum* unjust party (or parties) that is responsible for there being a war. However, if the war is causally unrelated to the internal injustice, and so all the war does is transform an internal injustice into an internal wartime injustice, then the *ad bellum* unjust party clearly owes no compensation to the victims of that injustice.

is also worth considering whether compensation is owed for morally permissible internal injustices, and who owes that compensation. Thus, I now turn to the two kinds of morally permissible internal injustice: first, what is owed for *morally optional* (i.e. morally permissible but not morally required) injustices, and by whom; and second, what is owed for *morally required* (i.e. morally permissible and also not morally optional) injustices, and by whom. The first case, I will argue, is very similar to the impermissible case discussed above, whereas the second is not.

I begin with the case of morally optional internal injustices. Suppose again that Japan entered World War 2 *ad bellum* unjustly, and that the US defending itself was *ad bellum* just. Suppose further that the US instituted an uncontroversially permissible but not required internal wartime measure, such as a prohibition on visible lighting at night, in response to Japan's aggression. Such a "blackout", while infringing on the rights of people to light their homes and property (unless consented to), is surely made permissible by the protection it might give against Japanese bombers (if and when they are a danger).⁴² It seems intuitive that victims of such injustices are owed compensation. After all, their rights have been infringed, just as the rights of victims of impermissible injustices have been. If those rights are to mean anything, the victims should be owed something for that infringement. Note that whereas requiring rights-infringers to compensate their victims for morally optional internal injustices seems appropriate, punishing them is not, as their actions were morally permissible.

Now, one might instead argue that the above objection, that it is the unjust attacker (if any) in response to whom the rights-were infringed, and not the rights-

⁴² If the reader has doubts that such a measure is merely morally optional, instead of morally required, suppose that the blackout being considered is one that takes effect every night, instead of only in response to warnings from a fairly reliable warning system. While a blackout before an impending raid by enemy bombers might be morally required, the blanket policy of blackouts every night, just in case, seems morally optional.

infringers themselves, who owes compensation to the victims, is more plausible when the injustice is morally optional. Whereas previously, the objection was that, if I *impermissibly* infringe someone's rights because I was *ad bellum* unjustly attacked, I owe my victim no compensation, one could instead argue that, if I *permissibly* infringe someone's rights because I was *ad bellum* unjustly attacked, the attacker, not me, owes the compensation to the victims. To use our example, one could argue that the Americans responsible for the blackout infringed the rights of their compatriots, but as they did so in response to Japan's aggression, and their actions were morally permissible, the victims are owed compensation not from their compatriots, but from the Japanese individuals responsible for Japan's *ad bellum* unjust attack.

However, the two considerations I raised against this argument above retain their force. First, even in the morally optional case, those instituting and supporting the blackout had a choice as to what to do, chose to infringe the rights of their compatriots, and were typically not excused from responsibility for doing so on account of coercion. Indeed, in the morally optional case (as in the impermissible case), morality permitted them to choose otherwise. Unless we want to deny them moral agency, we must hold them responsible for their actions. It was the Americans responsible for this measure, not any Japanese individuals, who chose to infringe their compatriots' rights to keep their lights on, and so it is only those Americans who owe compensation to the victims of that injustice.

Second, it remains the case that for the Japanese individuals responsible for Japan's *ad bellum* unjust attack on the US to owe special compensation to the victims of the US blackout policy, they must have infringed the rights of the victims of the US blackout policy more than those of other Americans. But again, Japan's war against the US, however *ad bellum* unjust, does not specifically infringe on the rights of precisely

those Americans who are prevented from keeping their lights on. It is the actions of their compatriots, not the actions of the Japanese, that infringe those rights. Thus, it is their compatriots, not the Japanese, who owe compensation for those rights-infringements.

Consider again an analogous individual case, where an unjust attacker pushes me to the floor, and I can choose either to suffer the blow, or use my brother to soften the blow, but hurt him. Suppose that the harm of me suffering the blow would be so great that it outweighs the harm of the rights-infringement that my brother will suffer, and thus using him to soften the blow is permissible (but not required). But using my brother in this way infringes on his right to bodily integrity, even if the attack on me which precipitated me using my brother was unjust, and even if it is morally permissible (and optional) for me to use my brother in this way. I am the one who chose to infringe my brother's rights, not my attacker. Furthermore, my attacker's actions did not infringe my brother's rights, and so the attacker cannot owe my brother any compensation. Thus, I owe my brother compensation for using him, even though I did so permissibly and in response to an unjust attack. Similarly, perpetrators of permissible internal injustices owe their victims compensation, even if they did so in response to *ad bellum* unjust attack.

Consider the alternative, that perpetrators of morally optional (or indeed impermissible) injustices instituted in response to *ad bellum* unjust attack do not owe their victims compensation. If this applies to internal injustices, then surely it should also apply to *external* injustices. If so, then we would be committed to, for example, the Allied fire bombings of civilian targets in Germany and Japan (which were either morally impermissible or optional) or the Allied blockade of Japan (morally optional) during World War 2 not resulting in the perpetrators owing any debt to the civilians who suffered very serious rights-infringements (death, dismemberment, disease, etc.). But

that would be absurd. The victims suffered at Allied hands, and did so even though the Allies had a choice as to whether to expose them to such suffering or not. In the morally optional cases, the potential benefits were not enough to force, morally speaking, the Allies into choosing these actions, and in the morally impermissible cases, the benefits were so comparatively small as to make it morally required for the Allies *not* to choose these actions. The fact that Nazi Germany fought World War 2 unjustly does not mean that the Allies were devoid of responsibility for their external in bello actions. I see no reason why the same should not be true of internal in bello actions.

I claim, then, that those who institute or support morally optional internal wartime measures in response to unjust attack are the only ones who owe compensation to the victims of those measures. Readers might find this implausible. For those that do, there is an alternative position that might be more convincing. Consider the following argument. Unjust attackers, not their victims, should bear the reasonable costs of minimizing the harms of their unjust attack. Internal wartime measures instituted in response to an unjust attack are attempts to minimize the overall costs of an unjust attack. Thus, the cost of minimizing the harm of the unjust attack includes the compensation costs owed by the defenders to the victims of the wartime measures. Note that while morally permissible wartime measures can plausibly be construed as attempts to minimize the harms of unjust attack, the same is not true of impermissible measures. The latter, after all, are impermissible precisely because they do not result in enough moral benefit to outweigh their associated harm.

On this alternative view, then, unjust attackers owe their victims the reasonable costs of minimizing the harm of that unjust attack, including the cost of compensating the victims of the minimization. Note that this alternative is compatible with the compensation theory of jus post bellum, as my two objections, above, apply only to the

view that the unjust attacker owes compensation *directly* to the victims of internal wartime measures. On this alternative view, the unjust attacker owes compensation to their victim, and they in turn owe compensation to their own victims. Indeed, I accept a view like this alternative in cases of morally *required* wartime measures, below. However, while I accept the principle that unjust attackers should bear the reasonable costs of minimizing the harms of their unjust attack, I am not convinced that this principle applies to cases of morally optional internal measures adopted in response to unjust attack. It is simply not clear to me that morally optional harm done to third parties counts as a reasonable cost of minimizing the harm of unjust attack. That required harm done to third parties does count, and that impermissible harm does not, seems clear. Thus, I leave it open whether victims of unjust attack who institute morally optional internal wartime measures, and thus owe compensation to the victims of such measures, are themselves in turn owed the reasonable costs of this compensation by the unjust attackers. Either way, victims of morally optional internal wartime measures are owed compensation for the harmful rights-infringements they are made to suffer. This is the important result of applying the compensation theory of jus post bellum to internal jus in bello violations.

Compensation, then, is owed to the victims by the perpetrators of morally optional (as well as of morally impermissible) internal injustice. But there is another kind of morally permissible internal injustice, namely *morally required* injustice.⁴³ Suppose again that Japan went to war against the US ad bellum unjustly, and that the US in response joined World War 2 ad bellum justly. Now, consider some uncontroversially (I hope) morally required (and so also morally permissible) internal wartime injustices instituted by the US, like prohibiting individuals with access to sensitive information

⁴³ I am assuming the largely uncontroversial claim that what morality requires of us it does not also prohibit.

from contacting the Axis powers or leaving the US, turning off power during Japanese bomber raids in order to mask the location of cities, or instituting a draft.⁴⁴ Because these measures infringe on people's rights to speech, to movement, to get the electricity they paid for, or to freely choose their occupation, they are unjust (unless consented to). While these measures were unjust, they were also morally permissible, as their benefits outweighed the associated rights-infringements. Furthermore, the benefits were so large, and the rights-infringements so comparatively minor, that not to institute these measures would be morally impermissible. State officials thus have a duty to implement and support such measures.

Of course, depending on one's views on the contents of our rights, some of these measures might not end up infringing the rights of that many people. For example, one could hold that the right to get the utility service one has paid for includes an exception for cases when that service would harm others. But such an exception will not cover all cases. Cutting off power to a whole city will also cut off power to households whose electric lighting would not have aided enemy bombers. After all, some households will only have indoor lighting, or will have minimized the amount of light shone or reflected into the sky. As the provision of electricity to these individuals does not endanger others, cutting off their power *does* infringe their right, even with the aforementioned exception. Nevertheless, because of the great costs of inspecting each household's electric lighting, the overall moral benefits of a policy to cut off all power still outweigh the rights-infringement to such an extent as to make this measure required. Similarly, exceptions on the right to free speech, free movement, and occupational choice will typically not cover everyone covered by restrictions on speech and travel, or the draft. Even on views

⁴⁴ Turning off power during bombing raids was planned in Portland, OR, among others. (Blackout Instructions Portland, OR).

where these rights have exceptions, then, internal wartime measures like travel restrictions or the draft will typically infringe the rights of some individuals.

Morally required injustices such as these differ from the morally impermissible and the morally optional ones in important ways. Whereas before, the Americans instituting and supporting such measures had a choice as to what to do, in the morally required cases this is no longer true, *morally speaking* (although, of course, they might still have a choice empirically speaking). These Americans are now morally *required* to infringe on the rights of their compatriots. Doing otherwise would be to act morally impermissibly. Demanding compensation from them thus seems inappropriate.

Moreover, my two arguments for why the responsible Americans, and not the Japanese, owe compensation to the victims of impermissible or optional US internal injustices no longer seem convincing in cases where the Japanese attack made the internal injustice morally required. My first argument was that as the perpetrators of the internal injustice, not the Japanese, infringed the rights of the victims, it is the perpetrators, not the Japanese, who owe the victims compensation. But if the Japanese attack made the internal injustice morally required, then the attack morally forced some Americans into instituting and supporting these injustices, and so there is a sense in which Japan's actions (morally) ensured that the victims of US internal injustice had their rights infringed.

Second, I argued that because Japan's ad bellum unjust attack did not single out the victims of US internal injustice for more rights-infringement than other Americans, the Japanese cannot owe those victims more compensation than they owe other Americans. But if the Japanese attack made the internal injustice morally required, then the Japanese attack did, in a way, single out the victims of the internal injustice, by

making it morally required for others to infringe their rights.⁴⁵ Thus, simply demanding compensation from the Americans responsible for the injustice, and leaving it at that, seems inappropriate.

At this point, two alternatives present themselves: one could hold that in cases when Japanese actions made it morally required for Americans to infringe someone's rights, only the Japanese owe compensation to the victims for those rights-infringements; or, one could hold that in such cases the Americans owe their victims compensation, but are themselves owed compensation by the Japanese for the cost of this obligation. The first option captures the ultimate moral responsibility of the Japanese for the rights-infringement, and thus has some intuitive appeal. However, I lean towards the second option, because it maintains the intuitively plausible principle that we owe compensation to those whose rights we infringe while still placing the ultimate burden on the Japanese.⁴⁶ Furthermore, in matters of compensation, the focus should be on the victims, and on restoring their interests. The second option accomplishes this by ensuring that even if the party ultimately morally responsible for the rights-infringement (above, Japan) cannot compensate the victims, they are still owed compensation by the proximate perpetrators of the injustice (above, America). As the victims of internal injustice will often be less influential and have less international clout than the perpetrators of that injustice, making the perpetrators, rather than the

⁴⁵ The idea that Japan owes compensation to group X because it "morally forced" others to infringe the rights of X, as well as singled X out for rights-infringement by making it morally required for others to infringe their rights, bears some similarity to the idea that we owe others compensation not only for harming them, but also for exposing them to risk of harm. A crucial difference, however, is that I am talking only about "moral risk" (i.e. has Japan made it "more" permissible to infringe the rights of X?), as opposed to practical risk (i.e. has Japan made it more likely that X will be harmed?). For the right not to be exposed to risk, see McCarthy (1996), Handfield & Pisciotta (2005), and an overview by Hayenhjelm & Wolff (2012).

⁴⁶ One could hold that this also applies to optional (or even impermissible) internal injustices instituted in response to unjust attack. While I do not share this view, for the two reasons mentioned above (in impermissible and optional cases of internal injustice, the unjust attacker does not infringe the relevant rights of the victims, and does not single them out), holding it does not negatively affect my larger project of showing how special *jus post bellum* can be based on compensation for wartime rights-infringement.

victims, be responsible for seeking compensation from the party that made the injustice morally required seems appropriate. For example, the US government would presumably have been more successful in seeking Japanese compensation for making it morally required for the US to institute some internal injustices, than Japanese-Americans, fresh out of the internment camps, would have been.

Lastly, recall the principle that unjust attackers, not their victims, should bear the costs of minimizing the harm of their unjust attack. Above, I expressed my doubts about whether the costs of morally optional actions count as reasonable costs of minimizing harm. However, it seems clear that morally required actions meant to minimize the harm of an unjust attack count as reasonable costs of that attack. Thus, according to this principle victims of unjust attack who minimize its harm in morally required ways owe compensation to the victims of these measures, but are themselves owed compensation by the unjust attacker for the reasonable costs of repaying that debt.

Consider again the analogous individual case, where the harm that would befall me and my family if I were robbed would be so great that I am morally required to use my brother as defense against a robbery. The two alternative distributions of the debt of compensation to my brother, then, are: first, only the robber owes my brother compensation; and second, I owe my brother compensation, and the robber owes me compensation for the reasonable costs of me compensating my brother. Both options put some burden on the robber, which is appropriate given that he morally forced me to infringe my brother's rights, and so is ultimately morally responsible for that rights-infringement. However, only the second option adheres to the principle that we owe compensation for infringing the rights of others. After all, I am the one who infringed my brother's rights, and so I should have to compensate him. As I was morally forced to do

so by the robber, he should compensate me for the reasonable costs of this action. But it was my action.

Note that on the second option the Japanese debt to the Americans would not always be equal to the compensation the Americans actually paid to their victims. Rather, the Japanese debt would amount to the cost of *reasonably* compensating those victims. If through corruption or incompetence the American compensation arrangements for their internal injustices end up costing much more than they reasonably could have, the Japanese individuals responsible for making that internal injustice morally required do not owe the American compensators the whole sum paid out by the latter. Their debt is capped at the reasonable cost of compensating the victims. So ideally, the Americans responsible will compensate their victims, and the Japanese will in turn compensate them. However, not receiving compensation from the Japanese does not absolve the Americans from the duty to compensate their victims.

To summarize, in these two sections I motivated the view that individuals who institute or support internal wartime injustices owe their victims compensation, even in the controversial case when that injustice was motivated by the ad bellum unjust attack of a third party. The one exception is when the ad bellum unjust attack made the injustice morally required, in which case the ad bellum unjust party owes compensation to the individuals who (morally) had to infringe the rights of their compatriots, to cover the reasonable costs of compensating their victims. My case for compensating the victims of morally impermissible internal injustices will, I think, prove uncontroversial. Rejection of my views on the morally permissible cases, however, does not endanger the compensation theory of jus post bellum overall. Wars are unfortunately rife with morally impermissible internal injustices, and so there will still be plenty of compensation to pay for internal wartime injustices.

One further point about the difference between permissible and impermissible injustices bears keeping in mind. I have so far assumed that compensation is owed for rights-infringement, and that the amount owed is determined by how much the rights-infringement set back the victim's interests, not by the moral permissibility or impermissibility of the rights-infringement. One could, however, hold the alternative view that one owes less compensation for morally permissible (and especially required) injustices than for impermissible ones. While this view has some intuitive appeal, it does substantially complicate matters. For one, does it mean that one owes nothing for morally required rights-infringements? As the compensation theory of jus post bellum is not meant to be a full theory of compensation, these issues are outside the scope of this dissertation. For this reason, I will for the rest of this dissertation continue to assume that moral permissibility does not affect the size of the compensation. Note, however, that the view that one owes less for permissible injustice, but more for impermissible ones, is not an objection to the compensation theory of jus post bellum in general. Impermissible wartime injustices are very prevalent, and so there will still be plenty of compensation to pay for instituting or supporting internal wartime injustices, as so many of them are impermissible.

4.4 Internal Compensation with Few Epistemic and Practical Difficulties

Internal jus in bello violations, then, ground a duty to compensate the victims just as other war-related injustices do. But what are some practical arrangements that cost-effectively compensate our compatriots for internal injustices? I will now argue that

some internal injustices have features that set them apart from external war-related injustices when it comes to cost-effective compensation arrangements.

While post-war compensation, as argued in Chapter 3, is typically complicated by a difficulty in knowing exactly who owes what to whom, and the cost of delivering compensation to the victims, the situation looks different for some typical internal in bello violations. First, internal in bello violations often present *fewer epistemic difficulties*. While it is typically unclear who exactly is harmed by our external war-related violations, it is sometimes much clearer who is harmed by internal in bello violations. Take, for example, the imprisonment of everyone politically, ethnically, or religiously related to the enemy (real or imagined). To institute such a measure, a state will typically need to have or make records on who is related in the relevant way to the enemy, in order to be able to detain them. Thus, finding the victims will be easier. Even if such records are not made or kept, the internment camps will typically keep records of who is there, to prevent escapes, and so on. Thus, again, finding victims will often be easier for internal in bello violations than for other war-related injustices. Moreover, since such records will give some idea of how long and under what conditions the detained individuals suffered, they will also provide good information about how much compensation is owed.

On the other hand, more general domestic measures than those just mentioned, such as restriction of the press, of labor action, or of free movement, can be instituted without first having a good idea of who exactly will be negatively affected, and to what extent. In these cases it is as unclear who is owed compensation, and how much, as it is in other war-related rights-infringements. In such cases, the post-war compensation arrangements for the internal injustices should be handled similarly to the external ones. I discuss compensation for such internal injustices in the next section.

Second, compensating for internal in bello violations presents *fewer practical difficulties* than for other war-related rights-infringements do. The *cost of overcoming the epistemic difficulties* (i.e. of finding out who owes what to whom) after internal injustices will typically be lower than after external injustices, because of the more detailed records (as mentioned above), and because a given society or state is typically much better (when willing) at compelling its own members or citizens to give up information than it is at compelling foreigners to do the same.⁴⁷ For example, an investigation into who was responsible for what parts of the wartime internment of Japanese-Americans in the US led by the US government would typically be much cheaper than a similar investigation by other governments, or non-state institutions.⁴⁸ People, especially if they work in government, will typically be more cooperative with their own government's investigation than with the investigations of other institutions.

Moreover, the *cost of delivering compensation* domestically will often be lower. Local governments will typically have better knowledge of local culture, customs, and other factors that can make delivery of compensation more costly, and the delivery of such compensation will often be more secure when done by compatriots, when compared to delivery of compensation for external injustices by foreigners. While internal wartime injustice can breed some resentment against the compatriots responsible, wars typically breed much stronger resentment against the external adversary. There are, however, some exceptions to this phenomenon, which I discuss at the end of the next section.

⁴⁷ While some epistemic difficulties will be insurmountable, I take the potentially costly task of overcoming the epistemic difficulties that can be overcome to be a practical difficulty. My claim here is that there are typically fewer insurmountable epistemic difficulties, and smaller practical difficulties, after internal injustices than after external injustices. Note that fully overcoming all epistemic will typically be a waste of money for compensatory purposes, as it is not guaranteed to be of help to the victims.

⁴⁸ Indeed, there was a (belated) US investigation into the internment of Japanese-Americans. See U.S. Commission on Wartime Relocation and Internment of Civilians (1982).

Because compensation for internal in bello injustices typically exhibits fewer epistemic and practical difficulties than compensation for external injustices, compensation for internal in bello injustices will more often be cost-effectively, relative to the evidence, handled on a person-to-person basis. This differs from the typical external injustice case, where the practical and epistemic difficulties of compensating foreign victims of war-related injustices are so high that compensation is more cost-effectively delivered through systemic arrangements such as reform or demilitarization (as discussed in Chapter 3).

There are two main ways to handle such person-to-person compensation cost-effectively. First, there is what I will call the top-down, investigation-led approach, and second, there is the bottom-up, civil litigation approach. As we shall see, both of these approaches have their merits and weaknesses, and so some combination of both will typically be the most cost-effective compensation arrangement.

On the top-down, investigation-led approach, a state-funded investigation into the internal injustice determines who was responsible for the injustice and to what extent, and matches perpetrators to their victims. While internal injustices often have few epistemic and practical difficulties, there will almost always be some, and such an investigation can be a cost-effective way of overcoming such difficulties when they are relatively easy to overcome. The compensation can then be transferred from perpetrators to their victims through this institution, in accordance with its findings.⁴⁹ While normally such an investigation would be led by prosecutors, the police, or the courts, in cases where these institutions are implicated in the internal injustice, other institutions might have to be used or created, and perhaps run by third parties (like the international

⁴⁹ For example, the US Congress eventually responded to the findings of its investigation into the internment of Japanese-Americans, the Commission on Wartime Relocation and Internment of Civilians, by passing the Civil Liberties Act in 1988, which granted each surviving victim \$20,000.

community). As the costs of this investigation will, at least initially, be paid by the state (and so by the taxpayer), this approach is perhaps most appropriate when the injustices were perpetrated by state agents acting in their official capacity, or when such injustices were wrongfully or negligently allowed by state agents. After all, in these cases the state is at least somewhat responsible for the injustice. As it is the rights-infringers who should bear the costs of delivering compensation to their victims, it thus seems reasonable in these cases to require the state to front the costs of the investigation. These costs could later be extracted from those specific individuals responsible for the injustice.

Moreover, there are two considerations that suggest that the state should front the costs of investigating *impermissible* internal injustices, even when the state is not implicated in them. First, on the plausible view that preventing impermissible injustice is one of the main purposes of states, any impermissible internal injustice seems to be at least a case of the state neglecting its duties. On this view, through negligence the state acquires some responsibility for the injustice, and requiring it to front the costs of investigating the injustice seems reasonable. It is less plausible that the same applies to permissible injustices, as another core function of the state is plausibly to promote morally valuable things, such as life, security, or wellbeing, and performing permissible internal injustices will usually promote exactly these things.

Second, the view that the state should front the costs of the investigation only if it was implicated in the injustice being investigated suggests that the arrangement should be modeled on civil disputes, where the plaintiff must typically front the costs of the civil prosecution against the defendant, costs which can then be paid by the defendant if the plaintiff is successful. However, criminal cases seem like a better model for impermissible internal injustices, if only because the harms of internal wartime injustices can easily eclipse those of even the most heinous crime. In criminal cases, the

criminal justice system, not the victim, fronts the costs of identifying perpetrators. For example, if I report being robbed to the police, but do not know the identity of my robber, the state pays the police to investigate and (hopefully) identify my robber. This process of matching criminal to victim is paid for by the state, not by the victim, regardless of whether the robber worked for the state or not. Thus, a system where the state should treat impermissible internal injustices as criminal, not civil, matters and front the costs of investigating them, does not seem too unreasonable to me, even if the state was not implicated in the injustice. However, I admit that this view will be controversial. But the idea that the state should be required to front the costs of identifying the perpetrators of internal injustices, and matching them to their victims, when it is at least partially responsible for those injustices is less controversial, and state institutions will often be implicated in many internal war-related injustices.

The advantages to this investigative approach are that the power and the investigative expertise of the state is brought to bear on the problem of identifying the perpetrators and matching them to their victims, which can be a cheaper way of identifying perpetrators than if outside groups attempt to do the same. Moreover, by having the state front the costs of the investigation, this approach saves the victims, who as recent victims of injustice might not be able to afford doing so, and anyway should not have to do so, from having to front these costs themselves.

However, the investigative approach suffers from several drawbacks. As mentioned above, when the state is not implicated in the injustice, having it front the costs of identifying the perpetrators and matching them to their victims may seem inappropriate. Furthermore, if the state is too corrupt, unrepentant, or dysfunctional, state-led investigations will be prone to shifting responsibility, diminishing or ignoring harms, and in other ways producing inaccurate or incomplete findings. In some cases

having a third party, like another state, an independent organization, or the international community handle the investigation will solve this problem. Typically, however, third parties will not have been responsible for the injustice, and so requiring that they front the costs of the investigation will be inappropriate.

The other approach to handling person-to-person compensation for internal injustices is the bottom-up, civil litigation approach. On this approach, the victims themselves sue their rights-infringers. As the legal system can be quite good at extracting compensation from rights-infringers who are reluctant to compensate their victims, using the courts to seek redress can be a good way of handling claims for internal person-to-person compensation when there are very few gaps in our knowledge of who owes what to whom. In cases involving many victims and cohesive groups of perpetrators, arrangements such as class-action lawsuits can further improve the cost-effectiveness of the compensation process.

This civil-litigation approach has a number of advantages. First, this approach can be cheaper, and so more cost-effective, than the investigative approach when there are few epistemic difficulties to overcome. After all, in such cases there is little need to overcome epistemic difficulties, and so little need for an investigation. When the perpetrators are known and can easily be matched to their victims, all that is left to do is to extract the proper amount of compensation from the perpetrators and transfer it to the victims. The courts can be quite good at accomplishing this.

Second, this approach does not rely on state-led investigations to determine who bears responsibility for the injustice, which is an advantage when the state institutions that would handle such an investigation are corrupt, implicated in the injustice and unrepentant, or simply dysfunctional, and so would not handle the investigation well. In some such cases, the courts themselves will not be so affected, and will still be a workable

venue for seeking compensation. Note that if the courts are also so affected, or there is worry that they might be, third-parties could provide courts instead (e.g., international tribunals).

Third, the legal system, given its experience with the similar tort law and its international equivalents, can be very good at ensuring that any given rights-infringer is not required to compensate more than he should, that the compensation demands are distributed among the rights-infringers according to their individual responsibility, and that the compensators, who are free to choose the most cost-effective means of fully compensating their victims,⁵⁰ follow through on the agreed upon compensation arrangements.

However, the civil litigation approach also has several drawbacks. First of all, as in other cases of civil litigation, the victims suing for compensation would have to front the costs of the proceedings. While these costs could eventually be extracted from the rights-infringers, victims might nonetheless be unable to front these costs. Perhaps the class-action lawsuit model could go some way to dealing with this issue, by splitting the costs over all of the victims. Alternatively, the lawyers representing the victims could be paid only if they win the case, although the risk with such an approach is that few lawyers would want to work on harder-to-win cases.

Nevertheless, this approach risks leaving those who cannot afford to sue for compensation without any compensation. Requiring that the state front these costs seems appropriate only if, as discussed above, the state is implicated in the injustice (or, perhaps, if the injustice was impermissible). Citizens as a whole, after all, are not in these cases responsible for the injustice, and so do not have a special obligation to bear the

⁵⁰ Although, as I have argued before, listening to the demands of victims is likely to help maximize the cost-effectiveness of compensation arrangements, as victims will typically know what will most promote their interests.

costs of overcoming the epistemic and practical difficulties facing compensation for that injustice. As mentioned above, there could be a universal obligation to do so, as there seems to be in criminal cases. Indeed, I am sympathetic to this position. However, I am here, and throughout this dissertation, mainly concerned with the *special* duties that we owe to the victims of our war-related injustice. Thus, the issue I am concerned with here is whether the state or third-parties have a *special* obligation to pay or front these costs. Whether they have a universal obligation to do so is a topic for a different day.

Of course, third-parties (such as the lawyers themselves, or the state) or even the rights-infringers could volunteer to front these costs. But it seems unreasonable to *require* that third-parties, who are not responsible for the injustice, front the costs of matching victims to rights-infringers, and the costs of extracting that compensation from the rights-infringers. As for the perpetrators, the purpose of the civil litigation is to establish their responsibility, and so prior to the civil litigation, there would not be an adequate basis on which to determine who, exactly, perpetrated the injustice, and thus who should front the costs of the litigation. Requiring perpetrators to front the costs of the civil litigation would already assume that which is supposed to be shown by that civil litigation. Lastly, a drawback of the civil litigation approach is that it might lead to a less accurate picture of who was responsible for the injustice. After all, adversarial lawsuits are, by their high-stakes, non-cooperative nature, not always well suited for discovering facts, as opposed to determining what is owed for an already established set of facts.

To summarize, then, compensation for internal injustices with few epistemic and practical difficulties will typically be most cost-effectively handled through an official investigation into the injustice, and subsequent compensation based on the findings, or through individual victims suing their rights-infringers, or some combination of both (e.g., using the findings of an official investigation to inform the individual lawsuits). The

fewer epistemic and practical difficulties there are to overcome, the less need there will be for an investigation. In cases where the state was implicated in the injustice, the state should front the costs of the investigation, and if needed, help front the costs of the individual lawsuits.

4.5 Internal Compensation with Significant Epistemic and Practical Difficulties

4.5.1 General issues

However, there will be cases of internal injustice with significant epistemic and practical difficulties in identifying victims and rights-infringers, and in individually compensating victims. I now turn to the question of how to best compensate for such injustice. In Chapter 3, I argued that external war-related injustices typically exhibit these kinds of difficulties, and further argued that because of the great cost (and sometimes impossibility) of overcoming these difficulties, compensation must take other forms. Thus, the forms of compensation discussed in this section will resemble those discussed in Chapter 3.

Most importantly, *domestic reform* may be a very cost-effective form of compensation for internal injustice, relative to the compensators' evidence. Such reform can greatly improve the ability of vulnerable groups to resist future harmful wartime measures, and increase institutional safe-guards against such measures in the future, thus promoting the victims' interest in security. Before I discuss specific reforms, however, it is important to deal with two general issues: whether the reform is

independently required by justice, and the moral permissibility of the injustice the reforms are meant to address.

I begin with the former. Consider how domestic reform can compensate victims of internal injustice. For example, in cases of internal injustice that involved the use of the police, the military, or other state organs against the victims, integration of abused groups into the police and military, or more broadly, democratization of the state, may increase the power of the victims over the state, and thus increase their security. However, one might object that democracy and integration are independently required by justice, and so cannot compensate victims. As discussed in Chapter 3, actions (or institutions) that are required by justice independently of past injustice do not compensate victims for past injustice. For example, ceasing a violent, unjustified assault on someone does not compensate them for the initial assault, and neither does ceasing to unjustifiably deprive someone of their right to vote.

I admit to finding it plausible that democracy, and integration in the above sense, are independently required by justice. However, not all democracies are perfect, nor is it plausible that only the most perfectly democratic state is permitted by justice. Thus, while the transition from non-democratic to democratic forms of government might well be independently required by justice, and so cannot compensate victims of internal injustice, the improvement of an already permissibly democratic state is not always independently required by justice, and such improvement, when it is in the interests of victims, can compensate them. Similarly, it is plausible that justice requires some basic level of integration and representation of minorities in government. Indeed, this seems implied by my earlier commitment to the claim that justice requires some basic level of democracy. But after some point spending further resources at integration is no longer

required by justice, and thus doing so can compensate victims, if the resulting gains in autonomy and security are in their interests.

The same applies to other reforms. For example, reducing the police's tendency towards violence is independently required by justice, if the police regularly use deadly force to disperse peaceful protesters, or to solve non-deadly disputes. But there might be levels of the police's readiness to use force that are permissible, but not necessary, in which case decreasing this tendency could compensate victims of internal injustice concerned with being exposed to further violence in the future. Similarly, a complete lack of any institutional recourse against abuse by one's government is independently impermissible for a state. Thus, creating such institutions is independently required by justice, and so cannot compensate victims. But there are many different kinds of permissible state institutions, and not every state is required by justice to be perfect. So reforming these institutions to better protect victims of internal injustice, or to better handle their compensation claims, can compensate these victims.

The other important general issue is that of the moral permissibility of the injustice the reforms are meant to address. If the injustice was *impermissible*, then reforms that make it less likely straightforwardly decrease the chances of future rights-infringements and harms to the victims, and thus is in their interests and can be compensatory. However, the picture is more complicated for reforms aimed at making *permissible* injustices less likely. On the one hand, such reforms will increase the security of victims from future rights-infringements, which is in their interests. On the other hand, the measures were permissible, which means that there were moral considerations (e.g., the protection of life, of autonomy, or of political institutions and their associated benefits) that were important enough to outweigh the infringement of individual rights. It is thus not clear that we should make permissible rights-

infringements less likely. Compensation for permissible injustices, then, will sometimes have to be done not through reform, but through the person-to-person arrangements discussed above.

Note, however, that as the permissibility of internal wartime measures depends on whether the values they promote or protect outweigh the individual rights they infringe, their permissibility will vary from case to case. Thus, just because an internal wartime measure was unjust but permissible once does not mean that it will be permissible again, and so reforms aimed at making internal wartime measures more difficult can over a long period of time be in the interests of victims, even if in some specific cases they are not. Reforms aimed at making injustices less likely, then, can be appropriate even if those very measures have in the past been permissible. For simplicity's sake, and because impermissible internal injustices, and their prevalence, are the main motivation of this chapter, I will now discuss compensation arrangements for internal injustices under the assumption that those injustices were impermissible.

4.5.2 Integration and democratization

So reforms such as integration or democratization, as long as they are not independently required by justice, can compensate victims of impermissible internal injustice. But how would such reforms do that? *Integration* of abused groups into state institutions, especially the police and military, will typically result in increased sensitivity to the group's concerns on behalf of the state, and reduce the probability that the state machinery will be used against that group in the future. As the security of oneself and one's family is typically in one's interest, the increase in security that integration typically results in can be a form of compensation to victims, especially if the internal

injustice being compensated involved the use of the police or military against the victims. Furthermore, integrations can bring with it the social and economic benefits of employment, which are likely to be in the interests of the victims.

Democratization would work similarly, although the effects would be more widespread. Such reform would allow the needs and concerns of past and potential victims to be heard, and create institutional incentives to act on those concerns, which will typically result in their risk of future abuse by their state or compatriots to decrease, and their political autonomy to increase. Furthermore, democratization will typically increase the number of such victims in positions of power, and so decrease the chance that the state will engage in, or tolerate, mistreatment of such individuals. Successful integration and democratization will involve upsetting established power structures, and the radical transformation of society that follows will promote the security, autonomy, and other interests of the victims (and hopefully of many others, too), and thus be a way of compensating them. Because of this, democratization can not only compensate for injustices such as the use of state force against the victims, but also for more subtle injustices such as the denial of political rights, or denial of services, benefits, and other unfair social or economic treatment by the state.

It is important to note, however, that the benefits of democratization are contingent on the composition, political views, and likely voting patterns of the democratizing society. If, for example, some abused minority is small and hated by a large majority, then democratization might mean that popular antipathy more easily translates into abuse of that minority. If the minority in question is the one meant to be compensated, then democratization, in this case, will not do so. Instead, political reform aimed at safeguarding that group's safety from the larger population will be needed,

perhaps through constitutional reform limiting the power of the majority, or perhaps through decentralization and increased regional autonomy.

4.5.3 Decentralization

However, *decentralization* and increased regional autonomy, while often called for after internal conflicts,⁵¹ comes with its own set of problems. It is true that decentralization can compensate victims by increasing their autonomy, and by decreasing the ability of their compatriots to use state institutions to harm them. It can thus be appropriate, if the internal injustice being compensated for involved social or economic discrimination by the central government. But decentralization also has significant downsides that reduce this compensatory value. It gives less recourse for groups that are persecuted only in some regions of a state, as other regions and the central government will have less power to stop such persecution. For example, slavery and then racial segregation persisted in the American South despite resistance from Northern states partly as a result of regional autonomy. If the victims being compensated would similarly be at more risk from their regional government than from their central government, then decentralizing power to the regions decreases their security, rather than increasing it. Decreased central authority can also undermine common defense and increase external military threats and the costs of defending against them, which will typically also decrease the security of the victims.⁵² Decentralization, then, is a potentially very costly form of compensation that can sometimes do more harm than good to the victims themselves. It must not be undertaken lightly.

⁵¹ For example, pro-Russian separatists demanded decentralization of power from Kiev during the 2014 Ukraine Crisis (“Ukraine crisis”, 2014).

⁵² Consider Russian actions during the 2014 Ukraine Crisis.

4.5.4 Educational reform

A fourth way of compensating victims of internal injustice through domestic reform is by instituting *educational reform*. After all, the fundamental cause of many internal injustices is ethnic, religious, or class animosity, whether as a result of, or pre-existing, the conflict. While any educational system that fosters such animosity is probably independently unjust, and so reforming such a system of education is independently required by justice and cannot be a form of compensation, a system of education that remains neutral on issues of ethnic, religious, or class division might be just. Reforming such a neutral educational system into one that reduces animosity could compensate victims of internal injustice, by creating a future where they and their children are safer. Indeed, because public education affects everyone when they are still young and malleable, it is uniquely capable of reducing such animosity. This can be done through increased exposure to the relevant groups or ideas, through books, trips, or even normalizing their presence by integrating the children of those minorities into the school system, or increasing their representation among teachers and staff. Educational reform can, at best, create a future where vulnerable groups will be at less risk of abuse, and make it harder for such animosity to take root.

Note that educational reform will typically take some time to bear fruit, as it will take time for the more tolerant cohorts of children to grow up and change the culture of their society and state. Thus, educational reform will typically promote the interests of young victims of internal injustice, and the children of victims, more than the (self-directed) interests of victims, who will typically not be around to see the full effects of such reform. However, as the prosperity and safety of one's children is typically in one's interests, educational reform, while slow to bear fruit, can be a very cost-effective way to compensate victims of internal injustice.

4.5.5 Demilitarization and police reform

Lastly, *demilitarization* is a kind of domestic reform that might seem to be able to compensate victims of internal injustice. As I argued in Chapter 3, demilitarization is often a cost-effective way of compensating for *external* war-related injustices. Unfortunately, it is less cost-effective as compensation for internal injustices. First of all, internal state violence is often perpetrated by the police, not by the military, and thus reducing the fighting force of the military does not increase the security of the victims. Second, even if the injustice was perpetrated by the military, demilitarization will be of limited benefit to internal victims of injustice. Such victims will still have little capability to resist aggression from their own state's military, even if its size and capability is severely diminished. This is unlike foreigners, whose security can be greatly increased by demilitarization of the state that infringed their rights, as demilitarization will increase the ability of their own military to resist aggression from the demilitarized military (as discussed in Chapter 3). Internal victims of a military have no such third party to defend them. Even a weak military can be a great threat to the people it is meant to protect. Thus, a reduction in the size of a state's military does little to promote the security of the victims of that state's internal injustice. Indeed, such a reduction might even have the net effect of decreasing the security of those victims, if it makes them more vulnerable to foreign aggression. Some demilitarization can be a cost-effective means of compensation, if only because the money saved can be used in more beneficial ways, but other forms of compensation will typically be necessary for injustices that involved the use of the military against victims.

Instead, reform of internal security forces will be a more cost-effective means of compensating for internal injustices, as these forces are often responsible for those injustices. Examples of such injustices include police brutality, violent suppression of

protests, or police or military-run concentration camps. Of course, some level of accountability and respect for individual rights on behalf of internal security forces is surely independently required by justice, but any reforms that go beyond this minimum can still increase the security of victims from future abuse, and so compensate them. Examples of such reforms include decreasing the police's capacity for violence, reforming their training and oversight to decrease their tendency to use violence, and integrating members of any abused group into the military and police,⁵³ so as to prevent the use of those forces against the abused group (see integration, above). Reforming and integrating the police or military, then, are more cost-effective ways of compensating for internal injustices that involved the use of these institutions against the victims than demilitarization.

4.5.6 Conclusion

There are, then, many ways of compensating victims of internal injustice through domestic reform. While the exact details of which measures will be most cost-effective will change from case to case, two things will typically remain true. First, it is important (in all cases of compensation) to involve the victims in the process of determining how best to compensate them, both because they are good sources of information about how best to compensate them, and because involving them in the process promotes their autonomy and so can itself be compensatory. Second, the most cost-effective way to compensate for internal injustices will usually be a combination of the reforms discussed above, alongside individual claims to compensation from victims, as arbitrated by the

⁵³ As has been attempted after civil wars in e.g. Congo and Nepal.

courts. These individual claims will typically be much more common in cases of internal injustice, as discussed earlier, than they will be in cases of external war-related injustice.

Finally, is there any role for the international community when states compensate their members through domestic reform? Recall my earlier claim that the cost of delivering compensation to compatriots will typically be lower than the cost of delivering it to foreigners would be, because wars tend to breed, naturally as well as through propaganda, a substantial amount of negative sentiment to foreign adversaries. Because of this a compatriot delivering compensation to his victims will usually be at less risk of attack than a foreigner would be.

However, there are exceptions to this rule that are important to consider, as they show an important role for the international community in internal jus post bellum. In very serious cases of internal injustices, especially when these are part of a long-standing pattern of abuse against a specific group or part of a civil war the victimized group will tend to react very negatively towards the “compatriots” that harmed them. In such cases, there might be as much, if not more, practical difficulties with direct compensation than there are after conventional wars, as the victimized group will, quite understandably, want to reject, perhaps violently, any contact with their “compatriots”. If so, delivery of compensation by third-parties or the international community might be most cost-effective for the compensators, as third parties might be more trusted by the victims. However, in such extreme cases, the only political reform able to really stop future abuse, and so the only political reform that would compensate the victims, might well be granting the victims independence. This will typically also best be done with international help, as negotiations are likely to be heated. Note, however, that in cases where the victims are too dispersed within the country that harmed them, or have mostly fled or been killed (as was the case with Jews in Germany after World War 2), granting

independence is impractical, as there is no one place within the offending state where the victims reside and could become a new state. Having the international community help oversee compensation arrangements for internal injustice, then, can help, because the victims will be more likely to trust third-parties.

But increased trust by the victims in the compensation arrangements is not the only reason why inviting and abiding by international oversight is a cost-effective way to deliver compensation for internal injustices. Typically, doing so will also objectively improve those compensation arrangements. As the need to compensate for internal injustices already suggests, the state and its citizens have handled their affairs vis-à-vis the victims badly. The former will be tempted to underestimate how much compensation they owe and how many victims there are, overestimate how much their actions compensate their victims, and perhaps funnel compensation funds into other endeavors. International oversight of compensation arrangements is more likely to be impartial and so more likely to avoid these problems. Indeed, in some cases the state's elite might be incapable or unwilling to reform itself in the ways necessary to truly compensate their victims, in which case international help will be necessary (consider the international administration of territories in the Balkans after the cessation of hostilities there). In cases of compensation between citizens of different states this is not as acute a problem, because even a defeated people will often have a state representing them that can loudly protest against any inappropriateness in the compensation arrangements. But victims of internal injustices have nothing as powerful to represent them against the state that harmed them. External third parties can fill this role, especially if they are largely disinterested with the economic and political status quo in the state that enabled and profited from the internal injustice. The need for international oversight of

compensation arrangements is, thus, even greater in internal compensation than it is in compensation between states (see Chapter 3).

Chapter 5 – Special Jus Post Bellum after the Bosnian War: A Historical Illustration

In the preceding chapters, I have presented the compensation theory of jus post bellum, according to which one has a duty to compensate one's victims for wartime injustices. Because of the practical and epistemic difficulties with compensating after a war, alternative compensation arrangements (such as supporting political reform) will typically be the most cost-effective way to discharge one's duty to compensate. In this chapter, I illustrate the compensation theory of jus post bellum by applying it to the Bosnian War. The focus of this chapter is not historical accuracy or depth, but rather presenting a common understanding of the Bosnian War (without asserting that it is fully correct) and then applying the compensation theory of jus post bellum to that description of the Bosnian War.

5.1 Historical Overview of the Bosnian War

The Bosnian War of 1992-1995, part of the conflicts surrounding the dissolution of Yugoslavia, was the bloodiest European conflict after World War 2. It remains infamous for extensive human rights violations, genocide, and ethnic cleansing. As such, it serves as a good case study for how to apply the compensation theory of jus post bellum to real conflicts. In this chapter, I will give a brief overview of the Bosnian War, and apply the compensation theory of jus post bellum to the conflict. While I have done my best to make my account of the Bosnian War reasonably accurate, I am not a professional

historian, and the focus of this dissertation is not historical accuracy or depth. Rather, the main point of this chapter is to illustrate the principles of post-war rectification if my description of the war is correct.

Until 1991, Yugoslavia was composed of six republics: Bosnia, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. When Croatia, Slovenia, and Macedonia seceded in 1991, Serbia was left in control of the Yugoslav government and the Yugoslav Army. This caused ethnic friction within Bosnia, the population of which was composed mostly of Bosniaks (Muslim Slavs), ethnic Serbs, and ethnic Croats. Bosnian Serbs demanded that Bosnia remain a part of (Serb-dominated) Yugoslavia, Bosnian Croats threatened secession from a Yugoslav Bosnia, and Bosniaks worried about being left alone in a Serb-controlled Yugoslavia. In a 1992 referendum Bosnians voted for independence, although Bosnian Serbs mostly boycotted the vote. Militias from Republika Srpska, the Serb part of Bosnia created in early 1992, and the Yugoslav Army responded by seizing most of Bosnia. The resulting war between Serb forces on the one hand, and the Bosnian Army and Bosniak and Bosnian Croat militias on the other, resulted in more than 200,000 dead and 2 million refugees (Rogel, 1998, p. 37). It lasted until 1995, when NATO intervention against Serb forces, combined with strengthened Croat forces, made Bosnian Serbs sue for peace (Rogel, 1998; Silber & Little, 1997). The final peace agreement, known as the Dayton Peace Accords, was signed in Paris on December 14, 1995.

Under the Dayton Peace Accords, Bosnia became a sovereign country, retained its pre-war borders, but was divided into three parts: the mostly Bosniak and Croat Federation of Bosnia-Herzegovina, the mostly Serb Republika Srpska, and the self-governing town of Brčko. This administrative division, along with lingering ethnic resentment and secessionist aspirations, has led to post-war Bosnia being very difficult

to govern. Because of this, de facto power is wielded by the UN's Office of the High Representative, who has wide powers to implement the Dayton Peace Accords.

I now turn to applying the compensation theory of jus post bellum to the conflict. To do so, the just war status of the belligerents must first be evaluated. Which parties violated the principles governing just war, to what extent, and against whom? Complete answers to these questions are, of course, outside the scope of my dissertation. Indeed, the central point of the compensation theory of jus post bellum is precisely that getting a complete picture is typically impossible or too costly, and thus that one must compensate one's victims relative to one's limited evidence. However, to apply the compensation theory of jus post bellum, some such knowledge is required. In the following section, I evaluate the jus ad bellum status of the three main belligerents of the Bosnian war. In Section 3, I turn to their jus in bello status. As there is no consensus on the content of jus ex bello (the principles that govern when justice demands that one cease fighting a war) and jus post bellum, I will not be discussing them here. A full application of the compensation theory of jus post bellum, however, would require compensating for all war-related injustices, not only those pertaining to jus ad bellum and jus in bello.

5.2 Jus Ad Bellum Status of Belligerents in the Bosnian War

I begin with the jus ad bellum status of the three main belligerents of the Bosnian War. Did they go to war justly? As discussed above, the main belligerents of the Bosnian war were (1) Republika Srpska, the Serb part of Bosnia, represented militarily by Bosnian Serb militias and the Serb-controlled Yugoslav Army (henceforth referred to collectively as "Serb forces"), (2) the Bosnian Croats, represented militarily by the Bosnian Army (to

some extent) and Bosnian Croat militias, and (3) Bosniaks, represented militarily by the Bosnian Army. The conflict also involved official or unofficial intervention by external parties, such as Serbia, Yugoslavia (at this point completely controlled by Serbia's government), Croatia, and Russia, as well as peacekeepers from NATO and the EU. For ease of analysis, and because the justice and morality of humanitarian intervention is a very controversial topic, I will focus on the three main parties to the Bosnian War and their main regional sponsors: the Bosniaks, the Bosnian Croats (supported by Croatia), and the Bosnian Serbs (supported by Serbia and Yugoslavia).

First, let's consider the *jus ad bellum* status of Republika Srpska and their Serbian and Yugoslav sponsors. On the face of it, their attempt to override the results of the 1992 Bosnian independence referendum by forcibly taking over Bosnia would seem unjust, given that 99.4% of ballots were in favor of independence (with a 63% turnout) (Rogel, 1998, p. 31). This result, combined with the lack of major incidents during the referendum, suggests that it was legitimate. However, readers might wonder whether the referendum having only two options, independence or the status quo, made it illegitimate, as it precluded an independent Bosnia but with the ethnically Serb areas remaining in Yugoslavia, or merging with Serbia (both of which were preferred by Bosnian Serbs).

Unfortunately, this alternative solution was not feasible, for several reasons. First, there was no continuous majority-Serb area that could have been separated from Bosnia. Instead, much of post-war Republika Srpska, the majority-Serb part of Bosnia, was before the war inhabited by both Bosnian Serbs and Bosniaks. Second, the idea of a Greater Serbia, which was behind Serbian and Bosnian Serb nationalism at the time, included much of both Croatia and Bosnia. Thus, placating adherents of a Greater Serbia could not be accomplished without ethnic cleansing. Third, any Bosnian rump-state

remaining after Bosnian Serb (and perhaps Bosnian Croat) secession, inhabited mostly by Bosniaks, would have been very vulnerable to aggression from both Croatia and Serbia. Given the highly nationalist rhetoric in the region at the time, such aggression would have been highly likely.

For the purposes of this chapter, I will assume that there is a right of secession under the right conditions. I admit that this is a very controversial assumption, and one that the compensation theory of *jus post bellum* does not require. Furthermore, I will assume for the sake of discussion that the right conditions for secession were met in Bosnia in 1992, and so the citizens of Bosnia had a right to secede. If so, then Serb forces (composed of the Yugoslav army and Serb militias) lacked a just cause for their forceful attempt to keep Bosnia a part of Yugoslavia. As having a just cause is a necessary condition of being *ad bellum* just, Serb forces were *ad bellum* unjust. Conversely, resisting an unjust attack is itself a just cause, which means that Bosnian Croat and Bosniak forces went to war with a just cause.⁵⁴

However, having a just cause is not sufficient for being *ad bellum* just. *Jus ad bellum* traditionally also requires that war be resorted to only with the intention to secure the just cause, by the proper authority, if necessary and as a last resort, that going to war have a reasonable chance of achieving the just cause, and that the harms of going to war are not in excess of the moral benefits. I begin with the proper authority requirement.

What exactly counts as a proper authority for the purposes of *jus ad bellum* is a complex question, especially in relation to organized sub-state entities such as the Bosniak and Bosnian Croat communities. However, denying an organized group of

⁵⁴ To be clear, this applies to Bosnian Croat and Bosniak forces going to war against the unjust attack on Bosnia by Serb forces. There was also fighting between Croat and Serb forces in Croatia at the time, and I am not here taking a stand on which side in that conflict, if any, had a just cause for war.

people the right of collective self-defense on the basis that they are not a state seems wrong, and so I will stipulate that both Bosniak and Bosnian Croat forces fulfilled the proper authority criterion.

Next, *jus ad bellum* requires that we go to war only if there is a reasonable chance of achieving the just cause. Given the successful secession of Croatia, Slovenia, and Macedonia the year before, as well as promises from the EU of recognition for any Yugoslav republics that seceded, it is plausible to assume that Bosniaks and Bosnian Croats thought that they had a reasonable chance of success. To examine whether they were correct would take us too far afield, and so I will simply assume that they were.

Jus ad bellum also requires that war be resorted to only if necessary, and as a last resort. The independence referendum was a peaceful attempt by Bosniaks and Bosnian Croats to protect themselves from perceived Yugoslav and Serb threats, and Serb forces responded to it with violence. Bosniaks and Bosnian Croats went to war, then, as a last resort. Moreover, the offensive by Serb forces, and the accompanying rhetoric, made it clear that diplomacy would not work. Bosniaks and Bosnian Croats went to war, then, when it was necessary to achieve their just cause.

Finally, the most problematic *jus ad bellum* requirements for Bosniaks and Bosnian Croats to meet are the right intention and proportionality requirements. The former requires that the proper authority declare war as an intended means to achieve the just cause. Other reasons, such as profit or ethnic animus are not allowed, even if achieving them would be guaranteed by the pursuit of the just cause. This is perhaps the most often criticized requirement in orthodox *jus ad bellum*.⁵⁵ After all, why should the mental state of a state's leaders at the time the state goes to war matter? I share this skepticism, but my purpose with this chapter is merely to illustrate the compensation

⁵⁵ Both Walzer (1977/2006) and Orend (2000b) discuss criticisms of the right intention requirement.

theory of jus ad bellum by applying it to a real conflict. I will thus put aside debates on the merits of orthodox just war theory, and take it at face value.

It seems unlikely that Bosniak and Bosnian Croat forces met the right intention requirement as it is traditionally understood. To have met it, ethnic animus must have not played any role in the decision to go to war against the Serb attack. Given the nationalist rhetoric prevalent in Serbia and Croatia at the time, and the widespread dislike of Serbian expansionism, this seems unlikely. Indeed, all three sides ended up ethnically cleansing the others during the war, and the ethnic divisions that motivated this predated, to some extent, the war itself.

On a related note, any reasonable estimate of the harms of going to war against the Serb forces should have taken this ethnic animus, and the crimes it likely would (and in fact did) inspire, into consideration. In other words, for Bosniaks and Bosnian Croats to go to war to be proportional, the benefits of war would have to make up for the likelihood that Bosniak and Bosnian Croat forces would engage in ethnic cleansing. However, when the decision to go to war was made, Serb forces had already begun ethnic cleansing themselves. The risk that Bosniak and Bosnian Croat forces would let their ethnic animus translate into horrific crimes thus had to be compared to the fact that Serb forces were already doing just that. It thus seems reasonable to say that going to war to prevent further ethnically motivated Serb crimes was proportional, even though there was a real risk of Bosniak and Bosnian Croats also perpetrating such crimes. For what it's worth, Bosniaks ended up being the main victims, by far, of the war (Rogel, 1998). I will assume, then, that Bosniaks and Bosnian Croats met the ad bellum proportionality requirement.

In summary, then, the attack by the Serb-dominated Yugoslav Army and other Serb forces was, we shall assume, ad bellum unjust, as attempting to override the results

of the independence referendum by force was not a just cause for war. The victims of this jus ad bellum violation were mainly individual Bosniaks and Bosnian Croats, who are thus owed compensation by the Serbs responsible for these violations. Bosniak and Bosnian Croat forces, on the other hand, probably violated the right intention requirement of jus ad bellum, as it seems likely they were at least partly motivated by ethnic animus.⁵⁶ The victims of this violation were mainly Bosnian Serbs, who are thus owed compensation by the Bosniaks and Bosnian Croats responsible.

The fact that the Bosniaks and Bosnian Croats violated jus ad bellum by violating the right intention requirement introduces at least two difficulties in identifying those responsible for violating jus ad bellum, and thus those who owe compensation for that violation. One difficulty is practical: it will be very difficult to determine which specific Bosniak and Bosnian Croat leaders had the inappropriate intentions, the possession of which made going to war against Serb aggression unjust. Another difficulty is normative: are only the leaders with the inappropriate intentions responsible for going to war ad bellum unjustly, or are all the senior members of government who decided to go to war responsible? On the one hand, it was probably foreseeable for Bosniak and Bosnian Croat decision makers that some of their colleagues had impure intentions, in which case it was foreseeable that the collective decision to go to war would be unjust. On the other hand, it is not clear that these leaders had the power to change the minds of their impurely intentioned colleagues. In what follows, I will assume, for simplicity's sake, that both kinds of decision makers are agent-responsible for the ad bellum violation of their

⁵⁶ This, I think, illustrates how strange the right intention requirement is. As long as ethnic cleansing was not part of the goal that Bosniaks and Bosnian Croats meant to achieve by going to war, and was not a part of the means by which they meant to defend themselves, it is absurd to condemn their self-defense on the ground that their motivations were impure. To take an extreme example, bigots are allowed to defend themselves from unjust attack by those they hate. However, as my main goal in this chapter is to illustrate the compensation theory of jus post bellum, not to argue for revisions to other parts of just war theory, I will continue taking orthodox jus ad bellum (and jus in bello) for granted.

side – the impurely intentioned ones for going to war with impure intentions (or for not excusing themselves from the decision when it was foreseeable that their intentions were impure), and the purely intentioned ones for going to war when it was foreseeable that the decision was tainted by their colleagues.⁵⁷

Putting the issues raised by the right intention requirement aside, which Serbs, Bosniaks, and Bosnian Croats are responsible for these ad bellum violations? Individual soldiers typically have little say in what the military or state that they serve decides to do. As the ad bellum violations discussed above consist precisely of having one's state (or state-like community) start an unjust war, the individual soldiers involved in the conflict owe little to no compensation for ad bellum violations (although they can owe much for in bello violations, as I argue they do in the next section). Instead, it is political and military leaders who make the decision to go to war, and thus they that owe most compensation for ad bellum violations. To the extent that voters (including soldiers) are agent-responsible for such leaders having power, they share some of the responsibility for the ad bellum violations.

The main political leaders on the Serb side were Radovan Karadzic, the leader of Republika Srpska, and his backer Slobodan Milosevic, who was the president of Serbia and unofficially in control of Yugoslavia. On the Bosniak side, the main leader was Alija Izetbegovic, the president of Bosnia, and so technically the leader of the Bosnian Army (although his central government was not always in full control). Finally, the most prominent Bosnian Croat leader was Mate Boban, supported by Franjo Tudjman, president of Croatia. These three political leaders and their political and military

⁵⁷ This issue shows, I think, the absurdity of the right intention requirement. Do we really want to say that Bosniak leaders, faced with a Serb aggressor hell-bent on eliminating Bosniaks from an imagined Greater Serbia, should refrain from defending themselves on the basis that some of their fellow leaders have impure intentions directed at the Serb aggressors? Why should the defense of their people be held hostage to the mental states of some of their fellow leaders?

supporters are chiefly responsible for the ad bellum violations of their respective sides. Thus, they owe most compensation to the victims of those ad bellum violations.

But what do leaders who engage in ad bellum violations owe their victims? As mentioned in Chapter 2, those responsible for ad bellum violations owe their victims compensation for the costs of war that they impose on those victims, including the costs to the economy, and to the interests of those who are forced to defend against this unjust attack. These costs will not, however, include the costs of war crimes (as those are violations of jus in bello that are counted separately), or the costs of unjust decisions made by future leaders (for example, after a change in government). Furthermore, if there is a change of leadership during the war, those responsible for originally going to war unjustly do not owe compensation for the decisions of their successors to continue an unjust war. Lastly, as discussed in Chapter 4, leaders responsible for unjust attack owe their victims compensation for the reasonable costs of minimizing the harm of that unjust attack (which includes the cost of morally required minimization measures). If instead they are morally impermissible or (more controversially) morally optional, only those instituting the minimization measures must compensate the victims of these measures.

Even if the leaders responsible for the jus ad bellum violations could identify all their victims (which is unlikely), they will typically not have enough wealth to be able to discharge even a fraction of their compensation debt through financial means. In the case of the Bosnian war, Karadzic, Milosevic, Izetbegovic, Boban, and Tudjman definitely did not possess the wealth necessary to compensate their victims financially.⁵⁸ Thus, these leaders will have to compensate their victims using alternative, non-financial,

⁵⁸ I use the past tense because Karadzic is the only one of these leaders that remains alive at the time of writing.

compensation arrangements. Using their considerable political influence to support political reform is the most cost-effective non-financial compensation arrangement (as discussed in Chapter 3). I describe the compensation arrangements that would probably have been most cost-effective after the Bosnian War in Section 4.

There is, of course, the possibility that leaders will no longer have political influence after the war. Many of the aforementioned leaders involved in the Bosnian War, for instance, saw their political influence diminish after the war concluded. How, then, are leaders supposed to compensate their victims when they lack both money and power? Probably the best they can do is to put whatever skills they have to productive use and provide any money (above what they require for the bare necessities of life) to their victims, as compensation.⁵⁹ Clearly, this will typically not result in all of their victims being fully compensated. But being unable to fully compensate one's victims does not mean that one should not try to compensate them as much as possible. Furthermore, the compensation theory of *jus post bellum* is compatible with there being a *universal* duty for third parties to make up for any shortfall in post-war compensation. For example, suppose that after the Bosnian War, the compensation that the parties to the conflict owed each other would have been most cost-effectively discharged by providing assistance with reconstruction and security (see Section 4). When many of the wartime leaders failed to use their political influence to make their countries provide such assistance, the EU and other third parties stepped in and did so (to some extent).

Lastly, note that the possibility that full compensation cannot be rendered, after war or in general, is not a problem specific to compensation. Other kinds of rectification also face this problem. For example, if an offender dies before having served his full

⁵⁹ This might seem draconian, but it is neither much harsher than the way international courts treat those guilty of the crime of aggression, nor obviously inappropriate when one considers the great harm that unjust wars cause.

prison sentence, then the full punishment cannot be imposed on him. Similarly, poor offenders might never be able to pay the full amount of their financial punishment. Similar situations could be conceived of for any plausible form of punishment. In general, any substantial theory of rectification will sometimes have to settle for less rectification than would be ideal.

5.3 Jus In Bello Status of Main Belligerents in the Bosnian War

So far, I have evaluated the jus ad bellum status of the three main belligerents of the Bosnian War. But another part of just war theory, the violation of which can result in owing massive debts of compensation, is jus in bello. This set of principles sets limits on acceptable behavior during war. Traditionally, jus in bello is said to (Orend, 2005):

- prohibit the intentional targeting of non-combatants
- prohibit any military action that will cause harm that is excessive when compared to its direct military benefits (proportionality)
- require that prisoners of war be treated humanely, and as non-combatants
- prohibit actions that are wrong in themselves (e.g. genocide, rape, military action under the guise of non-combatants)
- prohibit breaking jus in bello in order to punish the other side for doing so (reprisals)

As I mentioned above, all three sides to the Bosnian War ended up perpetrating ethnic cleansing, although to different extents. Rather than a complete recounting of every one, which would be impractical, I present a few examples, that illustrate the kind and extent

of in bello violations committed by the three sides, and their approach to fighting the war.

I begin with the jus in bello violations perpetrated by Serb forces (composed of the Yugoslav army and Serb militias). Immediately following their attack on Bosnia in 1992, Serb forces started ethnic cleansing⁶⁰ campaigns meant to create an “ethnically pure” Serb region, by killing or driving out Bosnian Croats and especially Bosniaks who lived in largely the same areas as Bosnian Serbs. Those who were not killed were terrorized through violence, rape, and theft. By the end of 1992, about half of Bosnia’s population had been driven out of their homes, largely by Serb forces. Serb forces also created concentration camps, where some civilians were executed, and others held hostage or raped. Serb ethnic cleansing operations in Serb-controlled territory were effective enough to enable post-war Republika Srpska (slightly smaller than its wartime maximum) to be largely ethnically Serb, even though its territory before the war had been very ethnically mixed (Rogel, 1998, p. 32; Silber & Little, 1997, ch. 18). Moreover, the two events for which the Bosnian War is most infamous, the 1,425 day Siege of Sarajevo and the murder of 8,000 Bosniak civilians in Srebrenica, were both perpetrated by Serb forces (Rogel, 1998, p. 38; Silber & Little, 1997, ch. 28). The Srebrenica genocide remains the single largest war crime to occur in Europe since the end of World War 2.

Bosnian Serb forces, then, violated jus in bello in several ways. Prisoners of war, in the form of Bosnian defense force volunteers, were singled out and executed. Civilians were intentionally targeted for death, rape (itself a violation), or theft. Innocent civilians were imprisoned (itself a violation) in order to trade them for Serbs (unjustly) imprisoned by the other side, which constitutes a reprisal prohibited by jus in bello. The

⁶⁰ Note that the meaning of “ethnic cleansing” is not restricted to killing members of a certain ethnicity. Rather, it means to eliminate a certain ethnicity from a certain area, which can be accomplished by killing any members of that ethnicity present in that area, or by driving them out (or typically by combining the two).

victims of these violations were mostly Bosniaks, although Bosnian Croats (and more moderate Bosnian Serbs) were also targeted.

The Bosnian Croats and Bosniaks were also responsible for some in bello violations, although to a much lesser extent than Bosnian Serbs. There were some in bello violations against Bosnian Serbs, and in the middle of the war, ethnic animus and an attempt to increase the area that would be deemed Bosnian Croat during peace negotiations resulted in conflict between Bosnian Croat forces and the Bosniak-led Bosnian government, with both sides at times targeting civilians (Rogel, 1998, p. 35; Silber & Little, 1997, ch. 22). Both Bosniak Croats and Bosniaks thus owe compensation to each other for jus in bello violations.

5.4 Compensating for the Bosnian War

Having given an overview of the jus ad bellum and jus in bello status of the three main belligerents, I now turn to evaluating the most cost-effective way of discharging their duties to compensate each other.

For the ad bellum violations of Bosnian Serb forces, compensation is owed mostly by the political and military circles around (and including) Republika Srpska's Karadzic and Serbia's Milosevic. As Milosevic came to power after campaigning on an explicitly nationalistic, expansionistic platform, those who supported him share some small amount of responsibility for his actions, and thus owe some small amount of compensation to the Bosniak and Bosnian Croat victims of those ad bellum violations. Because I am taking orthodox jus ad bellum (specifically, the right intention requirement) at face value, Bosniak and Bosniak Croat leaders, by which I mean the

political and military circles around (and including) Bosnian President Izetbegovic, Croatia's Tudjman, and the Bosnian Croat Boban, also owe compensation to the mostly Bosnian Serb victims of their *ad bellum* violations.

As mentioned previously, non-financial means of compensation, such as supporting political reform, will be the most cost-effective means of compensating for *ad bellum* violations, as leaders typically lack the information and the wealth necessary to compensate their victims financially. I turn to discussing specific political reforms shortly. But first, one might worry that having, for example, Milosevic compensate his victims by supporting political reform in Serbia actually puts the burden of compensation on the residents of Serbia, not (mainly) on Milosevic. There are three reasons to think that this is not a problem for the compensation theory of *jus post bellum*.

First, if Milosevic were to convince the citizens of Serbia to bear these costs, perhaps on the basis that they will of benefit to them, then the fact that they bear them no longer seems problematic. Admittedly, Milosevic's Serbia was not a well-functioning democracy, and had he wanted to compensate through political reform, he probably would not have engaged in attempts to convince Serbs of the virtues of political reform, in order to gain their consent. But it does not seem to me that only that ideal case of democratic consent is enough to make political reforms morally unproblematic.

Second, it will often be the case that the citizens of a country share some responsibility for the *jus ad bellum* violations of their leaders (as was indeed the case with Serbian citizens and Milosevic), and so the fact that some of the compensation costs for those violations rests on those citizens is appropriate.

Third, the fact that some citizens of Serbia *lack a duty* to bear the costs of compensating the victims of the unjust attack by Serb forces does not entail that those

citizens of Serbia *have a right not* to bear those costs. And if there is no such right, then it is morally unproblematic for Milosevic to make those citizens of Serbia bear those costs, especially since many of these reforms can be beneficial to the citizens whose state undergoes them.

Whereas the responsibility for *jus ad bellum* violations is mostly concentrated in the political leadership of the Bosniak, Bosnian Serb, and Bosnian Croat communities (and their regional sponsors), the responsibility for *in bello* violations is more dispersed. While the Serb political and military leadership was extremely influential in ensuring that Bosnian Serb forces engaged in ethnic cleansing and the many other *in bello* violations discussed in the previous section, some of the responsibility for these horrific acts rests with the rest of the Bosnian Serb military. The individual soldiers that carried out the war crimes will typically only be partially excused by considerations of ignorance or coercion. The same is true of their immediate superiors, who gave and enforced the orders, and for their superiors, and so on up the chain of command. On the Bosnian Croat and especially Bosniak side, the central leadership is much less responsible for the (much smaller amount of) *in bello* violations that their forces committed when compared to the Bosnian Serbs, as they exerted much less pressure on their forces to commit such violations, and especially in the Bosniak case, as the central leadership had much less control over their forces than the Bosnian Serbs did.

Leaders on all three sides, then, are mostly responsible for the *ad bellum* violations of their side. Serb leaders (and many voters) are also highly responsible for their side's *in bello* violations, whereas on the Bosnian Croat and Bosniak side, this responsibility rests mostly on individual soldiers. Serb soldiers are also highly responsible for their *in bello* violations. What is the most cost-effective way for these leaders, voters, and soldiers to compensate their victims?

As mentioned above, the leaders involved in the Bosnian War are unlikely to afford to financially compensate their victims. They do, however, have considerable influence over post-war political institutions. Thus, their support for political reforms of the kind discussed in Chapter 3 will be a very cost-effective means of compensating their victims (as long as the reforms are not independently required by justice, and promote the interests of victims). As for voters and soldiers, they will have less political influence, and so their support for political reforms will compensate their victims to a lesser degree than the support of leaders. However, they will typically be less responsible, and so owe less compensation, than their leaders. That their support for political reform compensates less will thus typically be made up for by them owing less compensation. Finally, due to the large numbers of (slightly) responsible voters and soldiers, even small tax increases on them can add up to a large amount of money that can then be used to compensate victims, through a compensation fund or by supporting political reform.

Supporting political reform, then, would have been a very cost-effective means of compensating victims after the Bosnian War. But before I turn to discussing in more detail how the compensation arrangements I suggested in Chapter 3 could compensate the victims of the Bosnian War, let me quickly reiterate why I am discussing the *most cost-effective* means of compensation. Because of the vast number of deaths, rapes, thefts, and other rights-infringements, and the anonymity of many of the victims and perpetrators, and so on, there is little hope for a full accounting of exactly who did what to whom during the Bosnian War. Thus, everyday means of compensation, where the rights-infringer identifies and compensates only their victims, will not work, because necessary information that would enable matching specific rights-infringers with only their victims is missing. The inaccessibility of this information is what in Chapter 3 I called the “epistemic difficulties” with post-war person-to-person compensation. Even if

this epistemic difficulty could be completely or mostly overcome (which I highly doubt), doing so would be costly for the compensator. This cost is what I have called the “practical difficulty” with post-war person-to-person compensation.

One might think, then, that rights-infringers should always choose to overcome practical difficulties when possible. But overcoming the practical difficulties first, and then compensating only the now fully identified victims can be very costly (if even possible). Instead, in Chapter 3 I proposed a number of compensation arrangements that (especially when combined) can fully compensate victims of war-related injustices without requiring full (or even much) information about those victims. Because these compensation arrangements do not require full information about the victims, they will often be more cost-effective, and thus rationally recommended, for the rights-infringer. As such, these arrangements are also the most promising ones for victims to demand.

Having reiterated the reason for my focus on cost-effective means of compensating the victims of the Bosnian War, I now turn to recommendations for specific compensation arrangements. Recall that the compensation arrangements I am about to propose are only compensatory if they are not independently required by justice and to the extent that they promote the interests of the victims (as discussed in Chapter 3). For example, if disbanding regional and ethnic militias in Bosnia is required by justice independently of what happened during the war, perhaps because only state-wide armed forces are ever permitted by justice, then such disbandment cannot compensate those who suffered at the hands of those militias. In what follows, I will propose compensation arrangements under the assumption that justice does not independently require them fully (so that they are at least partly compensatory). Furthermore, while

post-war punishment might seem like an obvious part of any just peace settlement,⁶¹ recall that in Chapter 2 I argued that punishment is a matter of universal, not special, jus post bellum. Thus, I will not be discussing the issue of punishing war-criminals here.

5.4.1 Educational reform

I begin with educational reform. Reforming the education system in Bosnia, especially in the majority Serb Republika Srpska, to reduce ethnic animus, emphasize the long history of peace and cooperation between people of different ethnicities, and the suffering that followed the breakdown of that peace, would go a long way to increasing the security of the victims of the Bosnian War, and their children. Given that their own security, and that of their children, is in their interests, educational reform would be compensatory. To be effective, such reform would have to be supported both by political elites, whose support is necessary for the legal and institutional reform necessary in reforming education, and by regular citizens, whose support (or at least acceptance) is necessary for changes in the law and in educational institutions to translate into changes in the attitude of students, for at least two reasons. First, the citizens who are teachers must change what and how they teach their students to be in line with the educational reform. Second, teachers will have difficulty changing the minds of students without at least acceptance from the parents of those students. Supporting educational reform in Bosnia, then, can be a way of discharging the debt of compensation for Bosnian political leaders, and for ordinary citizens (especially teachers).

But educational reform should not be limited to Bosnia. One of the chief causes of the Bosnian War was the expansionism of neighboring Serbia (and to a lesser extent

⁶¹ Indeed, the Bosnian War was followed by the creation of an international tribunal which has had some success in prosecuting those who committed war-crimes during that conflict.

Croatia), which materially and diplomatically supported the Bosnian Serbs in their ethnic cleansing. Educational reform in Serbia, then, that plays down the legitimacy of Greater Serbia, and that accurately portrays the great suffering that such empire-building projects lead to, in Bosnia and elsewhere, would go a long way to promote the security of Bosnian citizens of all ethnicities, and thus compensate them. Serbian leaders and voters who owe compensation to Bosnian Croats and especially Bosniaks could thus compensate them by supporting such educational reform. The same applies to Croatia, albeit to a lesser extent, due to the lesser threat to Bosniak security that Croatia and Croatian expansionism posed.

5.4.2 Reconstruction and restoration

Another good candidate for a cost-effective compensation arrangement after the Bosnian War is what in Chapter 3 I called reconstruction and restoration. This involves rebuilding or helping rebuild the untold hospitals, schools, roads and railroads, water treatment and power plants, and so on, that were destroyed during the war. To the extent that such destruction was just, this reconstruction is not independently required by justice, and so can compensate victims. Rebuilding such infrastructure can greatly promote the interests of those affected, many of whom are likely to be victims that one owes compensation to. For example, having access to a functioning hospital is beneficial at the best of times, but immediately following a war, the value of such access will typically be much higher due to wounds and malnourishment suffered during the war. Part of this reconstruction will also involve (paying for) staffing and equipping hospitals, power plants, and so on, as a staffed hospital promotes interests much more efficiently

than does an empty one. These measures also provide gainful employment, which can provide financial benefits to victims.

For example, the vast majority, if not all, inhabitants of Sarajevo (just after the war) were victims of Bosnian Serb in bello violations, and would clearly benefit from the reconstruction of infrastructure. Bosnian Serbs whose victims were likely to be in Sarajevo, then, could compensate their victims by supporting the reconstruction of Sarajevo. Effective reconstruction measures will require labor and resources, but also institutional support such as selection of projects, adapting to local requests, and other planning. Labor and resources can be provided through the rights-infringers taxing those who are likely to have infringed the rights of those who will benefit from the construction. Institutional support can be supported by ordinary citizens through voting and other forms of political action, and by leaders by creating and supporting the necessary institutions.

Restoration of the environment is another compensation arrangement that works in much the same way that reconstruction does. Wars typically lead to the destruction of the environment, but even when they do not, the victims of war would still benefit from a cleaner environment. Cleaning up pollution, whether war-related or not, then, can promote the interests of victims and thus be compensatory. Another example of environmental restoration is the replanting of forests destroyed during the war (or the planting new ones), which may promote health and provide economic benefits. Lastly, aiding in the removal of landmines and unexploded ordinance is another measure that, while not technically an environmental issue, does improve the environment of victims.⁶² In the case of restoration, just as in the case of reconstruction, political support can be

⁶² Note that removal of landmines or unexploded ordinance clearly benefits victims, but is only compensatory to the extent that it is not independently required by justice, which it arguably is.

provided by voters and especially by leaders, whereas financial support can be provided through a tax (or donations) from rights-infringers whose victims would likely benefit from the restoration. Given that this political support and financial assistance can be done from a distance (i.e. the costs of transport are low), reconstruction and restoration are cost-effective ways for rights-infringers in Croatia and Serbia to compensate their victims in Bosnia.

5.4.3 Democratization and decentralization

Another compensation arrangement discussed in Chapter 3 was democratization. In the few Bosnian areas that remain substantially ethnically mixed, democratization with institutional safeguards preventing majoritarianism could promote the interests of ethnic minorities present in those areas, and so compensate them. For example, granting ethnic majorities in the remaining Bosniak enclaves in Republika Srpska would give those Bosniaks a say in how they are governed, and so be a way for the Bosnian Serbs, a majority in Republika Srpska, to compensate those Bosniaks. This would mostly be a way for rights-infringers from inside Bosnia, as opposed to those from Serbia or Croatia, to compensate their victims, although some regional support for such democratization efforts could improve their longevity.

In Chapter 3, I cautioned against increasing regional autonomy as a way of compensation, because it makes it easier for regional majorities to abuse minorities, and for foreign states to interfere (which can be a bad thing). Unfortunately, by enshrining the divide of Bosnia between the Bosniak and Bosnian Croat Federation of Bosnia-Herzegovina and the Bosnian Serb Republika Srpska, the Dayton Peace Accords have increased regional autonomy in exactly the way that increases the aforementioned risks.

Foreign interference with Bosnian matters was already a problem before the war, and indeed Serbian (and to some extent Croatian) influence was crucial to starting the war. Dividing Bosnia officially into two parts, one Bosniak and Bosnian Croat, and one Bosnian Serb, seems to provide a handy pretext for Serbia and Croatia to interfere, and perhaps even annex these regions.

Increased regional autonomy, then, has not done much to increase security from foreign interference (which is a threat insofar as it can reignite the war). But regional autonomy has also rendered Bosnia ungovernable, with decisions having to be approved by multiple institutions, all with veto powers and all created with an ethnic bias.⁶³ Lastly, regional autonomy makes it very difficult for Bosnian Croats and especially Bosniaks to feel safe and secure in Republika Srpska, even though many Bosniaks are from there. The same is true of the Bosnian Serbs who are from the mostly Bosniak and Bosnian Croat Federation of Bosnia-Herzegovina. While increased regional autonomy has probably made Bosniaks who live in the Federation of Bosnia-Herzegovina feel safer from Bosnian Serbs, and Bosnian Serbs who live in Republika Srpska feel safer from Bosniaks the other, negative effects of increased regional autonomy seem to outweigh this benefit, thus making the measure (and this part of the Dayton Peace Accords) overall not compensatory.

5.4.4 Integration

Integration of the different ethnic groups into a unitary Bosnian state seems much preferable to decentralization. Once the leaders that were most divisive, and most responsible for rights-infringements, have resigned (or been made to resign), and the

⁶³ For example, the municipality of Mostar is unable to organize the placement of trash bins, apparently because of its ethnically divided government (“Bosnia: Mostar”, 2014).

ethnic animus decreased, the security interests of all victims would seem best promoted by the creation of a multi-ethnic Bosnia. By integrating the different ethnic groups into all levels of government, and so creating a multi-ethnic state administration, military, and police force, the state would be much less likely to favor or abuse people based on their ethnicity. This would also create a much stronger police and military when compared to the disparate Republika Srpska and Federation of Bosnia-Herzegovina forces. A strong, multi-ethnic military and police force would be better at repelling foreign attack, fighting crime, and containing domestic ethnic conflict fairly, and would thus increase the security of all relevant victims better than the splintered Bosnia the Dayton Peace Accords led to. This is especially true for Bosniaks, for whom a strong, multi-ethnic Bosnia might well be the only way of retaining adequate security, as they have no regional sponsors that could provide them with security (unlike Bosnian Serbs and Bosnian Croats, who have Serbia and Croatia, respectively), and there are too few of them to effectively resist Serb or Croat aggression without such a multi-ethnic army. Integration like this could also promote other economic interests through gainful employment, which would be especially useful for individuals who, in their region of Bosnia, are an ethnic minority (e.g., Bosniaks in Republika Srpska), and so might otherwise be discriminated against economically.

One could object to the claim that integration would promote the security of victims, on the grounds that integration was already attempted in the region, in the form of Yugoslavia, and that this integration was precisely what led to the Bosnian War. Attempting the same thing again, the objection would go, would just result in the same horrible results. But note that Yugoslavia was an integrated multi-ethnic state in name only. When Yugoslavia started fracturing and push came to shove, the Serb-dominated Yugoslav Army turned out to favor Serb interests to the exclusion of others. For

integration in Bosnia to work, this is precisely what must be avoided. A properly integrated Bosnia would be a state whose makeup and institutional structure was such that, when push came to shove, it would not favor one group over another because of ethnicity.

At first glance, it might seem that supporting the existence of ethnic militias could promote the security interests of victims at least as much as supporting an integrated, unitary Bosnia, and be easier. However, ethnic militias were a large part of the problem during the war, and so their continued existence (if even allowed by justice) poses a threat to the security of victims of other ethnicities. Moreover, such ethnic militias increase the risk, as discussed above, of regional minorities being abused, and so cannot compensate those minorities. This in turn increases the risk of reigniting the war, and so decreases the security of everyone. For example, the proliferation of explicitly Bosniak militias in the Federation of Bosnia-Herzegovina increases the risk that any remaining Bosnian Serbs living there will be abused, which increases the risk that Republika Srpska or Serbia will intervene on behalf of those Bosnian Serbs, and so restart the war. This is in nobody's interest. Lastly, if all three major ethnic groups retain their militias, then the security of members of one group is only increased to the extent that their militia grows in strength more than the others do. The compensatory value of supporting one ethnic militia, then, decreases when others support other ethnic militias. This upward spiral in costs suggests that strengthening ethnic militias is not a very cost-effective compensation arrangement.

5.4.5 Demilitarization

Demilitarization, on the other hand, is a much more promising compensation arrangement. Reducing the strength of ethnic militias, when combined with the creation of integrated, unified Bosnian security forces (as suggested above), would greatly promote the security (and other) interests of most victims of the Bosnian War, and so go a long way to compensating those victims. Leaders, soldiers, and other citizens could all compensate by supporting, in different ways, such demilitarization. Leaders could propose and push through the required institutional reform, and relinquish factional control over government. Citizens could exercise whatever political power they have to support such reforms. As the new, integrated Bosnian forces are unlikely to succeed without being representative, soldiers from ethnic militias could (if needed) volunteer to join the new Bosnian security forces, rather than simply disband.

Demilitarization of the regional sponsors of the violence in Bosnia would also promote the security interests of Bosnian victims. Serbian, and to a much lesser extent Croatian, intervention was crucial in starting and perpetuating the Bosnian War and its many in bello atrocities. Decreasing the threat of such future interventions by decreasing Serbia's and Croatia's military strength could thus compensate the victims of the victims of Serb and Croat forces. However, given the successful integration of Croatia into the EU and NATO, aggression or provocation of ethnic conflict by Croatia is a much smaller concern than the same from Serbia. Demilitarization of Serbia in particular, then, would be a very cost-effective way to compensate the victims of Serb-sponsored ad bellum and in bello violations. As mentioned above, demilitarization would require support from both leaders and regular citizens, and thus could be used by both to compensate their victims. While any given regular citizen's support matters far less than that of their

leaders, any given regular citizen will typically have been far less responsible for war-related rights-infringements, and so also owe far less compensation, than their leaders.

5.4.6 Security

Demilitarization of ethnic militias and their regional sponsors, then, can greatly promote the security interests of victims on all sides, and so be used by all sides to compensate the other, especially when combined with the creation of an integrated, unified Bosnian government. But building such a government will take time, during which there will be a lack of effective security. Indeed, such a security vacuum seems common after wars, which is why in Chapter 3 I suggested that belligerents can compensate their opponents by providing them with security until they can provide it themselves. After a war that involved so much ethnic animus, however, this compensation arrangement might seem laughable. Having forces from Republika Srpska provide security and law enforcement in, for example, Sarajevo would not go over very well. Indeed, given the history of those Bosnian Serb forces, they probably would not provide much security, either.

Instead, then, Republika Srpska (and their Serbian sponsors) could pay for the provision of such security. As it happens, international peacekeepers ended up enforcing the peace after the Bosnian War. Helping these peacekeepers, whether financially or in other ways, could then be a way of promoting the security interests of one's victims, and so compensating them. Such support for peacekeepers could be used not only by Bosnian Serbs and Serbia, but by all those involved in the Bosnian War.⁶⁴ Individuals could

⁶⁴ I have here simplified the matter slightly. If the international community is independently required by justice to provide peacekeeping services, as they might be by a theory of universal *jus post bellum*, then it is not clear that supporting them can count as a way of discharging one's duties of special *jus post bellum*. Recall that the aim of this dissertation is merely to present a theory of special *jus post bellum*, i.e. a theory of what parties owe each other for fighting a war against each other.

support such measures most easily by providing financial support, whether voluntarily or through taxation.

5.4.7 Individual compensation fund

The issue of taxation brings me to the final compensation arrangement discussed in Chapter 3, the individual compensation fund. The idea behind the individual compensation fund is to have a compensation arrangement of last resort. If any victims come forward with enough information to show that they have not been fully compensated by the other compensation arrangements, then special jus post bellum requires that this deficit be made up for. Setting up an individual compensation fund, funded by taxation (or less plausibly, by donations) of those who owe compensation (and proportionally to the extent that they owe compensation, to the degree that is practical) that can dispense compensation to such individual victims will be a very cost-effective way of doing so. Some estimate of how many such victims there will be will have to be made, and the estimated assets allocated to the fund. Any eventual surplus can be used to support the other compensation arrangements. If there is a surplus because the compensation arrangements overall proved more cost-effective than estimated, the surplus can be returned to the compensators.

5.4.8 Right of return

One aspect of the post-war settlement in Bosnia that I have not yet mentioned, but one that is (rightly) often discussed after wars that result in such huge numbers of refugees as the Bosnian War did, is the right of refugees to return to their pre-war homes. In the

context of the Bosnian War, this pertains mostly to Bosniak refugees who fled from what today is Republika Srpska. Fundamentally, the right of return is a right to one's pre-war property. As war-time refugees, especially in conflicts involving ethnic cleansing such as the Bosnian War, leave their homes and possessions under significant coercion and duress, their leaving cannot amount to morally relinquishing their ownership of their property. Thus, the fact that refugees' homes and property are currently used by others amounts to theft (although the new occupants might not always be fully responsible for this theft, as they might be ignorant of the circumstances under which the previous occupants left). Note that according to the compensation theory of *jus post bellum*, the right to have your property returned to your control is not a matter of compensation, but rather one of restitution, and one that must be adhered to for any peace to be just (see Chapter 2).

In the case of Bosnia, this might be seen as a problem for the compensation theory of *jus post bellum*, as returning the now ethnically uniform regions of Bosnia to their pre-war, ethnically mixed state might seem unfeasible or, even lead to another war. However, there are two reasons for thinking that the right of return does not pose much of a problem for the compensation theory of *jus post bellum*. First, it is not at all clear that the right of return should not be required for a fully just peace. Indeed, the Dayton Peace Accords that ended the Bosnian War state that all refugees have the right to return to homes and property (Dayton Peace Agreement, 1995, Annex 7). In this sense, then, the Dayton Peace Accords and the compensation theory of *jus post bellum* agree on the importance of the right of return.⁶⁵

⁶⁵ Note that to say that the right of return is extremely morally important is not to deny that the right of return, like most other rights, can be waived by the refugees in question.

But suppose instead that one wants to deny that refugees have a right to return. I think there are two plausible reasons for doing so, and both are compatible with the compensation theory of jus post bellum. First, one could claim that any right of return is in practice outweighed by other considerations, such as the threat to peace that such a return might pose. But this is perfectly compatible with the compensation theory of jus post bellum, as any such appeals to more universal values would seem to be part of universal jus post bellum. I do not mean to deny this possibility. The compensation theory of jus post bellum merely claims that a peace settlement that is perfectly just from the perspective of *special* jus post bellum requires that the right of return be respected. This is compatible with a theory of both special and universal jus post bellum claiming that such a right must be balanced against other, universal considerations.

The second reason for thinking that there is no right of return, it seems to me, is a view of property rights according to which losing control over one's property for a long period of time entails losing one's rights to that property. But this view of property rights is perfectly compatible with the compensation theory of special jus post bellum. I have up until now assumed a view of property rights on which such rights can only be lost voluntarily, but I did so only out of convenience. I do not intend to presuppose one view of property rights over another.

The most cost-effective compensation arrangements for the rights-infringements perpetrated during the Bosnian War, and thus the requirements of special jus post bellum, then, are (1) educational reform in Bosnia, Serbia, and to a lesser extent Croatia, (2) reconstruction of Bosnian infrastructure, and restoration of Bosnian environment (especially by Bosnian Serb rights-infringers), (3) creating and supporting an ethnically integrated, unified Bosnia, and (4) demilitarization of ethnic militias and of regional sponsors of ethnic violence (mainly Serbia). A way of further increasing the

compensatory value of these measures is to agree to international oversight of these measures (as the parties to the Dayton Peace Accords did). Such oversight can increase the trust and subjective security of victims, and so compensate them. Oversight can also increase the objective chance of fully compensating all victims.

5.5 The Dayton Peace Accords

So far, I have discussed what the compensation theory of jus post bellum would require of the belligerents of the Bosnian War in terms of compensating each other. The Bosnian War, however, ended with a peace agreement, the aforementioned Dayton Peace Accords. As I discussed in Chapter 3, post-war compensation claims (and other rights, such as the right of return) can be waived, and so peace settlements can override rights to compensation, as long as the holders of the compensation rights waive those rights freely. For an application of the compensation theory of jus post bellum to the Bosnian War to be complete, then, we must investigate whether the Dayton Peace Accords, and the waiving of compensation claims that they involved, were freely consented to.

In Chapter 3, I suggested three criteria for free consent to a peace settlement. First, there can be no credible threats to do independently wrong things unless consent to the peace settlement is given. I will call this the *no coercion-requirement*. Second, no party to the negotiations can knowingly misrepresent material facts. I will refer to this as the *no fraud-requirement*. Third, and most controversially, consent to the peace settlement must be given either because (1) the peace settlement is liked, or (2) there are acceptable alternatives to consenting to the peace settlement. I will call this the *acceptable alternatives-requirement*.

The Dayton Peace Accords may seem to fail the no coercion-requirement, because of the NATO intervention against Bosnian Serb forces that pushed them to the negotiating table. However, for this threat of continuing violence unless Bosnian Serbs committed to negotiations to violate the no coercion-requirement, continued military action against Bosnian Serb forces by NATO would have to be *independently wrong*. Now, the morality of international intervention is a fraught subject, and rightly so, as we should be wary of using military force lightly. But intervening to stop the genocide in Bosnia seems like a paradigm case of a morally permissible military intervention.⁶⁶ And as Bosnian Serb forces were responsible for the majority of the genocide, intervention against them was the only way to stop it. On the assumption that the NATO intervention was morally permissible, then, it did not violate the no coercion-requirement, and so the consent given by Bosnian Serb representatives to the Dayton Peace Accords is not invalidated in this way. As for the Bosniaks and Bosnian Croats, given their military successes leading up to the Dayton Peace Accords, and the lack of threats from third-parties, it seems reasonable to conclude that the no coercion-requirement did not invalidate their consent to the Dayton Peace Accords.

As for the second requirement, that there be no fraud or knowing misrepresentation of material facts, the international supervision of the peace negotiations suggests (although of course does not guarantee) that the three belligerents entered the negotiations with largely the same knowledge base. The Bosnian War was fairly well documented by international media, UN peacekeepers, and the intelligence services of various countries. While there were some attempts at deception, such as Serbian president Slobodan Milosevic's continuing denials of any responsibility for the

⁶⁶ The *legality* of the NATO intervention is less clear, as the NATO intervention did not obviously fit the mandate given by the UN Security Council (Silber & Little, 1997, ch. 26).

actions of the Yugoslav Army and Republika Srpska in Bosnia, these were mostly for show. There is no reason to think that anyone involved in the negotiations actually believed such denials (Silber & Little, 1997, ch. 29). Thus, the consent given to the Dayton Peace Accords seems not to have been undermined by fraud.

The third, and most controversial, criterion for free consent discussed in Chapter 3 is the acceptable alternatives-requirement, which demands that consent to a treaty be given either (1) because the treaty is well liked, or (2) because there are acceptable alternatives to consenting to the treaty. These acceptable alternatives can, as I discussed in Chapter 3, be an acceptable cold peace, acceptable alternative treaties, or both. As the Dayton Peace Accords did not give Bosnian Serbs control of as much of Bosnia as they wanted, nor let them become a part of Serbia, their consent to the peace treaty probably did not come from their love for it. Thus, to see if their consent was free, we must consider the alternatives the Bosnian Serbs faced.

First, consider what would have happened had Bosnian Serbs not agreed to negotiations. While Serbia had, because of international pressure, at this point decreased support for Bosnian Serbs, the threat of a complete defeat of Republika Srpska, and the likely reprisals on the Bosnian Serb population, could have led to Serbia (and Russia, their historical sponsor) intervening. For the Bosnian Serbs, then, a possible alternative to entering negotiations was a cold peace enforced by NATO on the one hand, and Serbia and Russia on the other.

Second, it seems likely that there were a number of alternative treaties that Bosnian Serb leaders, given their still extensive armed forces, could have negotiated, treaties that would have left Republika Srpska with substantial autonomy and territory. These alternative treaties seem like acceptable alternatives to the Dayton Peace Accords.

The Bosnian Serbs, then do seem to have given valid consent to the Dayton Peace Accords.

What about the Bosniaks and Bosnian Croats? Well, the carving up of Bosnia between the Federation of Bosnia-Herzegovina and Republika Srpska was not their ideal outcome, and so their consent to the treaty was not a result of them liking it. For their consent to be free, then, they must have had acceptable alternatives. First, consider the alternative of refusing to negotiate. This would have led to at least a few more military victories, and then a cold peace, possibly enforced by NATO and Russia. Given the territorial gains, and the attendant opportunities for refugees to return to their homes, this cold peace does not seem too bad. However, the Dayton Peace Accords are much better, as they enshrine the right of return everywhere in Bosnia, and make a resumption of war much less likely than a cold peace would have. It is not clear, then, that a cold peace would have been acceptable to Bosniaks and Bosnian Croats.

Second, consider the alternative treaties that could have been negotiated. The Dayton Peace Accords enshrine the right of return, make Bosnia independent, and preserve Bosnia's pre-war borders. While not ideal (because of the aforementioned decentralization), this does seem acceptable to Bosniaks and Bosnian Croats. Alternative treaties could have traded some of these aspects of the treaty in return for less decentralization, or perhaps different borders for Republika Srpska. In other words, the negotiating position of Bosniaks and Bosnian Croats was, because of NATO intervention, pretty strong. The negotiating process, then, seems to have offered them acceptable alternatives to the Dayton Peace Accords.

Of course, I do not mean to imply that all peace negotiations always result in free consent, because of the mere possibility that slightly different alternative treaties could have been negotiated. For consent to meet the acceptable alternatives-requirement,

these alternative treaties must also be acceptable. But as both the Dayton Peace Accords and at least some of the alternative possible treaties were acceptable to Bosniaks and Bosnian Croats, this renders their consent to the Dayton Peace Accords free on the third condition for free consent.

Lastly, the issue of representation must be considered. For consent to the Dayton Peace Accords to be morally valid, it must be given either by the individual victims who, as a consequence of the peace settlement, are waiving their compensation claims, or by the proper representatives of those victims, who after the signing will often enforce the terms of the peace treaty. For example, did Radovan Karadzic, the president of Republika Srpska, represent (morally speaking) Bosnian Serbs when he consented to the Dayton Peace Accords? If all the Bosnian Serbs who, according to the Dayton Peace Accords, ended up waiving their compensation claims had consented (directly or through proper representatives, like a representative legislature) either to Karadzic negotiating on their behalf, or to the peace treaty that he negotiated, Karadzic would count as properly representing them when signing the treaty. But such consent can be a difficult standard to reach, especially after wars, when emotions run high and people are reluctant to waive claims against their enemies. But any lower standard might be too low to be morally relevant. A solution to this problem, then, requires a theory of proper representation. This is a complex issue that, for reasons of space, I cannot discuss in depth in this dissertation. I will thus leave it open whether the Bosniak, Bosnian Croat, and Bosnian Serb leaders properly represented the victims of war-related injustices among their respective ethnic groups. If they did, then the free consent (see above) given to the Dayton Peace Accords renders the peace treaty just, even though in some cases it conflicts with the ideal peace (which would result from rights-infringers fully compensating their victims). If instead consent was not given by proper representatives,

then the Dayton Peace Accords do not morally supersede the mutual compensation claims discussed above.

Note that I have only evaluated the Dayton Peace Accords in the light of special jus post bellum. I have not discussed the consequences of the treaty for third parties. Do the Dayton Peace Accords promote peace in the region, or do they make it more likely that war will break out between parties to the treaty and third parties (or even between third parties)? Such issues are, of course, of huge moral importance. However, they concern not special jus post bellum, but further constraints on belligerents imposed by duties to third parties (or impersonal duties) not to increase the risk of war, and so on. Thus, such issues are a matter of universal, not special, jus post bellum. The moral foundation for such duties is unlikely to be compensation (which is owed only between parties to a war), and so a theory of universal jus post bellum would need a different moral foundation than that of special jus post bellum. This is a promising topic for future research.

Chapter 6 – Conclusion

I have articulated and briefly defended the compensation theory of jus post bellum, according to which parties to a war owe each other compensation for the war-related injustices (i.e. violations of the principles of just war theory) they have imposed on each other. Because of limited knowledge of who did what to whom after a war, and because of the costs of filling that knowledge gap, the most cost-effective way of discharging this duty of compensation will often be to institute and support measures with a high probability of compensating one's victims, such as political reform or demilitarization.

These arrangements are not required – compensators are free to choose the means by which they fully compensate their victims. But the most cost-effective compensation arrangements will be rationally recommended for the compensator, and as such also the most promising ones for victims to demand. I argued that the most cost-effective post-war compensation measures overlap with the commonly proposed principles of jus post bellum (with the exception of punishment). Thus, as most of what we want from a theory of jus post bellum can be accounted for by compensation, there is little need to suppose that jus post bellum is grounded in anything but compensation.

I have put aside the issue of punishment as a matter of *universal*, not *special*, jus post bellum, because the rights, duties, and aims of punishment appear to be owed not only to the victims, but to everyone. *Special* jus post bellum deals with what parties to a war owe each other in virtue of having fought each other. *Universal* jus post bellum, on the other hand, deals with the general duties that everyone has to help those affected by war. In this dissertation, I focused on special jus post bellum, and articulated the claim that it is, fundamentally, only compensation for war-related injustices, and that as

special jus post bellum accounts for most of the proposed principles of jus post bellum, the role played by *universal* jus post bellum seems secondary to that played by *special* jus post bellum. But by focusing on special jus post bellum I do not mean to deny that a just or good peace is everyone's concern – it may well be that there are universal post-war duties of assistance. However, as the third parties that are supposed to have these universal duties will typically have nothing to compensate for, these universal duties cannot be grounded in compensation. The moral foundations of universal jus post bellum, then, are a promising topic for future research.

In cases where there is large and persistent disagreement between parties about the validity of post-war compensation claims, a better solution can be to instead negotiate a peace settlement that involves mutual waiving of some such compensation claims. As long as consent to such a peace treaty is given freely, the compensation claims are effectively waived, and the peace settlement overrides the compensation claims. Consent to peace treaties raise issues of proper representation and voluntary choice that I have only briefly sketched, and that would have to be settled before fully applying the compensation theory of jus post bellum to real peace settlements.

The compensation theory of jus post bellum as presented in this dissertation has assumed that *individual* victims are owed compensation by their *individual* rights-infringers. I shall now comment on the implications of rejecting this assumption. While the details of what kinds of communities (states, ethnic groups, etc.) have what kinds of rights according to this collectivism will matter, the general picture will remain roughly similar. Any collectivist compensation theory of jus post bellum according to which communities are the victims, and so must be compensated, will typically involve some non-financial compensation arrangements, just as the individualist compensation theory of jus post bellum does. When individuals are the victims, non-financial compensation

arrangements are typically recommended because wars introduce serious epistemic difficulties in identifying which individual was harmed, how much, and by whom. Furthermore, the practical difficulties in overcoming these epistemic gaps can be prohibitively costly, making compensation arrangements that do not require overcoming the epistemic difficulties more cost-effective.

If instead communities are the victims to be compensated, the epistemic and practical difficulties are much smaller. Identifying which community was harmed by a war-related injustice, and by whom, will typically be much easier than in the individual case. However, non-financial compensation arrangements can still sometimes be more cost-effective than financial compensation. Communities have interests not only in wealth, but also in security, happiness, and so on. The most cost-effective way to promote the interests of a community, then, is not guaranteed to be purely financial compensation. Instead, measures such as political reform or demilitarization, that promote the other interests of the victim community, should also be considered. This is especially the case if individuals, not communities, are the compensators, as individual right-infringers are highly unlikely to have enough financial resources to be able to compensate whole communities. The case for alternative compensation arrangements here is, of course, somewhat weaker than in the individual case, where epistemic and practical difficulties make financial individual-to-individual compensation extremely impractical.

As for collectivist accounts on which communities are the compensators, financial compensation might be more feasible, as communities can have access to more financial resources than individuals do, and so fully compensating victims financially becomes possible. However, if communities are to compensate individual victims, then they face the same practical and epistemic difficulties in identifying who the victims are, who

infringed their rights, and how much they were harmed, that individual compensators would face. If instead communities are to compensate other communities, then they should still consider non-financial compensation arrangements, which by promoting the non-financial interests of the victim community might promote their overall interests more than financial compensation.

The effects for the compensation theory of jus post bellum of rejecting individualism, then, differ depending on what that individualism is replaced with. If individuals still play a role, as either victims or compensators, then the core features of the theory remain, that being the practical requirement (unless superseded through negotiation) to, in typical cases, compensate victims through political reform and similar non-financial compensation arrangements. Only when communities are the only victims and the only compensators is there less need for such non-financial compensation arrangements, although there are still reasons to consider them.

There are two major practical implications of accepting the compensation theory of jus post bellum. First, as both sides to a war will typically infringe the rights of the other, the compensation theory of jus post bellum entails that both sides owe each other compensation, even if one of them entered the war justly. This means that the unfortunate tendency to justify violations of jus in bello by appealing to one's jus ad bellum justice should not be tolerated. Furthermore, this means that even defeated ad bellum unjust parties must have a real say during peace negotiations, as they typically will have legitimate claims to compensation. Peace negotiations, then, should never be one-sided, even if the ad bellum just party won.

Second, accepting the compensation theory of jus post bellum means paying much more attention to what countries at war do to their own citizens. Wartime emergency measures are common, and can be horrific. Unfortunately, they are sometimes treated as

an internal, political issue, rather than an issue of wartime justice, on par with the other principles of just war. According to the compensation theory of jus post bellum, internal wartime measures that infringe rights are wartime injustices like any other, and the victims of such measures are owed compensation for their injustices. Internal post-war reform or settlement, then, is not merely a matter of politics or social stability, but a matter of justice, just as settling compensation claims with other states.

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