Justice in Armed Humanitarian Intervention

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Abstract

This thesis throws new light on a central question in the normative theory of armed humanitarian intervention. Assuming that it is, under certain conditions, permissible to employ lethal force to protect people from atrocity crimes, what are the principles governing wars fought for distinctly humanitarian purposes?

The thesis comprises seven self-standing chapters, each of which makes a distinct contribution to philosophical debates about the moral nature of other-defence, the just distribution of risks of harm between morally innocent persons, the legal regulation of just conduct in humanitarian intervention, and rectificatory duties that arise once hostilities have ceased.

Chapter 2 argues that duties to rescue may take the form of a duty to harm in other persons' defence. Chapter 3 defends a conception of the requirement to minimise harm that extends across multiple agents, which entails that victims' and rescuers' respective permissions to harm in victims' defence may become interdependent. Chapters 4-6 argue that key considerations to which philosophers and militaries have appealed - intending to benefit vulnerable people, the lesser evil, and acting in supererogatory fashion - do considerably less to justify harms to non-liable people than is commonly assumed. Chapter 7 questions the moral adequacy of international humanitarian law in light of the notion of the 'responsibility to protect,' and explores a case for affording morally innocent people greater legal protection from being harmed in military rescue operations. Chapter 8 defends duties of compensation for harmful military acts that were all-things-considered permissible on lesser-evil grounds.

Collectively, these chapters show that the conditions under which carrying out a military intervention may be permissible is not all that matters. The way in which such operations are conducted is just as critical. There are weighty constraints on how intervening forces may seek to bring about good consequences, even in pursuit of distinctly humanitarian aims.

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1. INTRODUCTION

1. The Topic

'Though this be madness, yet there is method in't.' Applied liberally, Polonius' response to Hamlet's seemingly going mad captures the central premise of this thesis. Even in the madness - the chaos, horror, and tragedy - of war, there must be right and wrong actions, and some 'method' to determine how individuals ought to conduct themselves. This thesis is concerned with cases in which principles of just conduct, and redress, appear particularly unfathomable and abstruse: cases in which one state forcefully intervenes in another state without that state's permission, to protect the latter's citizens from egregious violations of their fundamental human rights, usually by their own government and its supporters.[1]

The vast majority of people believe that it is unacceptable to stand by as individuals abroad are systematically tortured, raped, and killed. At least in theory, most people believe that, in the face of atrocities which 'shock the conscience of humanity,' the international community cannot do nothing.[2] Doing something, however, usually comes with a host of moral, legal, and political conundrums. Military interventions are not only costly for interveners but invariably cause great numbers of innocent deaths, extensive destruction, and suffering, usually with impunity for wrongdoers and without justice for victims. Partly for this reason, military interventions have been hugely ineffective in facilitating just and lasting peace.[3] They are, as J. Bryan Hehir noted, 'notoriously difficult to contain and complete.'[4]

In cases where armed intervention is the last resort, the choice is therefore between two profoundly morally unappealing options: intervening, and foreseeably causing considerable

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[1] For a more detailed version of this widely accepted definition, which accords with the views of the philosophical mainstream, see J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP, 2010), 18. I use 'armed' and 'military' humanitarian intervention interchangeably.

[2] '"All atrocity crimes are preventable" and can never be justified – UN chief,' *UN News*, https://news.un.org/en/story/2018/06/1013002; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), Preamble: http://legal.un.org/icc/statute/99_corr/preamble.htm.

[3] Consider, for instance NATO's intervention in Libya in 2011, which left the region deeply unstable, or the state of Afghanistan since 2001 and Iraq since 2003. For discussion, see Simon Caney, *Justice Beyond Borders* (OUP, 2005) 226-262; Cécile Fabre, *Cosmopolitan War* (OUP, 2012) and 'Permissible Rescue Killings,' *Proceedings of the Aristotelian Society* 109 (2009): 149-64; Fabrice Weissman, '"Not In Our Name": Why Médecins Sans Frontières Does Not Support the "Responsibility to Protect",' *Criminal Justice Ethics* 29 (2010): 194-207.

[4] J. Bryan Hehir, 'Expanding Military Intervention: Promise or Peril,' *Social Research* 62 (1995): 41-51, 50.

harm, or not intervening, and allowing considerable harm to be inflicted by others. Many people think that the latter is preferable.[5] Some hold that interventions are wrong due to 'a mix of realist perspectives, colonialist memories, and institutional limitations.'[6] Others believe that there are primarily contingent reasons to be sceptical of a practice which appears to cause more harm than good, and exacerbates the suffering of innocent individuals.[7]

One aspect that is frequently criticised is that military interventions are standardly treated as 'classic military campaigns,' which exercise overwhelming force to defeat an adversary and secure victory at the lowest cost possible to the intervening military's own forces - usually at the cost of civilian lives.[8] Critics have therefore argued that the very practice of armed humanitarian intervention is untenably hypocritical if it permits interveners to prioritise their own security over the protection of civilian populations, thereby harming those whom they are supposed to protect.[9] However, others have defended the current practice on the grounds that, if interveners are already going beyond the call of moral duty, it would be unfair to demand that they suffer even greater risks to their lives to save individuals in faraway places for whose predicament interveners were in no way responsible.[10] Even amongst liberal internationalists who generally agree about basic principles, there is no consensus on the fundamental question of how wars of humanitarian intervention should be fought.

This thesis seeks to help resolve some of the 'moral confusion endemic to international Liberalism,' which puts individual rights above everything else, and of which the intervention debate is supposedly a symptom.[11] Taking as its starting point the warranted scepticism of human rights protection by military means, it seeks to establish whether, and how, we may

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[5] For example, S. P. Huntington, 'New Contingencies, Old Roles,' *Joint Forces Quarterly* 2 (1993): 38-44, 42. For discussion, see Fletcher and Ohlin, *Defending Humanity: When Force is Justified and Why* (OUP, 2008), 132; Frowe, *The Ethics of War and Peace*, 87.

[6] Hehir, 'Expanding Military Intervention,' 48.

[7] See Charles Beitz, 'Nonintervention and Communal Integrity,' *Philosophy & Public Affairs* 9 (1980): 385-391; Ken Booth, 'Military Intervention: Duty and Prudence,' in Lawrence Freedman (ed), *Military Intervention in European Conflicts* (Blackwell, 1994), 56-75. See also Paul H. Wise, 'The Epidemiologic Challenge to the Conduct of Just War: Confronting Indirect Civilian Casualties of War,' *Daedalus* 146 (2017): 139-54.

[8] For instance, Martin Shaw, *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq* (Polity, 2005).

[9] See Shaw, *The New Western Way of War;* Bruce Cronin, *Bugsplat: The Politics of Collateral Damage in Western Armed Conflicts* (OUP, 2018); James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (OUP, 2010); see also International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect,' *International Development Research Centre* (2001), 63.

[10] See McMahan, 'The Just Distribution of Harm Between Combatants and Non-Combatants,' *Philosophy & Public Affairs* 38 (2010): 342-79.

[11] This diagnosis is delivered predominantly, but not only, by realists. See Hehir, 'Expanding Military Intervention,' 49.

escape the fatal 'combination of good intentions and bad consequences.'[12]

The Problem

This thesis suggests that those who dismiss armed humanitarian interventions as morally doomed on the grounds that they cause intolerable amounts of wrongful harm may be too quick. What they fail to acknowledge is that the morally relevant alternative to unjust intervention is not necessarily non-intervention, but justly conducted intervention. Indeed, some decisions *not* to intervene to halt atrocity crimes, such as in Rwanda in 1994, were just as controversial, and catastrophic in their consequences, as decisions to take military action in other cases, such as in Iraq and Libya.

However, it is not merely misjudgements about the overall justness of interventions which cause wrongful harms. It is also the lack of understanding of what constitutes just conduct during these operations, and what is owed in the aftermath, which causes wrongful deaths, destruction, and long-term suffering. This thesis, therefore, is not concerned with identifying the circumstances in which military interventions are morally justified *ad bellum*. Assuming that armed humanitarian interventions can be justified in principle, it focuses exclusively on interventions that are justified *ad bellum*, and considers questions of justice *in bello* and *post bellum*.

In contrast to mainstream debates, the worry that motivates this project is not one about misguided incentives, such as self-interested interveners prioritising their national over humanitarian interests, or starry-eyed theorists unwittingly advocating an imperialism of liberal values.[13] Nor is it concerned with the exceedingly non-ideal circumstances under which a theory of just intervention must operate, such as certain non-compliance or inescapable obstacles to feasibility. The deeper, spanner-in-the-works worry is about interveners committing *wrongs* in the process of doing what appears morally required. If past interventions are anything to go by, the severity, scale, and long-lasting effects of harms caused by interveners call into question whether it is at all possible to conduct interventions

[12] Hehir, 'Expanding Military Intervention,' 49.
[13] For instance, Weissman, 'Not In Our Name.'

justly *in bello,* and to bring them to a just close *post bellum*, even if they are justified *ad bellum.*[14] The trouble seems to be that, given the nature of armed conflict, interveners in effect set themselves up to commit inexcusable moral transgressions. Effectively protecting fundamental human rights thus becomes an undertaking so morally hazardous that, far from being the no-brainer it ought to be, it makes the alternative of standing by, as innocent persons' rights are egregiously violated, look morally acceptable.[15] But how can something uncontrovertibly morally required - protecting the most elemental of rights - become a morally dubious undertaking?

We not only need what many theorists have provided - accounts of the circumstances in which international action is required in the face of humanitarian crises. We also need an account of *how to do it right*. Despite being a matter of considerable moral complexity, and legal and political urgency, this question has hardly been afforded the degree of attention and analysis it warrants in the philosophical literature. This project's guiding question therefore is - assuming that it is, in certain cases, permissible to employ lethal force to protect vulnerable people from atrocity crimes, what would a justly conducted military humanitarian intervention look like? More specifically, what are the principles governing a just humanitarian intervention?

The Question

In light of this overarching question, the thesis addresses three subquestions. First, what permits harming in other-defence? Second, what are the principles governing a just distribution of risks of harm during an armed humanitarian intervention? And, third, who owes what to whom in the aftermath of an intervention, once hostilities have ceased? The first question concerns the nature, and the limits, of the duty to protect individuals' rights. My particular interest is in whether this duty to protect can generate a duty to harm, or even kill, in other persons' defence. The second question concerns the nature and limits of the duty to

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[14] Consider, for example, the NATO-led intervention in Libya in 2011. This was justified by some under the 'responsibility to protect' and legally authorised by the UN Security Council, but now widely regarded as a failure, given devastating post-conflict regional instability. See, for instance, 'Libya and the Responsibility to Protect,' *Council on Foreign Relations* (March 2011), and Dominic Tierney, 'The Legacy of Obama's 'Worst Mistake,'' *The Atlantic* (15 April 2016), https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/.

[15] For instance, Soran Reader argues that cosmopolitans should be committed to pacifism, because killing innocent people is practically inevitable even if it is not intended. (Reader, 'Cosmopolitan Pacifism,' *Journal of Global Ethics* 3 (2007): 87-103).

minimise harm when rescuing. More specifically, it concerns the just distribution of risks of harm between individuals who are not liable to be harmed - in particular, just combatants, civilians whom the intervention is meant to protect, and neutral bystanders, all of whom are morally innocent and have rights not to be harmed. The third question is about which rectificatory duties and liabilities arise in the aftermath of wars fought for distinctly humanitarian purposes.

Why We Should Care

From a bird's-eye perspective, this project's concern is with what is the right thing to do in a harrowingly non-ideal world. This is not a philosophical exercise conducted for its own sake. As Henry Shue put it, '[a]ny system of global governance or theory of international order is ridiculous if it allows the rest of us to be at liberty to sit on the sideline as people with machetes move house to house, day by day, hacking unarmed civilians to death until half a million innocents have been murdered.'[16] Whether it is machetes in Rwanda, sarin gas in Syria, or arson and sexual violence in Myanmar[17] - states and multilateral organisations still find themselves 'paralyzed in the face of suffering and injustice which can and should be prevented.'[18]

With autocracies on the rise, democracies on the defensive, and the authority of human rights as trumps waning, the pursuit of justice across borders is anything but a matter of course. Solving the international community's collective failure to protect individual rights across the globe, however, requires more than additional resources and more effective international collaboration. It requires a clear understanding of what we owe to each other when some people commit unspeakable crimes, which generate obligations for others to engage in costly, harmful actions. But it also requires a clear understanding of the *limits* of what we owe - for instance, of the principles that should guide armed forces in weighing their own safety against the protection of civilians, and in weighing the protection of those whose rescue justified an armed intervention against the protection of neutral bystanders.

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16 Henry Shue, *Fighting Hurt* (OUP, 2016), 151-2.

17 Agence France-Presse in Ottawa, 'Canada accuses Myanmar of genocide against Rohingya,' *The Guardian,* https://www.theguardian.com/world/2018/sep/21/canada-accuses-myanmar-of-genocide-against-rohingya.

18 Hehir, 'Expanding Military Intervention,' 48.

2. Current Debates and the Scope of the Thesis

The thesis presents an intervention into two broad philosophical debates, which are typically confined to distinct bodies of literature. The first concerns the ethics of defensive harming, the second international rectificatory justice. By intertwining some of their respective lines of enquiry, I show that we can shed considerable new light on what justice requires during and after armed humanitarian interventions (AHI), and on how these burdens ought to be shared.

What follows is a discussion of the relevant philosophical territory, the broader context in which key questions arise, and challenges I will raise to existing views within contemporary just war theory about the ethics of AHI. To avoid repetition, the following chapters will iterate neither the assumptions nor the broader context outlined here, which is therefore presented in the necessary detail.

Just War Theory's Blind Spot

Most philosophers believe that it is permissible, and sometimes morally obligatory, to wage wars of humanitarian intervention to protect individuals from especially grave violations of their fundamental rights.[19] Along with self-defence, other-defence is a paradigmatic example of a just cause for war in the literature. However, not nearly as much has been written on wars of other-defence as on wars of national self-defence, and discussions of wars of humanitarian intervention are remarkably rare in the just war literature.[20] Two decades ago, Mona Fixdal and Dan Smith noted that 'discussions of humanitarian intervention rarely make links with the just war tradition,' and justifiably found this omission 'somewhat surprising.'[21] More recently, Alex Leveringhaus still went so far as to designate the topic of military

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[19] Simon Caney, *Justice Beyond Borders*; Jeff McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' in N. Ann Davis, Richard Keshen, and Jeff McMahan (eds), *Ethics and Humanity: Themes From the Philosophy of Jonathan Glover* (OUP, 2010), 44-71; Cécile Fabre, *Cosmopolitan War* (OUP, 2012); Helen Frowe, *Defensive Killing* (OUP, 2014); Henry Shue, *Fighting Hurt.*

[20] Exceptions are: Jonathan Parry, 'Defensive Harm, Consent, and Intervention,' *Philosophy & Public Affairs* 45 (2017): 356-396; Cécile Fabre, 'Permissible Rescue Killings,' *Proceedings of the Aristotelian Society*, 109 (2009): 149-64; Cécile Fabre, 'Mandatory Rescue Killings,' *Journal of Political Philosophy* 15 (2007): 363-84; Seth Lazar, 'Authorisation and the Morality of War,' *Australasian Journal of Philosophy* 94 (2016): 211-26; Seth Lazar, 'Associative Duties and the Ethics of Killing in War,' *Journal of Practical Ethics* 1 (2013): 6-51; Russell Christopher, 'Self-Defense and Defense of Others,' *Philosophy & Public Affairs* 7 (1998): 123-41; Eduardo Rivera-Lopez, 'Puzzles on Defending Others from Aggression,' *Law and Philosophy* 25 (2006): 377-86; George Fletcher, 'Defensive Force as an Act of Rescue,' *Social Philosophy and Policy* 7 (1990): 170-79.

[21] This was in 1998. Cited in Simon Caney, *Justice Beyond Borders,* 254.

humanitarian intervention the 'blind spot' of contemporary just war theory.[22]

Nearly all debates on the ethics of AHI focus on the conditions that need to be met for military intervention in another country to be justified. There is a considerable body of literature dedicated to establishing what types, scope, and degree of human rights violations warrant military action by outsiders, whether state sovereignty is intrinsically or merely instrumentally valuable, who if anyone should do the intervening, and whether there may be a moral obligation, rather than a mere permission, to intervene in some cases.[23] 'There are,' Jeff McMahan states, 'two broad questions about the morality of humanitarian intervention. The first is whether humanitarian intervention can be permissible . . . The second is whether it can be morally required.'[24]

But for all the sophisticated work on the *jus ad bellum*, illuminating analyses of the *jus in bello* and compelling accounts of the *jus post bellum* with regard to distinctly humanitarian wars are hard to come by.[25] Simon Caney and James Pattison, respectively, have pointed out that the topic of just conduct during humanitarian intervention is 'almost always neglected,' and only 'rarely receives detailed and systematic attention in the literature.'[26] The same is true for the topic of just peace after military interventions, but even this very fact is hardly remarked upon.

As a result, what individuals owe to one another once an intervention is underway, and

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[22] Alex Leveringhaus, 'The Moral Status of Combatants During Military Humanitarian Intervention,' *Utilitas* (24) (2012): 237-258, 244.

[23] For instance, Jeff McMahan, 'Humanitarian Intervention, Consent, Proportionality'; Cécile Fabre, 'Permissible Rescue Killings' and 'Mandatory Rescue Killings'; Fernando R. Téson, 'The Liberal Case for Humanitarian Intervention,' *Public Law Research Paper No. 39* (2001); Terry Nardin, 'The Moral Basis of Humanitarian Intervention,' *Ethics & International Affairs* 16 (2002): 57-70; James Pattison, *Humanitarian Intervention and the Responsibility to Protect;* Henry Shue, *Fighting Hurt.* The UN doctrine of the 'responsibility to protect' and the Genocide Convention are remarkably ambiguous with regard to whether the protection of human rights is a full-blown enforceable legal obligation or a mere permission. (International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, Canada, 2001; Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 (III) A of the United Nations General Assembly (9 December 1948).)

[24] McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 45.

[25] For an illuminating exception, see Cécile Fabre's *Cosmopolitan Peace.*

[26] Simon Caney, *Justice Beyond* Borders, 254; Pattison, *Humanitarian Intervention and the Responsibility to Protect,* 99. He also cites a few exceptions. For related discussions that focus on the 'responsibility to protect' in practice, see Bradley J. Strawser and David Whetham (eds), *Responsibilities to Protect: Perspectives in Theory and Practice* (Brill - Nijhoff, 2015).

after hostilities have ceased, is far from settled.[27] This thesis seeks to present central elements of such an account, focusing in particular on principles governing the just distribution of harm *in bello* and rectificatory obligations *post bellum*. In this light, it is important to clarify what the thesis does *not* do in relation to mainstream scholarship.

The Jus Ad Bellum

There is, as I've begun to indicate, no shortage of sophisticated literature discussing whether military intervention can ever be justified, and under what conditions this might be the case. The majority of philosophers writing on the matter believe that there are, at least in theory, cases in which the international community is morally required to intervene to prevent or stop egregious human rights violations.[28] This view is not only supported by moral philosophers but has also been institutionalised by the United Nations to a contested degree. For instance, humanitarian intervention has been defended as a legal right arising from Chapter VII, Article 51, of the UN Charter, which affirms the 'inherent right of individual or collective self-defence' in the case of an armed attack against a UN member state. On this basis, George Fletcher and Jens David Ohlin have argued, it is permissible for the international community to come to the assistance of any nation - and any sub-state group - that has such a right to defend itself against an armed attack.[29] While Article 51 only explicitly mentions states, international laws prohibiting genocide effectively grant the right of self-

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[27] Mona Fixdal and Dan Smith, 'Humanitarian Intervention and Just War,' *International Studies Review* 42 (1998): 283-312; Alex Leveringhaus, 'The Moral Status of Combatants During Military Humanitarian Intervention,' *Utilitas* 24 (2012): 237-258; Simon Caney, *Justice Beyond Borders*, 254; Charles Beitz, 'Nonintervention and Communal Integrity,' *Philosophy & Public Affairs* 9 (1980): 385-391; Ken Booth, 'Military Intervention: Duty and Prudence,' in Lawrence Freedman (ed), *Military Intervention in European Conflicts* (Blackwell, 1994), 56-75; James Pattison, *Humanitarian Intervention and the Responsibility to Protect* and 'Bombing the Beneficiaries: The Distribution of the Costs of the Responsibility to Protect and Humanitarian Intervention,' in Scheid (ed), *The Ethics of Armed Humanitarian Intervention*, 113-129; J. Bryan Hehir, 'Intervention: From Theories to Cases,' *Ethics & International Affairs*, 9 (1995): 1-13.

[28] See, for example, McMahan, 'Humanitarian Intervention,' 56-7; David Miller, 'The Responsibility to Protect Human Rights,' in Lukas H. Meyer (ed), *Legitimacy, Justice, and Public International Law* (CUP, 2009), 41–44; Nardin, 'The Moral Basis of Humanitarian Intervention,' *Ethics and International Affairs* 16 (2002): 57-70, 69; Fernando R. Tesón, 'The Liberal Case for Humanitarian Intervention,' in Holzgrefe and Keohane, *Humanitarian Intervention,* 93-129; Tesón, 'Eight Principles for Humanitarian Intervention,' *Journal of Military Ethics* 5 (2006): 93-113, 97-8; Tesón, *A Philosophy of International Law* (Routledge, 1998); Walzer, *Just and Unjust Wars*, xiii; Noam J. Zohar, 'Can a War Be Morally Optional,' *Journal of Political Philosophy* 4 (1996): 229-41, 236–39; Kieran Oberman, 'The Myth of the Optional War: Why States Are Required to Wage the Wars They Are Permitted to Wage,' *Philosophy & Public Affairs* 43 (2015): 255-86, 258-9; Gerhard Øverland, 'High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?' in Paolo Tripodi and Jessica Wolfendale (eds), *New Wars and New Soldiers: Ethical Challenges in the Modern Military* (Ashgate, 2011), 78.

[29] For discussion, see Frowe, *The Ethics of War and Peace,* 92-94.

defence to sub-state groups.[30] As Helen Frowe has pointed out, if sub-state groups are permitted to defend themselves against genocide, it must also be permissible for others to assist in their defence.[31]

In addition, since the early 2000s, traditional appeals to countries' 'right to intervene' have gradually given way to the notion of a 'responsibility to protect.'[32] This UN doctrine stipulates that states must protect their own citizens' human rights, and that failure to discharge this responsibility authorises the international community to take measures - military ones, if necessary - to ensure the protection of these rights. It explicitly states that, if a state 'manifestly fails' to fulfil its responsibility to protect its citizens' human rights, the international community may take 'stronger measures, including the collective use of force' to ensure the protection of those rights.[33]

I assume that this basic idea is correct. In particular, I assume that the moral context in which AHI occur is distinctly rectificatory, in that they seek to mitigate, or prevent, wrongful harm. Thus, I assume that the principles of just conduct in AHI are essentially, as Simon Caney puts it, 'principles that should apply when some people have violated (or are about to violate) the entitlements of others,' which are 'required only because people fail to live up to the standards specified by principles of justice' in the first place.[34] I further assume that 'the reasons that favor humanitarian intervention actually rise to the level of obligation far more often than we intuitively recognize,' as McMahan observes.[35]

As a general matter, I will set aside questions regarding the *jus ad bellum*. I consequently take no stance on questions such as who ought to carry out AHI. As Michael Walzer noted, AHI 'comes much closer than any other kind of intervention to what we commonly regard, in domestic society, as law enforcement and police work.'[36] I am therefore sympathetic to the view that, ultimately, the international community should seek to create an independent force whose sole purpose it is to conduct AHI. Like the police, bodyguards or firefighters, combatants of this special force would have a professional duty to protect and rescue

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[30] See the Convention on the Prevention and Punishment of the Crime of Genocide.
[31] Frowe, *The Ethics of War and Peace*, 94.
[32] This was, for instance, invoked when the UN Security Council approved military intervention in Libya in 2011. See Don E. Scheid (ed), *Introduction to Armed Humanitarian Intervention* (CUP, 2014).
[33] So long as this is authorised by the UN Security Council.
[34] Simon Caney, *Justice Beyond Borders*, 190.
[35] McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' 62.
[36] Walzer, *Just and Unjust Wars*, 106.

others.[37] This, however, is unlikely to happen in the near future, and nothing in my argument hangs on whether the just intervening party is a state, a group of allied states, or a completely independent international force.

Unlike most debates about the ethics of AHI, this thesis is *not* concerned with questions of whether, and in what circumstances, it may be permissible, or obligatory, to carry out an AHI. Nor is it concerned with the contested legality of military interventions. I will assume that there are cases in which AHI is justified as a matter of principle, but do not seek to specify what these are. Instead, my concern is with *how* justified humanitarian interventions ought to be conducted and brought to a close, and to what extent corresponding moral principles ought to be reflected in the law.

To a limited degree, then, this project shares a concern which has also been broached by J. Bryan Hehir and Henry Shue. Both have suggested that the normative grounds for intervention may be quite broad, whereas the ways in which interventions are authorised and conducted ought to be more carefully restricted.[38] This thesis makes a similar assumption. Neither Hehir nor Shue, however, satisfactorily address the distributive question of how risks and burdens ought to be shared *in bello* or *post bellum*.[39]

The Jus in Bello *and Risk Imposition as a Distributive Matter*

The just war literature is abundant in well-developed accounts of the *jus in bello*. The fact that it is only exceedingly rarely addressed in the specific context of humanitarian intervention is therefore surprising. The few accounts that have been offered by Simon Caney, James Pattison, and Cécile Fabre, for instance, are comparatively recent and exceptions in their

[37] For an attractive proposal, see McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 70.

[38] They offer differing interpretations of how the grounds may be 'broadened' but the means 'tightened.' See Henry Shue, *Fighting Hurt*, 153, and Hehir, 'Expanding Military Intervention.'

[39] In fact, Shue is sceptical as to whether the just distribution of harm can, and should, be regulated during armed conflict at all. Chapter 7 discusses this question in detail.

treatment of the matter. They are also limited in their respective scopes.[40]

Despite widespread agreement that military intervention can be justified, there is no consensus on what the rules guiding just conduct in humanitarian wars ought to be, and whether they ought to be more restrictive, less restrictive, or no different from the rules governing wars of national self-defence. Arguments have been advanced for each of these possibilities.[41] Yet, the question of who ought to be permitted to harm whom on which grounds during an armed intervention into a foreign state, without that state's government's permission, and at considerable risk to both interveners and the local civilian population, is of indisputable moral and legal significance.

Many theorists and practitioners believe that intervening states are almost always permitted, and might in certain cases be morally required, to prioritise the security of their own combatants over the protection of civilians of the target party.[42] Indeed, in real-world practice, interventions are conducted as classic military campaigns, exercising overwhelming force to secure victory at the lowest possible cost to one's own forces. According to retired US Army colonel Tony Pfaff, for instance, when commanders and their soldiers determine how much force to use, they seek to establish how much force it is legally permissible to use - not how little it would be possible to use while still accomplishing their military objective.[43] The priority is to do what is possible to preserve soldiers' lives without violating the law of war. This typically means that what is ultimately defined as 'necessary' force is the amount of force which it is permissible to use to minimise risks to own combatants.

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[40] Caney assumes that humanitarian intervention should be guided by existing principles of the *jus in bello,* i.e., proportionality and non-combatant immunity (*Justice Beyond Borders*, 265). But he neither considers whether these may be interpreted differently when the aim of the war is distinctly humanitarian rather than that of national self-defence nor whether there are questions of the *jus in bello* that arise in AHI which cannot be resolved with existing principles. Pattison discusses the *jus in bello* of humanitarian wars in one chapter of his book, but with the explicit aim of determining interveners' legitimacy, and identifying who should intervene, which is not the focus of this thesis (see his *Humanitarian Intervention and the Responsibility to Protect*, 100); see also Pattison, 'Bombing the Beneficiaries' in Scheid (ed), *The Ethics of Armed Humanitarian Intervention*, 113-129. Fabre holds that the ethics of killing enemy combatants in wars of humanitarian intervention do not differ from the ethics of killing in conventional wars (*Cosmopolitan War*, 194).

[41] For instance, Pattison and Cronin argue that it ought to be more restrictive (see Pattison's *Humanitarian Intervention and the Responsibility to Intervene?*, 101-112, and Cronin, 'Killing Civilians in Order to Save Them,' 9); McMahan implies that interventions may be less restrictive, in suggesting that states may be morally required to prioritise the security of their own combatants over the protection of enemy civilians, and that intervening combatants themselves might be required to prioritise the protection of their own lives ('Humanitarian Intervention, Consent, Proportionality, 343); and Fabre, as noted earlier, suggests that there is no difference (*Cosmopolitan War*, 194).

[42] For instance, McMahan, 'The Just Distribution of Harm,' 343.

[43] Tony Pfaff, *Peacekeeping and the Just War Tradition,* Strategic Studies Institute, U.S. Army War College (2000), 2-5.

Some critics have argued that, in wars fought for distinctly humanitarian purposes, interveners ought to give absolute priority to the protection of the civilian population.[44] Since the principal aim of, and the justification for, a war of humanitarian intervention is the protection of civilians from atrocity crimes, the thought is, interveners must act in accordance with the idea that their humanitarian operation's main purpose is to protect individuals from persecution and death, rather than to defeat an enemy.[45] Both theorists and practitioners have therefore argued that AHI should be subject to more restrictive principles of the *jus in bello* than conventional wars of national self-defence.[46]

Cécile Fabre, by contrast, has suggested that the morality of killing enemy combatants in wars of humanitarian intervention does not differ from the morality of killing in conventional wars. By applying the principles of proportionality and minimal force, for example, she argues that we can justify the intervening forces' right to try to ensure a decisive military victory, and to topple the target party's regime.[47] While I agree with Fabre that morality itself remains unchanged in different contexts, insofar as it is comprehensive, this doesn't necessarily mean that debates about 'conventional' just wars of self-defence against unjust aggressions provide all requisite answers to questions about justice in AHI.

One of the questions this thesis addresses is therefore whether just combatants are required to shoulder greater risks of being harmed to protect innocent civilians in a just AHI than they would be in a just war of national self-defence. If commentators, practitioners, and theorists like Cronin, Pfaff, and Pattison are right that there is some intrinsic moral difference between *defeating* an unjust enemy on one hand and *protecting* the enemy's victims on the other, what individuals owe to each other may be contingent on what type of war they are fighting. However, for all of the mainstream's concerns with determining who is permitted to kill whom on what grounds, it has neglected to investigate what combatants owe to those whom they are not permitted to kill.

Scholars have paid little direct attention to the question of what intervening combatants

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[44] For example, George R. Lucas, 'From *Jus ad bellum* to *Jus ad pacem*: Rethinking Just War Criteria for the Use of Military Force for Humanitarian Ends,' in Don E. Scheid and Deen K. Chatterjee, *Ethics and Foreign Intervention* (CUP, 2004).

[45] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect,' 63; Cronin, *Bugsplat*.

[46] For discussion, see Pattison, *Humanitarian Intervention and the Responsibility to Protect*, 101-112; Pfaff, 'Peacekeeping and the Just War Tradition.'

[47] Fabre, *Cosmopolitan War*, 194.

owe to those whom the intervention is meant to protect, and to others who are morally immune to being harmed.[48] Whilst there are plenty of sophisticated discussions about what renders persons - whether they are combatants or non-combatants - liable to be harmed, the question of what is owed to non-liable individuals is rarely addressed directly. However, it is particularly acute in AHI. While most people agree that those morally responsible for bringing about unjust threats of harm should bear the costs of preventing or mitigating these harms, many risks of harm in AHI fall on non-liable people; including just combatants, intended beneficiaries of the intervention, and neutral bystanders. For the most part, the thesis is therefore concerned with questions that result when risks of harm must be distributed between non-liable individuals, who are morally immune to attack.

Just like liability, however, the concept of immunity is anything but straightforward. On one hand, many just war theorists assume that immunity from harm simply is the conceptual flip-side of liability to harm - its straightforward, philosophically less enthralling concomitant. 'Liability and immunity,' as McMahan put it, 'are different sides of the same coin. To be morally immune to attack is just to be not morally liable to attack.'[49] However, as Gerhard Øverland observed, immunity does not appear to be a black-and-white matter, but rather 'something that comes in degrees.'[50] And McMahan must assume something similar, as, elsewhere, much of his discussion on distributing harms focuses on how civilians' immunity to harm can be 'diminished.'[51] But if individuals' claim on protection comes in degrees, there must be a way of (a) determining the strength of an individual's claim to protection, and (b) weighing different individuals' claims to protection against one another. This, presumably, is what an account of the just distribution of risks of harm between non-liable individuals must rely on. However, contemporary just war theory has not yet provided adequate tools for answering these questions. The existing literature is therefore markedly inconclusive with regard to how risks of harm ought to be distributed between non-liable individuals *in bello*. As McMahan has illustrated, the issue of how harms ought to be distributed *in bello*, and what interveners owe to non-liable individuals, is neither a matter of necessity nor of

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[48] For general accounts of the importance of protecting civilians, see for instance, Seth Lazar, *Sparing Civilians* (OUP, 2015); Adil Haque, *Law and Morality at War* (OUP, 2017).

[49] McMahan, 'Liability and Collective Identity: A Response to Walzer,' *Philosophia* 34 (2006): 13-17, 15.

[50] Gerhard Øverland, 'High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?,' in Paolo Tripodi and Jessica Wolfendale (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Ashgate, 2011), 69-86, 72.

[51] McMahan, 'The Just Distribution of Harm,' 373.

proportionality.[52]

Nor are the current laws of war able to resolve this question. The conduct of armed conflict is regulated by international humanitarian law (IHL), consisting in customary practices, multilateral treaties, and normative principles, which restrict combatants' use of force in certain ways. The primary goal of IHL is to protect those who are not directly participating in hostilities, that is, civilians, and combatants who have been rendered *hors de combat*. IHL's most important principles are that of 'distinction' or 'discrimination,' which requires combatants only to target other combatants and which prohibits the targeting of civilians; and the principle of 'necessity,' which restricts legitimate targets to those that make an effective contribution to the military goal. So long as combatants abide by these principles, they are generally not held legally accountable for unintentional civilian casualties and damage caused as a side effect of military acts. 'Collateral harms' therefore do not constitute a violation of IHL, so long as they are not disproportionate to the military gain of the operation. Essentially, this means that militaries may cause significant numbers of civilian casualties without fearing legal consequences. For AHI, this means that intervening parties are legally permitted to fight these wars aimed at protecting vulnerable populations from being persecuted or killed in the same way as wars to defeat an enemy.

Since existing principles fail to adequately capture the morality of distributing harms in armed conflict, McMahan has suggested that we are in need of a principle 'entirely new in the theory of the just war' to govern the just distribution of harm.[53] Rather than conjuring one such principle, this thesis suggests that we can shed light on the issue by looking to debates about distributive and rectificatory justice, devising a systematic account of the morality of harming in other-defence in relation to general duties to rescue, and integrating this within a broader theory of global rectificatory justice.

That said, the appropriate distribution of risks of harm between just interveners and other non-liable individuals in any given case depends on a number of considerations which I do not discuss in detail. These include how strong the duty to intervene is, who conducts the intervention, and on what grounds - questions which are themselves contingent on a number of further considerations. The scope and content of interveners' duties in particular are contingent on numerous variables, including interveners' moral connection to victims; the

[52] See McMahan's discussion in 'The Just Distribution of Harm,' 378.
[53] McMahan, 'The Just Distribution of Harm,' 378-9.

severity of the harm victims are likely to suffer in the case of non-intervention, the number of potential victims in the case of non-intervention; the probability of a defensive war by the target party, the risk of escalation of violence; financial and human costs for interveners; chances of post-bellum peace and political stability; and the probability and severity of collateral harms to both intended beneficiaries and civilian bystanders.[54] While interveners' particular duties and permissions will therefore vary on a case-by-case basis, my concern will be with identifying, examining, and justifying the principles that should play a role in determining what these duties and permissions are to begin with.

The Jus Post Bellum

The literature on humanitarian intervention increasingly acknowledges that, if political institutions are to effectively and sustainably fulfil their 'responsibility to protect,' they must also fulfil their 'responsibility to rebuild.'[55] Yet, it is far from clear which principles we should use to determine how costs of reconstruction ought to be distributed in the aftermath of military intervention. For example, humanitarian organisations continue to call for interventions in the name of the 'responsibility to protect' without presenting a coherent vision of how a just and peaceful post-conflict state of affairs might be achieved, or what type of political order a military intervention might entail.[56] It is no surprise, then, that critics frequently attack what they see as the quixotic assumption that 'undertaking broadly defined tasks in unstable political settings' can go anything but wrong.[57]

Whilst the literature on the *jus in bello* is virtually inexhaustible, the *jus post bellum* has only recently been (re)discovered by just war theorists as an aspect of interest, whose very relevance to the discipline is somewhat contested.[58] Questions of when it is just to end or withdraw from a war, and what constitutes a just settlement of a war, are still comparatively rarely discussed in the mainstream just war literature.[59] Most theories of the *jus post bellum*

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[54] McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 62.

[55] Gregory H. Fox, *Humanitarian Occupation* (CUP, 2008).

[56] Weissman, '"Not In Our Name",' 10.

[57] See Hehir, 'Expanding Military Intervention,' 49.

[58] See Seth Lazar, 'Scepticism About Jus Post Bellum,' in Larry May and Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP, 2012).

[59] Important exceptions include Cécile Fabre, *Cosmopolitan Peace* (OUP, 2016); Gary J. Bass, 'Jus Post Bellum,' *Philosophy & Public Affairs* 32 (2004): 384-412; Larry May and Andrew Forceheimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP, 2002); Darrel Moellendorf, 'Jus Ex Bello,' *Journal of Political Philosophy* 16 (2015): 123-36; Brian Orend, 'Jus post Bellum,' *Journal of Social Philosophy* 21 (2000): 117-37; Brian Orend, *The Morality of War* (Broadview Press, 2006).

demand some form of the following: negotiations to establish a stable peace, the restoration of the defeated party's political and territorial sovereignty, the reconstruction of its country, the payment of compensation for wrongs committed *in bello*, and holding perpetrators of war crimes to account for their actions.[60]

While debates about reckoning with the wrongs of war typically focus on what the unjust side owes to the just side, and how to bring war criminals to justice, little is usually said about what, if any, rectificatory duties arise from the *just* side's actions after a war, and what, if anything, is owed by those who were *not* involved in hostilities. A significant proportion of the literature on post-bellum duties of rectification is concerned with the compensation of wrongfully inflicted harms by unjust combatants, and has consequently neglected important questions that arise as a result of harms that were *justifiably* inflicted and harms that resulted from wrongful *omissions*, that is, violations of positive duties to aid. However, harms caused by foreseen and unintended side effects of justified actions constitute a large proportion of post-bellum suffering, for instance as a result of widespread destruction of homes, businesses, infrastructure, as well as physical harms and severe psychological trauma.[61] Yet, despite some sophisticated discussion about the permissibility of self-defence against justified attackers, remarkably little has been written on what, if anything, is owed to victims of justified harmful actions, such as operations carried out by just interveners with foreseeable though unintended harmful consequences for innocent civilians. Hence, the latter part of the thesis seeks to provide a systematic answer to why compensation can be owed to innocent victims of justified, collateral harms.

This, however, is not uncontroversial. Philosophers and practitioners alike have criticised the assumption that the normative principles for a just post-intervention state of affairs must be consistent with the principles that govern the moral relationships between belligerents during the intervention. Seth Lazar, for instance, has criticised this way of

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[60] Larry May, *After War Ends - A Philosophical Perspective* (CUP, 2012); Mark Evans, 'Moral Responsibilities and the Conflicting Demands of Jus Post Bellum,' *Ethics & International Affairs* 23 (2009): 147-164; 'Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of 'Just Occupation,' *Millenium - Journal of International Studies* 36 (2008): 533-554; C.A.J. Coady, *Morality and Political Violence* (CUP, 2008); David Rodin, 'Two Emerging Issues of *Jus Post Bellum*: War Termination and the Liability of Soldiers for Crimes of Aggression,' in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum - Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, 2008); Brian Orend, *The Morality of War*, his 'Jus Post Bellum: Just War Theory and the Principles of Just Peace,' *International Studies Perspectives* 7 (2006): 309–320, his 'Justice after War,' *Ethics & International Affairs* 16 (2002): 43–56, and his 'Jus Post Bellum,' *Journal of Social Philosophy* 31 (2000): 117–137.

[61] See Cronin, *Bugsplat;* Paul H. Wise, 'The Epidemiologic Challenge to the Conduct of Just War: Confronting Indirect Civilian Casualties of War,' *Daedalus*, 146 (2017): 139-154.

theorising the *jus post bellum* as 'relentlessly backward-looking,' insofar as its norms are derived from the principles of the *jus ad bellum* and *jus in bello*.[62] According to this challenge, all an account of rectificatory post-intervention justice can do is to 'revisit the wrongs of war' by imposing duties of punishment or compensation. What it cannot do is effectively remedy the harm suffered. Insofar as a theory of the *jus post bellum* does little more than reflect whether the principles of the *jus ad bellum* and *jus in bello* were breached, Lazar argues, the real-world usefulness of theories of post-war justice is fatally limited.[63]

What is more, 'victor's justice' has historically ruled out true justice entirely. Given the asymmetry of power between interveners and the target party, one might worry, this concern is particularly acute in the context of military responses to humanitarian crises. One type of view to which the thesis responds, then, is one according to which a backward-looking rectificatory project is ultimately doomed. The view I defend is that backward-looking, corrective justice is not the whole story, and that just interveners themselves may incur rectificatory obligations. The account I offer is under no illusion that, in many circumstances, questions of rectification might have to wait until conditions are more conducive to a stable peace. However, post-bellum duties also include the facilitating of conditions in which rectificatory obligations can be discharged. Non-ideal circumstances and feasibility constraints do not imply that questions of justice become any less significant.

Indeed, there are illuminating parallels between some *jus post bellum* accounts and the transitional justice literature in their respective problematisation of transitions from war to peace, non-democracy to democracy, and large-scale human rights abuses to criminal prosecutions, reparations, and institutional reforms. Questions of justice rear their heads in both contexts. What unites post-intervention rectificatory justice and transitional justice issues is the nature, and the magnitude, of stakes. In both cases, the danger is that of a return to a severely unjust *status quo ante*.

Rather than demand that 'justice be done though the heavens might fall,' my account of the *jus post interventionem* recasts post-intervention duties within a broader theory of global

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[62] For a compelling argument in favour of deriving the *jus post bellum* from the *jura ad bellum* and *in bello*, see Fabre's 'War's Aftermath and the Ethics of War,' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (OUP, 2018); for a general defence of the rectificatory project, see for instance Daniel Butt, 'Restitution Post Bellum: Property, Inheritance, and Corrective Justice,' *Journal of Applied Philosophy* 36 (2019): 357-365.

[63] Seth Lazar, 'Scepticism About Jus Post Bellum.'

justice. The account I defend in the latter part of the thesis throws new light on the well-trodden 'peace versus justice' debate, which is typically conceived of as a conflict between forward-looking and backward-looking conceptions of justice, by moving beyond typical victim-centred and perpetrator-centred accounts of corrective justice. Instead, the final chapter shines a light on a class of duties that are conventionally ignored: compensatory duties that arise from all-things-considered permissible acts justified as 'lesser evils.' The elements of post-intervention justice I sketch thus seek to dispel doubts about the *jus post bellum* as an integral part of a theory of just military intervention.

In sum, while the existing just war literature has overlooked some fundamental questions posed by wars of humanitarian intervention, debates about the ethics of humanitarian intervention have disregarded the *jus in bello* and *jus post bellum*. This thesis helps to close this gap by pulling together various strands of analysis from discussions which have predominantly been carried on in disparate bodies of scholarship in moral, political, and legal philosophy. Following Terry Nardin, this thesis seeks to 'relocate discussion of humanitarian intervention, moving it out of the familiar discourse of sovereignty and self-defence and into the discourse of rectifying wrongs and protecting the innocent.'[64] By revealing important normative and conceptual connections - between duties to rescue, harming in other-defence, and global justice - across disciplinary boundaries, this thesis illuminates several less-frequently discussed areas of the moral landscape of military intervention. It thus presents a philosophical enquiry into the practice of AHI that goes beyond both paradigmatic just war theory and existing laws of armed conflict.

3. Methodology[65]

This thesis operates within a broadly revisionist approach to analysing the morality of armed conflict. Analytic just war theory has become increasingly sensitive to the rights and responsibilities of individual moral agents. This has generated the 'revisionist' strand of just war theory, which has transformed what it means for individuals to conduct themselves justly in armed conflicts. While orthodox approaches and the current laws of armed conflict assume that the permissibility of harming is largely determined by individuals' status as

[64] Nardin, 'The Moral Basis of Humanitarian Intervention,' 86

[65] Part of this section is based on a more detailed discussion in Linda Eggert, 'Unjust Combatants, Uncertainty and *Jus Post Bellum*: Remedial Responsibility and Reparative Obligations in Revisionist Just War Theory,' MPhil Thesis (University of Oxford, 2016).

combatants or non-combatants, revisionist theory rejects this status- and group membership-based framework in favour of one based on individual rights and responsibilities.[66] On these views, individuals forfeit their right not to be harmed only if they have a certain degree and type of responsibility for standing in a certain type of moral or causal relationship to an unjust threat of harm.

Dismissing the traditional state-centric framework of the morality of war in favour of an emphasis on individuals' moral status as the principal determinant of the permissibility of employing defensive force, revisionist theory makes a point of whether individuals fight for a just or an unjust cause, and foregrounds the extent to which people are responsible for their actions. This, incidentally, is why just AHI provide a particularly compelling case for rejecting the orthodox principles of the moral equality of combatants and unqualified civilian immunity. Accordingly, I assume that, if an intervention is justified, combatants of the intervening party are *pro tanto* morally immune to attack, and that combatants of the target party may not use force against them.[67] One key assumption, accordingly, is that intervening combatants are not liable to be killed as they retain their right against being attacked by virtue of fighting for a just cause.[68]

Revisionists are often 'reductivist' about war: they believe that war does not constitute a qualitatively different endeavour from other instances of human violence. Reductivists begin their analyses by examining principles derived from 'ordinary' instances of interpersonal violence, and scale them up to fit the paradigm of war, which is treated as ordinary violence on a massive scale.[69] Many revisionists are thus reductivist in that they believe that the justifications for killing in war must be based on justifications for killing outside of war. In an important sense, many revisionists are therefore also 'individualists,' since their reasoning begins by analysing violence between individuals in ordinary life, rather than between nations,

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[66] For a seminal reiteration of the traditional view, see Michael Walzer's *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, 1977).

[67] For an application of revisionist theory to AHI, see Alex Leveringhaus, 'The Moral Status of Combatants During Military Humanitarian Intervention,' *Utilitas* 24 (2012): 237-258; see also Pattison, *Humanitarian Intervention and the Responsibility to Protect,* 103; Caney, *Justice Beyond Borders*, 194. Walzer himself makes a similar observation (*Just and Unjust Wars*, 59).

[68] See McMahan, *Killing in War* (OUP, 2009) 7–15. This, of course, changes if they pose unjust threats during the war. An overall just war is likely to comprise unjust phases, for instance, if pro tanto just combatants engage in unjust missions; and an overall unjust war can comprise just phases and missions, for instance if overall unjust combatants kill permissibly. (Fabre, *Cosmopolitan War*, 71-82.)

[69] For example, Rodin, *War and Self-Defense;* McMahan, *Killing in War;* Fabre, *Cosmopolitan War* and her 'Guns, Food, and Liability to Attack in War,' *Ethics* 120 (2009): 36-63; Frowe, *Defensive Killing*.

states, or other forms of political communities.[70] Many contemporary theories about the permissibility of harming *in bello* and accountability *post bellum* accordingly orient themselves in relation to *individuals'* rights and responsibilities. The main methodological premises of this thesis fall within this approach.

Traditional theorists, by contrast, are often 'exceptionalists.' They begin with the premise that war constitutes a *sui generis* area of human activity, and derive principles of individual action from this assumption. The current law of armed conflict is premised on this same view. Traditionalists assume that there are some properties pertaining to the ethics of killing that are unique to war.[71] This is why Michael Walzer repudiates Jeff McMahan's reductivist method, rejecting it as a 'precise account of what individual responsibility in war would be like if war were a peacetime activity.'[72]

Like many others, I am sceptical of the view that wars - or any spheres of human activity, for that matter - are morally 'exceptional.' To this extent, the thesis relies on broadly individualist-reductivist assumptions. The thesis presupposes that moral principles are comprehensive, and denies that war, including humanitarian intervention, represents a major exception to ordinary morality. While this does nothing to deny the real-world significance of legal and political challenges concerning coercive external interference in another state to forcefully prevent atrocity crimes, distinctly political features of the justification and administration of humanitarian intervention fall outside the scope of this thesis.

In this light, it is worth acknowledging a few of the considerations which go beyond the scope of the following chapters, but which a more comprehensive account of just AHI might seek to accommodate. Broadly speaking, these include much of what happens outside of the narrowly defined temporal phases (*in, post*) or aspects (*ad, ex*) of an armed intervention. For example, a more comprehensive theory of just AHI might consider relevant conditions *ante bellum* in which political institutions are designed and sustained, and in which individuals' rights are unprotected, and indeed violated to such a degree as to necessitate intervention. A

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[70] See Rodin, *War and Self-Defense*. For the opposite view, see Joseph Margolis 'War and Ideology,' in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds), *Philosophy, Morality and International Affairs* (OUP, 1974), 265.

[71] Although revisionist methodology typically pairs reductivism and individualism, and orthodox methodology typically pairs exceptionalism with collectivism, there is no necessary conceptual interdependence between these contrasting approaches to theorising the ethics of war and their differing methodologies. See Seth Lazar, 'Method and Morality in War,' in Seth Lazar & Helen Frowe (eds), *The Oxford Handbook of Ethics of War*. See also Seth Lazar and Laura Valentini, 'Proxy Battles in the Ethics of War,' in David Sobel, Peter Vallentyne, and Steven Wall (eds), *Oxford Studies in Political Philosophy*, Volume 3 (OUP, 2017).

[72] Walzer, 'Response to McMahan's Paper,' *Philosophia*, 34 (2006), 43.

more comprehensive theory might moreover address questions about the site of justice: it might specify the circumstances in which justice is primarily a matter of individual behaviour and those in which it is primarily a matter of institutional design. For example, political institutions and humanitarian agencies play a decisive role before and after military interventions, whereas legal rules for individual combatants' conduct are critical during engagement. In short, a theory more comprehensive than the thesis is able to offer might address the fact that it is within certain institutional frameworks that people become victims of atrocity crimes, that military interventions are administered and justified, and that contents of peace-settlements are enforced. Insofar as these considerations are neither 'exceptionalist' nor necessarily 'collectivist,' this thesis' broadly revisionist commitments do nothing to undermine their significance.[73]

A few more points on the following chapters' methodological and substantive commitments to individualism. I broadly assume that justifications for harming in other-defence in AHI are ultimately grounded in cosmopolitan egalitarian liberal principles of rectificatory and distributive justice.[74] That is, I assume that a convincing account of the permissibility of harming in other-defence *in bello* should ultimately be able to be integrated within a broader liberal egalitarian theory of global justice, which presumes that the *jura in bello* and *post bellum* are determined with reference to the question of which universal principles of justice there are.[75] In this context, I assume that individuals' moral relationships to others are determined by their moral status qua individuals, rather than their affiliation, association, or integration within a particular type of collective, or, indeed, their geographical location.[76]

While my account is grounded in basic cosmopolitan individualism, it does not regard individualism as exhaustive. The chapters ahead presume that revisionist theory is right to treat individuals as analytically sacrosanct - as rights-holders in need of protection, as targets

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[73] Although Lazar rightly suggests that it is possible to endorse reductivism without also endorsing individualism, I assume that there is nothing wrong with individualism insofar as it is compatible with the types of considerations I outlined. For broader discussion, see Noam J. Zohar, 'Collective War and Individualist Ethics,' *Political Theory,* 21 (1993): 606-622; Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War,' *Philosophy & Public Affairs* 33 (2005): 148-80.

[74] Caney, *Justice Beyond Borders*, 232.

[75] See Caney, *Justice Beyond Borders,* 231.

[76] For discussion and defences, see for instance, David Miller, 'Cosmopolitanism: A Critique,' *Critical Review of International Social and Political Philosophy* 5 (2002): 80-85; Carl Knight, 'In Defence of Cosmopolitanism,' *Theoria* 58 (2011): 19-34; Cécile Fabre, *Cosmopolitan War*; Simon Caney, *Justice Beyond Borders*; Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State,' *Philosophy & Public Affairs* 35 (2007): 3-39.

liable to attack based on their responsibility as individual moral agents, and as agents who can be held accountable for violating others' rights. However, my discussion also suggests that mainstream revisionist individualism is, at once, too broad and too narrow. It is too broad insofar as it fails to distinguish between different categories of innocent (that is, non-liable) individuals. All it tells us is that morally innocent persons retain their rights not to be harmed; but, as Chapters 4-6 illustrate, just interveners, beneficiaries, and bystanders' claims to protection of their rights may differ, despite the fact that they are all equally innocent. In this sense, conventional reductivist individualism is not sufficiently fine-grained to give us answers.

On the other hand, it is too narrow, insofar as it provides a blinkered view of the tools at our disposal to determine who owes what to whom in responding to humanitarian crises. For all its focus on the ethics of *self*-defence, it has neglected to provide adequate analytical access to the ethics of *other*-defence. By means of remedy, my account adopts a distinctly distributive approach to the justification of preventive harming. By framing the question of permissible defensive harming in military rescue operations as a matter of the just *distribution* of risks of harm between non-liable individuals, it looks beyond standard debates about liability, necessity, and proportionality. Since the literature abounds with differing interpretations and theoretical disagreements, the project of specifying hitherto neglected aspects of the conditions in which it is permissible to harm some people to protect others is as philosophically ambitious as it is morally important.

One final note on methodology. As will no doubt transpire, I assume that the rightness or wrongness of people's actions is determined not solely, and often not even primarily, by the goodness or badness of outcomes they bring about.[77] There are critical constraints on how agents bring about good consequences, even when what's at stake is the protection of human rights and the prevention of atrocity crimes. A large part of the discussion is therefore concerned with the behaviour of deontological constraints in inherently non-ideal circumstances. This brings to light critical connections between theoretical issues in non-consequentialist ethics and real-world duties to rescue, specifically with regard to the ethics of distributing harms between non-liable individuals in AHI.

[77] For discussion, see Frances Kamm, *Intricate Ethics* (OUP, 2007).

4. The Road Ahead

The thesis comprises seven themed chapters. Each addresses a distinct dimension of the demands of justice during and after AHI, and each seeks to make a specific contribution to the philosophical literature pertaining to some of the more obscure, less prominent questions of justice that arise in this context. While all chapters are, to this extent, connected, each is self-standing and can be read on its own.

2. *The Duty of Other-Defence*

This chapter sets out an account of the morality of other-defence, by examining whether the duty to rescue others from unjust threats of harm may take the form of a duty to use lethal force in their defence. It suggests that our ability to answer this question has been limited by the assumption that the morality of defensive killing amounts to no more than principles of self-defence. The chapter's main claim is that permissions to harm in other-defence are grounded in duties to rescue victims from wrongful threats of harm. Such a self-standing account of other-defence offers a more complete picture of justifications for harming in humanitarian wars than alternative, self-defence-based views, because it can explain both why other-defence is generally obligatory, whereas self-defence is typically optional, and how to think about cases in which justifications for defensive harming do not amount to obligations.

3. *Necessity and Other-Defence*

This chapter examines how victims' and third parties' permissions to harm in victims' defence interact in light of the requirement to minimise harm. It is often thought that, if one could repel an attacker in a number of ways, one must choose the least harmful course of action, because it is impermissible to inflict more harm than necessary. This chapter asks what this principle implies for cases in which it is unnecessary for a victim to inflict a particular harm because a third party could avert the threat in a less harmful manner. It suggests that the necessity requirement may extend across defensive agents, and that there may consequently be cases in which victims are prohibited from harming in self-defence, and third-party rescuers are required to intervene in victims' defence, if rescuers can avert the threat to victims in a less harmful way than victims themselves could. This is a feature of the ethics of defensive harming which has largely remained obscure in mainstream discussions.

4. *Harming Beneficiaries*

This chapter addresses a central aspect of the just distribution of risks of harm during wars fought for distinctly humanitarian purposes: how intervening combatants' safety should be weighed against the protection of expected civilian beneficiaries of the intervention. I challenge an argument that has been advanced to justify imposing risks of collateral harm on prospective beneficiaries of a rescue operation. This argument holds that non-liable individuals' immunity to being harmed as a side effect of just AHI is diminished by their prospect of benefiting from the intervention. Against this, I argue that mere beneficiary status should not permit exposing beneficiaries to greater risks of being harmed, because standing to benefit is not morally salient when the benefit consists in the mitigation or prevention of wrongful harms. Beneficiary status should therefore play a significantly less decisive role than others have suggested in justifying the exposure of threatened civilians to risks of collateral harm.

5. *Self-Defence Against Just Interveners*

This chapter examines whether innocent civilians who are at threat of being harmed as an unintended side effect of a just AHI may use lethal defensive force against just interveners. The challenge at the heart of this chapter is to reconcile the fact that just interveners have a lesser-evil justification for posing threats of unintended lethal harms to civilians with the fact that these civilians are morally innocent, and have no duty to let themselves be killed. While existing accounts defend views according to which it is either permissible or impermissible for non-liable civilians to use lethal defensive force in such cases, I propose that the answer depends on highly variable constellations of several associated considerations of both distributive and rectificatory nature. Whether civilians are permitted to use lethal force against just interveners in self-defence will therefore vary depending on which combination of considerations applies in any given case.

6. *Supererogatory Interventions*

This chapter examines the *jus in bello* of AHI carried out in supererogatory fashion. It investigates whether, when an intervention is so costly that it is not required, but interveners take it upon themselves to carry it out nonetheless, this affects how risks of harm ought to be distributed during the intervention. I argue that the fact that a humanitarian intervention is

optional due to high costs does not imply that bearing certain risks of harm *in bello* is similarly optional. Even if positive duties to assist are less weighty than negative duties not to kill, the permissibility of letting others die by not intervening does not entail a permission to cause lethal harms as unintended side effects of a supererogatory intervention. This, I argue, shows that rescuers who go beyond the call of moral duty are subject to the same constraints as those acting within the bounds of what morality requires.

7. *Law and Morality in Armed Humanitarian Intervention*

This chapter concerns the legal regulation of just conduct, and the criminalisation of attacks against just intervening combatants, in AHI. It investigates whether the law ought to grant all combatants the same permission to use lethal force, even in cases in which one side is acting on the 'responsibility to protect' and the other is defending those who commit atrocity crimes. Finding mainstream justifications of the legal equality of combatants unconvincing, the chapter ultimately argues that it is international law's own essential indeterminacy with regard to the legality of AHI which precludes rendering principles of just conduct *in bello* sensitive to questions of the *jus ad bellum*. The perpetual tension between state sovereignty and the protection of individual human rights, this chapter thus shows, doesn't merely generate familiar controversies about the legality of military intervention. It also carries far-reaching implications for the very possibility of codifying principles of just conduct, and criminalising morally wrongful killing, in AHI.

8. *Compensating Beneficiaries*

The final chapter defends compensatory post-bellum duties for harms permissibly inflicted on innocent individuals on lesser-evil grounds. It argues that compensatory obligations are owed not merely to victims of wrongful rights violations but may, in certain cases, also be owed to victims of justified rights infringements. I defend such compensatory obligations against the objection that survivors of collateral harms may be significantly better off as a result of the intervention than they would have been in its absence. I also suggest that those morally and causally responsible for those threats of harm whose prevention generates lesser-evil justifications for harming innocent people bear the primary moral duty to compensate victims *post bellum*. In cases in which primary duty-bearers cannot be made to bear the costs of compensation, these may fall on the international community at large.

2. The Duty of Other-Defence

1. Introduction

Two common assumptions in moral and political philosophy are (1) that there is a duty to rescue others in need when this is urgent and sufficiently easy, and (2) that individuals are permitted to inflict defensive harm on those who pose unjust threats.[1] This chapter is concerned with the relationship between these core assumptions. It examines the conditions under which the duty to rescue others from unjust threats of harm can take the form of a duty to harm in their defence.

In war, combatants employ lethal force not merely, or at all, to defend their own lives, but primarily to defend others - their comrades, fellow nationals, or other individuals whose fundamental rights are at threat of being violated. Yet, many influential accounts of the ethics of killing in war focus on principles of self- rather than other-defence.[2] That self-defence and other-defence are often treated as morally analogous for analytical purposes is neither surprising nor necessarily troublesome, as most philosophers assume that there is no fundamental difference between the ethics of defending oneself and the ethics of defending others.[3]

However, this assumption has obscured a number of questions about the ethics of harming in other-defence. In particular, standard discussions of the ethics of self-defence don't generally specify the circumstances in which defensive harming might be morally

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[1] To name but one example, John Rawls describes this as a natural duty 'to help another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself.' (John Rawls, *A Theory of Justice* (OUP, 1972), 114.)

[2] Influential theories of self-defence include Judith Jarvis Thomson, 'Self-Defense,' *Philosophy & Public Affairs* 20 (1991): 283-310, and her 'Self-Defense and Rights,' 1976 Lindley Lecture at University of Kansas, reprinted in William Parent (ed), Judith Jarvis Thomson, *Rights, Restitution and Risk: Essays in Moral Theory* (HUP, 1986); Phillip Montague, 'Self-Defense and Choosing Between Lives,' *Philosophical Studies* 40 (1981): 207-219; Cheyney C. Ryan, 'Self-Defense, Pacifism, and the Possibility of Killing,' *Ethics* 93 (1983): 508-524; Jenny Teichman, *Pacifism and the Just War* (Blackwell, 1986), ch. 8; David Wasserman, 'Justifying Self-Defense,' *Philosophy and Public Affairs* 16 (1987): 356-378; Phillip Montague, 'The Morality of Self-Defense: A Reply to Wasserman,' *Philosophy & Public Affairs* 18 (1989): 81-89; B. J. Smart, 'Understanding and Justifying Self-Defense,' *International Journal of Moral and Social Studies* 231 (1989): 237-42.

[3] For example, Jeff McMahan almost always mentions other-defence in the same breath as self-defence; Helen Frowe, whilst explicitly distinguishing the two, argues that the principles of self-defence ground those of other defence, and Cécile Fabre argues in more detail that the permissibility of killing in other-defence follows from the permissibility of self-defence. See, for instance, Jeff McMahan, *Killing in War* (OUP, 2009), 14, 24, 107, 132; Helen Frowe, *Defensive Killing* (OUP, 2014) 1, 120; Cécile Fabre, *Cosmopolitan War* (OUP, 2012), 55.

required. For the abundance of sophisticated accounts explaining under what conditions it may be *permissible* to defend *oneself*, comparatively little has been said about the conditions in which it may be *obligatory* to defend *others*.[4]

At heart, this discussion is therefore concerned with what we owe to those at risk of being unjustly harmed. This chapter examines under which circumstances duties to rescue can take the form of duties to harm in other people's defence. More specifically, it examines under what conditions agents are required to use defensive force to aid victims of unjust threats, in light of the common view that we generally have duties to rescue only if rescuing doesn't require us to make sacrifices we have no duty to make, and if our act doesn't impose greater costs on others than they are required to bear.

Harming in other people's defence can be costly both for agents and for bystanders. For example, other-defensive acts may expose agents to risks of being harmed themselves, and it may require them to perform violent acts which they would prefer not to perform. What is more, negative duties not to harm are generally significantly more stringent than positive duties to aid and rescue. The idea of duties to harm in other-defence is therefore peculiar, insofar as these duties seem to require what would ordinarily be a transgression of one's negative duty not to harm.

Clarifying the nature of duties of other-defence is important because a self-standing account of the ethics of harmful other-defence as a special type of duty to rescue has far-reaching implications. Most relevantly, intervening combatants' use of force in armed humanitarian interventions is more adequately justified by their duty to rescue than by the principles of self-defence which ordinarily dominate debates about killing in armed conflict. But similar principles may also apply in cases of civil wars, revolutions, and national self-defence against unjust aggression, in which third parties could join a war in defence of victims of an unjust attack.

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[4] Exceptions include Cécile Fabre, 'Mandatory Rescue Killings,' *Journal of Political Philosophy* 15 (2007): 363-384; Fabre, 'Permissible Rescue Killings,' *Proceedings of the Aristotelian Society* 109 (2009): 149-164, 159–60; Christopher Finlay, 'Legitimacy and Non-State Political Violence,' *Journal of Political Philosophy* 18 (2010): 287–312, 290–95; Jeff McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' in N. Ann Davis, Richard Kershen, and Jeff McMahan (eds), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (OUP, 2010), 44–72, 49; McMahan, *The Ethics of Killing: Problems at the Margins of Life* (OUP, 2002), 415; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP, 2011), 295–96, Seth Lazar, 'Authorisation and the Morality of War,' *Australasian Journal of Philosophy* 94 (2016): 211–26; Helen Frowe, 'Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley,' *Philosophical Quarterly* 68 (2018): 460-480; Jonathan Parry, 'Defensive Harm, Consent, and Intervention,' *Philosophy & Public Affairs* 45 (2017): 356-396.

This chapter does three things. First, I will outline why we might conceive of other-defence as a duty. Second, I will address the objection that potential rescuers have an interest in not harming, and that harmful acts of other-defence therefore cannot amount to duties. Finally, I will describe a challenge potential interveners consequently face - that of justifying exposing innocent people to risks of harm during an intervention in light of the alternative of allowing them to be harmed by others.

The discussion proceeds as follows. Section 2 explains why we might conceive of other-defence as a duty to rescue. Sections 3 and 4 discuss the objection that harming should not be required because agents have an interest in not performing harmful acts: Section 3 examines if third-party rescuers are required to act on liability-based justifications for harming in victims' defence; and Section 4 examines if third-party rescuers are required to act on lesser-evil justifications for harming in victims' defence. Section 5 then outlines what I call the Intervener's Conundrum, which captures the distinct challenge of weighing the moral permissibility of harming innocent people as an unintended side effect of carrying out a military rescue operation against the moral permissibility of allowing innocent people to be wrongfully harmed when one chooses not to rescue them. Section 6 concludes.

Assumptions and Clarifications

I make two basic assumptions. First, I assume that certain threats to fundamental rights may generate a permission to use defensive force to protect these rights. Second, I assume that there is a general duty to rescue, but will neither defend its existence nor explain its moral grounds.[5] My aim is thus not to defend justifications for defensive harming or duties to rescue in general, but rather to examine how the amalgamation of the two may result in duties to harm in other-defence. More broadly, my concern here is not with the extent to which the permission to harm in someone else's defence rests on the victim's own permission to harm in self-defence. It is therefore mainly for the purpose of acclimatisation to questions of other-defence that I will sketch one way of mapping the relationship between victims' permission to harm in self-defence and third parties' duties to harm in victims' defence.

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[5] For discussion, see David Miller, 'The Nature and Limits of the Duty to Rescue,' *Journal of Moral Philosophy* 17 (2020): 320-341; Zofia Stemplowska, 'Doing More Than One's Fair Share,' *Critical Review of International Social and Political Philosophy* 19 (2016): 591-608; Garrett Cullity, *The Moral Demands of Affluence* (Clarendon Press, 2004).

2. Other-Defence as a Duty to Rescue

Generally speaking, Victim's permission to harm Aggressor in self-defence is generated by Aggressor's enforceable obligation not to harm Victim. By engaging in self-defence, Victim enforces Aggressor's negative duty not to harm him. The same is true for third parties acting in Victim's defence. By inflicting defensive harm on Aggressor to prevent Victim from being wrongfully harmed, Rescuer enforces Aggressor's duty not to harm Victim.

One way of mapping the relationship between Victim and Rescuer assumes that the right not to be harmed is a claim right, which confers both duties of non-interference and duties of assistance on others.[6] Thus, if Aggressor threatens to violate Victim's right not to be harmed, not only may Victim enforce Aggressor's obligation not to harm him by defending himself; but Rescuer simultaneously incurs a duty to assist Victim's defence against the unjust threat of harm. While Victim's permission to harm Aggressor in self-defence is thus tied to his permission to enforce Aggressor's obligation not to harm him, Rescuer acts under a duty of assistance in enforcing Aggressor's obligation not to harm Victim. This is one reason to think that Rescuer incurs a duty, rather than a mere permission, to harm in Victim's defence. If defending Victim against a wrongful attack is sufficiently easy for Rescuer, doing so is not merely a matter of discretion, but a matter of justice.

Insofar as other-defence may be required as a form of rescue, one main asymmetry between self-defence and other-defence is thus that self-defence is generally optional when it is not prohibited; whereas other-defence is generally required.[7] While victims are not generally required to defend their right not to be harmed, protecting others' rights is typically mandatory when the costs of doing so are not prohibitively high. All other things being equal, the fact that Victim's right is at threat of being violated therefore provides Rescuer with a positive reason for acting in Victim's defence.[8]

One main objection to the very idea of a duty to harm in other-defence is that there is

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[6] See Frowe, *The Ethics of War and Peace*, 26-29.

[7] For example, Kieran Oberman, 'The Myth of the Optional War: Why States Are Required to Wage the Wars They Are Permitted to Wage,' *Philosophy & Public Affairs* 43 (2015): 255-286, 278; Richard Norman, *Ethics, Killing, and War* (CUP, 1995), 131-2, and Frowe, *The Ethics of War and Peace*, 26-29. Although self-defence is generally optional, it may be required in cases in which it is other-regarding. For instance, one might have a duty to defend oneself so as to be able to fulfil duties to others. I set aside differences between individual duties to rescue and duties to join the military to fight wars here. Chapters 5 and 6 address related issues.

[8] Of course, positive moral reasons on their own do not yet justify harming. Third parties must, just like self-defensive agents, overcome a general presumption against harming, and meet the requisite necessity and proportionality requirements.

something intrinsically morally objectionable about harming another person. One view is therefore that harmful rescues are fundamentally different from ordinary acts of rescue in that agents have a basic interest in not having to kill others, even in order to rescue. For example, as Alec Walen and David Wasserman have argued, a potential rescuer 'has a substantial interest in not having to be an agent of death' - an interest strong enough to render harmful rescues supererogatory.[9] Call this the *agent-of-death objection* (ADO). According to the ADO, people have a fundamental moral interest in not having to seriously injure, or kill, others, which can therefore not be required.[10]

In this light, the following two sections aim to clarify to what extent other-defence differs from ordinary duties to rescue on account of the fact that it involves *harming* people. I will do so by examining to what extent agents may be morally required to act on standard justifications for defensive harming. The two main justifications are based on (1) individuals' liability to be harmed, which generally results from their forfeiture of rights, and on (2) a lesser-evil rationale, according to which harming innocent people is permissible because this is unavoidable in preventing a significantly greater harm to other innocent people.[11] Section 3 focuses on cases in which third-party rescuers have a liability-based justification; and Section 4 discusses cases in which rescuers have a lesser-evil justification for harming.

3. Liability-Based Justifications for Harming in Other-Defence

Consider the following set of cases.

> *Pond 1:*[12] You come across a child drowning in a pond. There is nobody else around. Wading into the pond to save the child would ruin your expensive outfit, and cause you to miss an important meeting, but is, you recognise, a cost you can reasonably be expected to bear in the circumstances.

> *Pond 2:* As you look out the window, you see Villain dragging a child towards the pond - no doubt with the intention of drowning her. There is nobody else around. You could grab the decorative rifle from the wall and lethally shoot Villain to save the child. However, you're a committed pacifist, and killing another person would go against your deepest moral commitments. This is the case

[9] Alec Walen and David Wasserman, 'Agents, Impartiality and the Priority of Claims Over Duties: Diagnosing Why Thomson Still Gets the Trolley Problem Wrong by Appeal to the "Mechanics of Claims",' *Journal of Moral Philosophy* 9 (2012): 545–71, 554.

[10] See Alec Walen, 'The Right to Cause Harm as an Alternative to Being Sacrificed for Others; An Exploration of Agent-Rights with a Special Focus on Intervening Agency,' *San Diego Law Review* 55 (2018): 381-417.

[11] I do not discuss agent-relative prerogatives here. For discussion, see Jonathan Quong, 'Agent-Relative Prerogatives to Do Harm,' *Criminal Law and Philosophy* 10 (2016): 815-829; Fabre, 'Permissible Rescue Killings.'

[12] Based on Peter Singer, 'Famine, Affluence, and Morality,' *Philosophy & Public Affairs* 1 (1972): 229-243.

> despite your assessment that Villain is liable to be killed, and thus wouldn't be wronged by being harmed in the child's defence.
>
> *Pond 3:* You come across a child who is trapped on a fountain at the centre of a pond. There is nobody else around. The pond is inhabited by hungry crocodiles. Wading in to save the child would likely result in the loss of several of your limbs - a cost high enough to render rescuing supererogatory.

Grant that you are required to rescue in *Pond 1*. Are you also required to shoot and kill Villain to save the child in *Pond 2*? Or does Pond 2 differ in any fundamental sense from *Pond 1*, and more closely resemble *Pond 3*, such that saving the child in *Pond 2* is supererogatory? If the ADO is correct, you are under no duty to kill to rescue the child in *Pond 2*, even though you would not wrong Villain by killing her. The fact that killing would be necessary and proportionate, and all-things-considered permissible is irrelevant on the ADO. Insofar as agents have an interest in not harming, or killing, they are, according to the ADO, not required to act on liability-based justifications for harming, to save innocent victims. In what follows, I will offer two reasons to resist the ADO in some cases, and one reason to support it in others.

3.1 Scepticism About the Agent-of-Death Objection

The first consideration is that liability to defensive harm effectively neutralises ordinary duties not to harm. While liability-based justifications to harm in self-defence generally remove ordinary constraints against harming, such that people are not wronged by suffering harms to which they are liable, duties to rescue provide positive reasons for acting. Insofar as agents have a pro-tanto duty to act on liability-based justifications, it may consequently be wrong *not* to harm a liable individual to prevent harm to an innocent victim.

While negative duties not to harm are generally more stringent than positive duties to rescue, targets' liability changes things. If a target has made herself liable to defensive harm, this removes the ordinary constraint against harming her. For example, in cases in which an attacker has forfeited her right not to be harmed, the ordinary constraint against harming her is removed. As a result, one's positive duty to prevent harm to an innocent victim outweighs what would otherwise be a more stringent negative duty not to harm. After all, ordinary duties

to abstain from unjustified harming are not duties to abstain from *all* harming.[13] Only absolute pacifists would therefore deny that there may be cases in which positive duties to forcefully prevent innocent persons from being unjustly harmed override ordinary negative duties not to harm. Unless we subscribe to absolute pacifism, then, there is no principled reason to think that harming couldn't be morally required.

Thus, while there is a clear moral asymmetry between doing and allowing harm when all other things are equal, the constraint against harming can weaken, or disappear altogether, when all other things are not equal. Duties to prevent harm consequently acquire special weight. Insofar as harming in other-defence can be morally justified, potential rescuers' interest in not harming can therefore not be defended as a desire to comply with moral duties.[14] One key consideration here is the means principle, which brings us to the second reason to resist the ADO.

The second reason to be sceptical of the ADO is that our autonomy interests are legitimately constrained by moral duties. It is commonly assumed that the means principle constrains duties to rescue. The means principle effectively protects agents from having to make themselves available as means for the greater, or others', good. Just like the means principle constrains ordinary duties to rescue to protect our autonomy interests by limiting the costs we must bear for the sake of others, we might think, it also constrains duties of other-defence. Thus, insofar as inflicting harms on other people is something we perceive as overly costly, the moral sanctity of our autonomy interests might preclude a moral duty to perform harmful rescues. On this view, you are not required to rescue in *Pond 2* for the same reason that you are not required to rescue in *Pond 3*.

But matters are more complicated than this. Moral duties legitimately restrict our autonomy interests, and the ends we might like to pursue, all the time. Thus, the mere fact that, as a pacifist, you have chosen to shape your life in a way that avoids harming other people does not necessarily absolve you from a moral duty to rescue the child in *Pond 2*, even if this requires killing Villain.[15] To the extent that we are concerned purely with individuals'

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[13] See Helen Frowe, 'Lesser-Evil Justifications,' 470.

[14] There might be substantive disagreements about what is true in a fact-relative sense, at the level of 'deep morality.' I do not discuss this here. For a case against absolving Rescuer of her duty to rescue Victim if Rescuer happens to be a pacifist, see Fabre's 'Mandatory Rescue Killings.'

[15] Frowe makes this case in detail in 'Lesser-Evil Justifications,' 468.

formal autonomy, duties to harm are no different from duties to rescue.[16] Just like our autonomy interests in general do not automatically weaken ordinary duties to rescue, they do not automatically weaken duties of harmful rescue. This is because we can be required to bear great costs for the sake of others without this compromising our status as autonomous moral agents.

To see why, it helps to distinguish between our autonomy interests and the inherent wrongness of treating people as means. While both considerations support the means principle, they drive at different concerns. Although being used as a means often entails a violation of autonomy interests, what makes it wrong to treat people as means is their inviolable moral status. Having one's autonomy restricted by morality itself and being used as a means by others are thus morally objectionable for different reasons. Doing what morality requires, even if this involves a significant sacrifice of our autonomy, is different from being used as a tool by other agents. Our ability to pursue our own ends can therefore be severely limited by moral duties without this doing anything to undermine our status as moral entities who shouldn't be used as means to the pursuit of the greater good. Limits to our ability to pursue our ends therefore do not automatically amount to violations of the means principle.

For example, rescuing the child and missing your meeting in *Pond 1* may prevent you from pursuing certain ends you have set for yourself and is, in this respect, a significant cost you incur. But a moral theory that requires you, as an autonomous moral agent, to conform with a moral duty to rescue the child in this case poses far less of a threat to your inviolable moral status, I submit, than a moral theory that would permit me to throw you into the pond to distract a hungry crocodile eyeing the child in *Pond 3*. Thus, having our autonomy interests restricted by moral demands is one thing; the wrong that is inherent in being used as a means by other people quite another.[17]

Thus, conforming with even demanding moral duties doesn't automatically demote us to mere means, so long as we are responding to moral reasons as autonomous moral agents. Appealing to the means principle to justify failing to rescue on the grounds that one has a

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[16] We might, however, think that you are excused on agent-relative grounds. Chapters 5 and 6 say a bit more about this.

[17] Both, I take it, are distinct from Bernard Williams' point that agents' integrity is compromised by impartial, utilitarian demands. See Williams, *Ethics and the Limits of Philosophy* (Fontana, 1985), 68.

deep aversion to harming will therefore not automatically get one off the hook in *Pond 2*.[18]

There is an additional reason why we can't justify failures to rescue on the grounds that agents must always be able to shape their lives however they please. There would be something deeply unsatisfying in appealing to the idea that we are unique and separate without affording any concern to the uniqueness and separateness of others when this is in greater need of protection. This is because the very considerations to which one would need to appeal to justify not rescuing in these cases also apply to rescuees. After all, the same consideration on which the means principle itself rests - our unique, inviolable moral status - applies universally, to all (innocent) persons. Thus, just as we think we have a special moral status of inviolability, which allows us to perform certain acts in pursuit of our autonomously chosen ends, we must assume that other persons have a similar special moral status of inviolability.[19] It would therefore be incoherent to appeal to our moral status as ends in ourselves without acknowledging others' moral status when this is in jeopardy.[20] Thus, we can't appeal to our inviolable moral status to justify not protecting other people's moral status without ascribing significant weight to agent-relative prerogatives.

In sum, the mere fact that harmful rescues can be demanding does not weaken harmful duties to rescue, because our autonomy interests are restricted by moral duties all the time. If there is something distinctly troubling about duties to rescue that involve harming, it must therefore be for a reason other than that agents may perceive harming even liable targets as excessively costly. To this, we now turn.

3.2 The Instrumental Nature of Liability

The main consideration that supports the ADO in cases in which agents have a liability-based justification for harming in other-defence, I suggest, is that liability is wholly

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[18] Indeed, Cécile Fabre has suggested that this would be selfish, and argues against absolving Rescuer of her duty to rescue Victim if Rescuer happens to be a pacifist. See her 'Mandatory Rescue Killings.'

[19] Alan Gewirth defends a version of this view. As he puts it, '[f]ailure to fulfil these duties [of easy rescue] is rationally unjustifiable: the agent in such circumstances is involved in an unavoidable contradiction between his implicit judgement that he has a right to basic well-being insofar as he is a prospective purposive agent and his denial that his recipient, who is also a prospective purposive agent, has this right.' (Gewirth, *Reason and Morality* (University of Chicago Press, 1978), 227.) See also his description of what he calls the 'Principle of Generic Consistency' (ibid., 217-229).

[20] See also Patricia Smith, 'Bad Samaritans, Acts, and Omissions,' in R. G. Frey and Christopher Heath Wellman (eds), *A Companion to Applied Ethics* (Blackwell, 2007), 482.

independent of considerations of desert.[21] In cases in which liable targets are only minimally responsible for bringing about a threat of harm, agents may permissibly refuse to act on a liability-based justification for harming. The most convincing explanation for why agents may permissibly refuse to perform harmful rescues in cases in which the target is liable is thus that many liable targets are not culpable, and may, in fact, be merely minimally responsible for bringing about unjust threats of harm.[22]

Liability-based justifications for harming are primarily concerned with determining onto whom harms should fall when harming has become unavoidable.[23] Liability-based justifications for defensive harming are thus not concerned with treating people according to what they are due, but with determining who, rather than someone else, should bear certain harms. What instrumental liability-based justifications for harming imply is merely that it is more just for certain people rather than others to suffer unavoidable harms. Consider

> *Conscientious Driver:* Driver, who always keeps his car well maintained and always drives carefully and alertly, decides to drive to the movies. On the way a freak accident occurs that causes his car to veer out of control in the direction of a pedestrian. The out-of-control car will now kill the pedestrian unless the pedestrian destroys the car with a grenade, thereby killing Driver.[24]

On McMahan's (agent-)responsibility-based account of liability, Driver is liable to defensive harm, because he voluntarily undertook to drive, and is consequently responsible for the threat posed to Pedestrian.[25] This creates an ever-so-slight moral asymmetry between Driver and Pedestrian, which provides the latter with a liability-based justification for killing the former in self-defence. But suppose that Pedestrian's grenade is broken, and that a nearby stranger, Rescuer, could throw *her* grenade, saving Pedestrian and killing Driver. I don't think it's obvious that Rescuer is required to throw her grenade, despite the fact that she has a liability-based justification for doing so.

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[21] For example, Rodin, 'Justifying Harm,' *Ethics* 122 (2011): 74-110, 75, 95; McMahan, *The Ethics of Killing*, 401-2; Stephen De Wijze, Matthew H. Kramer, and Ian Carter (eds), *Hillel Steiner and the Anatomy of Justice: Themes and Challenges* (Routledge, 2009), 97 (n.3).

[22] Another consideration is that people may not be blameworthy for failing to carry out harmful rescues if they justifiably, but mistakenly, believe a harm to be unjust. This applies both in individual rescue cases and to combatants in the military.

[23] For example, McMahan, 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15 (2005): 386-405; Norman, *Ethics, Killing, and War*, 122-3. See also the following chapter.

[24] McMahan, *Killing in War*, 165.

[25] For the sake of the discussion, we might as well assume that Pedestrian is sitting in a park or is in a pedestrian zone, far away from where cars should be. McMahan's assumption is that Pedestrian is not thought to be engaging in a risky activity.

Since liability-based justifications for defensive killing can obtain even in cases in which the target is only minimally responsible for bringing about an unjust threat of harm, agents may reasonably refrain from acting on a liability-based justification - even if harming would be all-things-considered permissible. In the absence of a certain degree of moral responsibility on targets' part, and additional considerations such as lesser-evil justifications, it is difficult to see why third-party rescuers should have a moral duty, rather than a mere permission, to harm.

In sum, we have reasons to resist the ADO in general insofar as targets' liability removes ordinary constraints against harming. However, in cases in which targets have made themselves liable on the mere basis of minimal (agent-)responsibility for bringing about a threat of harm, it is hard to see, in the absence of other considerations, how rescuers could be required, rather than merely permitted, to harm liable targets.

The following section considers whether agents can be required to harm non-liable people to conform with a duty to rescue

4. Lesser-Evil Justifications for Harming in Other-Defence

The main type of justification for harming people who are not liable to be harmed is the lesser-evil justification. Lesser-evil justifications for harming innocent people obtain when this is necessary to prevent a significantly greater harm to other innocent people. Lesser-evil justifications thus arise from a comparison between the amount of harm one would prevent and the amount of harm one would cause in the process, either as a means or as an unintended side effect. This, however, does not mean that lesser-evil justifications are purely consequentialist in nature. They are constrained by proportionality considerations which are sensitive to deontic differences in how outcomes are brought about, such as the moral asymmetry between doing and allowing harm, and the distinction between intention and foresight.[26]

Lesser-evil justifications effectively permit agents to transgress innocent people's rights. In this context, I'll distinguish, as is common practice, between rights 'infringements' and rights 'violations.' If one transgresses a right with justification, one infringes it; if one

[26] See Rodin, 'Justifying Harm,' 97; Larry Alexander, 'Lesser-Evils: A Closer Look at the Paradigmatic Justification,' *Law and Philosophy*, 24 (2005): 611–43, 616; McMahan, 'Proportionate Defence,' in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP, 2017), 135-6; Frowe, 'Lesser-Evil Justifications,' 462.

transgresses a right without justification, one violates it.[27] In essence, the question here is therefore if agents can be required to infringe innocent people's rights to conform with a duty to rescue.

Consider a typical trolley case in which Rescuer could divert a trolley that will otherwise kill five innocent victims towards innocent Bystander, who will be killed as a side effect. Assuming that Rescuer stands in no special relationship to either the victims or Bystander, is she required to divert the trolley even if this will kill innocent Bystander as a side effect?

According to Helen Frowe, Rescuer is required to save the five, even if this will kill Bystander, because Rescuer's autonomy interest in not becoming an 'agent of death' by killing Bystander does not outweigh her duty to rescue. Since agents can be required to prioritise others' benefit over their own autonomy interests, as indicated above, they can, Frowe argues, also be required 'to cause harm to innocent people even if they would prefer not to.'[28]

Frowe rejects the ADO on the grounds that acting on lesser-evil justifications, even if this involves killing innocent people, can be required. Against the ADO, Frowe argues that not wanting to kill does not weaken duties to rescue if killing is justified on lesser-evil grounds. Thus, agents can be required to act on lesser-evil justifications even if this will kill innocent people as an albeit justified side effect, so long as this is the overall least harmful course of action.[29] As she puts it, 'infringing rights, including the right not to be killed, is sometimes required as the lesser evil.'[30] If this is right, agents can be morally required to inflict lethal harm when this is justified as the lesser evil, even if this means killing innocent people as a side effect.[31]

While I share Frowe's view that mere autonomy interests do not defeat duties of harmful rescue, I take issue with the implicit assumption that whether harming is justified is all that matters. While a mere aversion to harming in general does not permit failing to comply with duties of harmful other-defence, I submit, agents may reasonably wish to refrain from performing harmful acts that involve wronging people, even if this is all-things-considered justified. For this reason, I think, while agents may be required to act in ways that

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[27] Judith Jarvis Thomson, 'Some Ruminations on Rights,' in William Parent (ed), *Rights, Restitution, and Risk* (HUP, 1986), 51. See also Thomson, *The Realm of Rights* (HUP, 1990), 122.
[28] Frowe, 'Lesser-Evil Justifications,' 471.
[29] Ibid., 468.
[30] Ibid., 467.
[31] Ibid., 466-8.

will harm innocent people as a side effect, harms that are not compensable should carry extra weight in wide proportionality calculations.

In what follows, I will consider three points Frowe presents in defence of the view that agents are not merely justified, but actually morally required, to act on lesser-evil justifications for harming. I'll explain why I think we should resist the view, and then propose a more moderate position. My aim is to challenge the assumption that, if harmful rescues are supererogatory, this is because agents may prefer not to perform harmful acts. I argue that, in cases in which harming in other-defence is supererogatory in the absence of excessive costs to oneself, the primary reason for this is that those who would be harmed are morally innocent. In this respect, Frowe's defence of duties of harmful rescue misses what seems to me the most relevant objection. In cases in which harming innocent people to rescue others is not morally required, this is not because one would become an 'agent of death' - but because victims would be wronged.

4.1 Autonomy Interests vs Wronging Victims of Justified Rights Infringements

On Frowe's account, the difference between justified and unjustified killing is paramount. In her words, '[w]hile we clearly have a moral interest in refraining from unjustified killing . . . it doesn't follow that we should extend this aversion to killing generally,' because we also 'have a moral interest in saving lives.'[32] While Frowe is right to emphasise that there is a critical difference between justified and unjustified killing, this isn't all that matters. Lesser-evil justifications for harming can involve serious wrongs.[33]

Whether a lesser-evil justification for harming obtains may be all we need to know to determine that harming is all-things-considered permissible, but it doesn't necessarily follow from this that agents are automatically required to act on this lesser-evil justification. After all, while we do have a moral interest in saving lives, we also have a moral interest in not wronging innocent people, even if this would be all-things-considered permissible on lesser-evil grounds. The prospect of wronging innocent people, I submit, provides a valid reason for agents to refrain from permissibly transgressing others' rights, especially in cases in which the

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[32] Frowe, 'Lesser-Evil Justifications,' 470.

[33] Chapter 5 discusses this in more detail. For an opposing view, see Richard Arneson, 'Resolving the Responsibility Dilemma' in Saba Bazargan-Forward and Samuel C. Rickless (eds), *The Ethics of War: Essays* (OUP), 2017.

harms in question are so severe as to be non-compensable.[34]

In defending duties to act on lesser-evil justifications for harming against the objection that becoming an 'agent of death' by killing Bystander would compromise Rescuer's autonomy, Frowe points out that we can legitimately be required to prioritise others' welfare over our own autonomy interests, and that the scope of the ends we may adopt and pursue is constrained by our moral duties.[35] 'Faced with a drowning child,' she notes, 'the fact that I have chosen to shape my life in a way that does not involve rescuing children would not make it permissible for me to fail to save her. Likewise, that [Rescuer] has chosen to shape her life in a way that does not involve killing [Bystander] does not show that she may refrain from killing him' in the trolley case.[36]

I think this is right, but beside the point. The kind of sacrifice involved in rescuing drowning children from ponds is different from the kind of sacrifice involved in lesser-evil killings. Having one's autonomy interests infringed by rescuing the child from the pond is hardly comparable to killing an innocent person, even if this is all-things-considered permissible on lesser-evil grounds. The difference lies in the fact that one would wrong the innocent person by killing her, even if only as a side effect, whereas no person is wronged in the pond case.

Contrary to what Frowe's account assumes, what's objectionable about duties to act on lesser-evil justifications for harming is neither that agents have their autonomy interests infringed by being required to bear certain costs nor that they are made to do things they would prefer not to do. As discussed above, neither consideration automatically precludes demanding duties to rescue. The real issue is that agents are made to do things which they have a good moral reason to resist doing, even if it is all-things-considered permissible on lesser-evil grounds. The challenge, then, isn't that we must get to grips with some aversion to doing what's morally justified, such as killing an innocent person as a side effect of saving a significantly greater number. The real challenge is to explain how it can be morally obligatory, rather than merely permissible or even justifiable, to kill an innocent person. Frowe merely

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[34] Non-compensable harms include death, torture, rape, and grievous bodily injury, but where precisely we draw the line is a question I'll leave open here. For discussion, see Robert E. Goodin, 'Theories of Compensation,' *Oxford Journal of Legal Studies* 9 (1989): 56–75; David Rodin, 'Justifying Harm.' I address related issues in Chapters 3, 4 and 8.

[35] Frowe, 'Lesser-Evil Justifications,' 471-2.

[36] Ibid., 471.

notes that any plausible view will recognise that 'there is *some* amount of preventable harm that could make killing required.'[37] And indeed, this seems to be about as precise as we can be. But any plausible view will also grant that the amount of harm to be prevented is not the only dimension along which the rightness of an action is assessed, and that the fact that one would wrong an innocent person may, in many cases, be a valid reason to refrain from killing her, even if one has a lesser-evil justification for doing so.

To be clear, none of this is to deny that third-party rescuers may *permissibly* harm innocent people on lesser-evil grounds. In many cases, there might even be a duty to do so, especially since lesser-evil justifications generally obtain only if the harm to be prevented is significantly greater than the harm one would cause. While I share Frowe's assumption that we shouldn't be too precious about our own autonomy interests when it comes to rescuing, which can be legitimately demanding, and require us to do things we'd rather not do, my principal point remains that the main obstacle to duties to act on lesser-evil justifications for killing lies in the fact that those whom one would kill are innocent. This is not to say that the mere aversion to harming itself renders harming supererogatory in these cases because the aversion is appropriate. Rather, harming is supererogatory for the same reason that the aversion is appropriate. Thus, contrary to what Frowe's account assumes, harming innocent people is not objectionable because it compromises our autonomy interests. It is objectionable because morally innocent people have rights not to be killed.[38]

Here, then, is a more moderate proposal. Harming non-liable people on lesser-evil grounds can be required, but whether the harms in question are compensable affects proportionality. Many people accept that even permissible rights infringements can give rise to claims to compensation.[39] The reason for this is that inflicting harms on morally innocent persons still wrongs them, even if harming them is all-things-considered permissible.[40] Non-compensably harming innocent people must consequently be more difficult to justify than compensably harming them - not merely because compensable harms are generally less

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[37] Ibid., 467.

[38] Relatedly, individuals may also justifiably refrain from taking the risk of harming someone unjustly, under the mistaken assumption that their harmful action is justified. I discuss the distinct moral risk involved in harming people in Chapter 5. We might, however, also think that there are cases in which agents are required to take moral risks - namely, the risk of committing moral wrongs, which combatants run all the time.

[39] For example, Judith Jarvis Thomson, 'Some Ruminations on Rights,' in William Parent (ed), *Rights, Restitution, and Risk* (HUP, 1986), 51; Thomson, *The Realm of Rights* (HUP, 1990), 122; Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life,' *Philosophy & Public Affairs* 7 (1978): 93-123, 102. See also Chapter 8.

[40] See Chapter 5.

severe, but also because, in being compensated, the wrong which victims were made to, albeit permissibly, suffer is rectified. While agents may be required to act in ways that will harm innocent people as a side effect, harms that are not compensable should carry extra weight in wide proportionality calculations. Harmful acts that are not compensable should thus be more stringently constrained than those that can readily be compensated, including in rescue cases.[41]

4.2 Saving the Greater Number

Frowe offers two further reasons in support of the claim that, in the trolley case, Rescuer is required, rather than merely permitted, to save the greater number at the cost of killing Bystander. She suggests that duties to rescue are owed 'to those the saving of whom will minimise harm'; and that, if the five are permitted to kill Bystander as a side effect of their own defensive action, they must also have a right to be defended by Rescuer.[42]

But neither point is fully satisfying. First, it is unclear why duties to rescue should be owed to people whose rescue will minimise harm. While this consideration might provide agents with a positive moral reason for rescuing the greater number, it seems like an odd way to ground a claim to be saved. After all, it's not clear why the prospect of minimising harm should take the form of a duty *to individuals* whose saving would minimise harm. That is, it's not clear why the fact that you happen to be surrounded by a large group of others who also need saving should strengthen *your* right to be rescued. After all, your right to be rescued is no stronger than Bystander's right not to be killed. Put differently, if you happen to be part of a larger group, why should the fact that saving the group minimises harm bestow on *you* a right to be saved? Protecting others from rights violations is something we owe to them by virtue of their moral status as rights-bearing persons. Your right to be saved thus originates in your moral status; not in the fact that saving the larger group, which includes you, will have the instrumental value of minimising harm overall. Your right to be saved is just that, and distinct from the general consideration that it is morally desirable to minimise harm. If we think that numbers count, then Rescuer might be permitted, or admittedly required, to save the greater

[41] I defend this view in a working paper ('The Compensability Condition for Wide Proportionality,' available upon request).

[42] Frowe, 'Lesser-Evil Justifications,' 468.

number, even if this will kill innocent Bystander as a side effect.[43] But the point remains that there's a difference between a duty to rescue individuals and a duty to minimise harm. And it's not clear, why we should derive the former from the latter.

Frowe also suggests that, if it is permissible for the five to kill Bystander as a side effect of their own defensive action, they must have a right to be defended by Rescuer. In her words, 'we cannot plausibly grant the five rights of defence even though they will kill [Bystander], but deny them a right to be saved because of the harm to [Rescuer's] autonomy.'[44] But this seems too quick. It seems perfectly plausible, for example, to say that the five each have an agent-relative excuse for harming Bystander in self-defence, given that Bystander is innocent; and that Rescuer's permission, or duty, to save the five has nothing to do with their own permission to act in self-defence but is grounded in a lesser-evil justification to save the greater number.

One final worry about the case for duties to act on lesser-evil justifications for harming is that, while Frowe explicitly acknowledges that there is a critical moral difference between harming as a means and harming as a side effect, there doesn't seem to be anything internal to the argument limiting its applicability to cases in which people are harmed as a side effect. Accepting that agents are required to act on lesser-evil justifications for the reasons Frowe outlines might thus commit us to a view that is unduly permissive with regard to harming people as a means in rescue cases.[45]

Let us take stock. Having suggested that harming to rescue can be required, I considered a broad objection to the idea of duties to harm in other-defence - the view that agents have a moral interest in not becoming 'agents of death.' I examined this objection in the context of the two primary justifications for defensive harming - liability-based justifications and lesser-evil justifications. I suggested that the ADO doesn't, in principle, preclude duties to harm liable targets in other-defence, but that agents are not generally

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[43] For discussion, see Nien-Hê Hsieh, Alan Strudler, and David Wasserman, 'The Numbers Problem,' *Philosophy & Public Affairs* 34 (2006): 352–72; David Rodin, 'The Lesser Evil Obligation,' in Saba Bazargan-Forward and Samuel C. Rickless (eds), *The Ethics of War: Essays* (OUP, 2017), 28–45.

[44] Frowe, 'Lesser-Evil Justifications,' 473.

[45] Consider, for instance, Larry Alexander's suggestion that harming as a side effect may imply a permission to harm as a means - 'if an innocent bystander could justifiably be harmed as a side effect of use of defensive force, perhaps he could also then be used as a shield—a means—for defense, if the amount of harm he would suffer as a shield were less than the amount he would suffer as a side effect.' See Larry Alexander, 'Recipe for a Theory of Self-Defense: The Ingredients, and Some Cooking Suggestions,' in Christian L. Coons and Michael Eric Weber (eds), *The Ethics of Self-Defense* (OUP, 2016); Larry Alexander, 'The Means Principle,' in K. K. Ferzan and S.J. Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael Moore* (OUP, 2014), 257.

required to harm liable targets particularly in cases in which liability results from a minimal degree of responsibility for an unjust threat of harm.

I then considered whether agents are required to rescue when this would involve harming non-liable people. While the ADO holds that harmful rescues are optional primarily because agents' autonomy interest permits them to refrain from engaging in harmful acts in general, I suggested that this is the case primarily because lesser-evil justifications are compatible with wronging innocent people. I considered Frowe's rejection of the ADO, and her case in favour of a duty to act on lesser-evil justifications for harming, but suggested that it doesn't take seriously enough the fact that victims of justified rights infringements are still wronged. If there is anything that might prevent us from holding that it is obligatory for agents to act on lesser-evil justifications for harming, it is the fact that victims would be wronged. For this reason, I suggested, while agents may be required to act in ways that will harm innocent people as a side effect, harms that are not compensable should carry extra weight in the proportionality calculations that constrain lesser-evil justifications.

In this light, the final section addresses a distinct challenge that arises for potential interveners in the context of humanitarian intervention, which will accompany us throughout the remainder of the thesis.

5. The Intervener's Conundrum

So far, I have suggested that other-defence may be required at least in principle, even if it involves harming to rescue. In the absence of excessive costs to oneself, the principal obstacle to duties to rescue in any given case is that rescuing would involve harming non-liable people. Writ large, this is one of the main moral challenges to armed humanitarian intervention (AHI).

Assuming that all *jus ad bellum* requirements are met, the question faced by states with the means to conduct an AHI is whether, in intervening, to risk the lives of their own military, and potentially kill innocent individuals as an unintended side effect, or whether by refraining from intervening, to let innocent people be killed by their own governments or wrongdoers whom those governments are unwilling or unable to stop. This is what I'll refer to as the Intervener's Conundrum. The Intervener's Conundrum seizes upon a powerful concern underlying objections to AHI - that wars harm innocent people - and contrasts it with the

alternative - that non-intervention effectively entails allowing innocent people to be wrongfully harmed by others.

The Intervener's Conundrum arises from the tension between the moral imperative of safeguarding people's fundamental human rights and the significant moral costs of military action. Common responses to this tension in the philosophical literature, and in political practice, have been to acknowledge a commitment to the protection of human rights in theory while being explicitly wary of military intervention as a valid enforcement mechanism in practice, and to set the bar for justified intervention extremely high, such that it is thinkable only in the extreme cases of genocide, crimes against humanity, and ethnic cleansing.[46]

In short, the Intervener's Conundrum arises because military intervention will foreseeably cause harms to innocent people as a side effect, while not intervening will allow wrongful harms to be committed by others. Potential interveners consequently face the challenge of weighing the moral costs of military intervention, including the considerable risk of harming non-liable people, against the moral costs of non-intervention, and failing to prevent egregious wrongs. My aim is not to solve the Conundrum itself. It is, however, helpful to spell out in full here, because it informs a number of the questions I will address over the course of the following chapters. I'll briefly explain the philosophical heart of the challenge, and indicate how it will bear on the discussion in the remainder of the thesis.

The Crux of the Conundrum

Failure to prevent atrocity crimes is an instance of *allowing* harm. Carrying out an armed intervention to protect the innocent would involve *causing* harm, including to innocent people who suffer risks of collateral harm. As we saw earlier, a central question is whether agents can be required to rescue when they can only do so by harming innocent people as a side effect.

For clarity's sake, set aside questions about the scale and gravity of harms interveners would either allow through non-intervention or cause as a side effect of an intervention. Also set aside the consideration that the people whom interveners would allow to be killed in the event of non-intervention are not all identical with the people whom interveners would

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[46] Charles Beitz and Ken Booth, for example, are critical of military intervention because they are sceptical of the possibility of success. See Beitz, 'Nonintervention and Communal Integrity,' *Philosophy & Public Affairs* 9 (4) (1980): 385-391; Booth, 'Military Intervention: Duty and Prudence,' in L. D. Freedoman (ed), *Military Intervention in European Conflicts* (Blackwell, 1994), 65-70; Booth, 'Human Wrongs in International Relations,' *International Affairs* 71 (1995): 103–36, 120-21.

expose to risks of being killed as a side effect of the intervention - a complication to which I will return shortly. Keeping other considerations constant, then, one question is how potential interveners should assess the permissibility of imposing risks of unintended harm to innocent people against the permissibility of failing to rescue innocent people from suffering wrongful harms.

The Intervener's Conundrum effectively captures the moral choice between (a) allowing innocent people to be wrongfully harmed when one could rescue them and (b) preventing wrongful harms while harming innocent people as an unintended side effect. What it brings to the fore is the quandary of either allowing a harm that is wrongful or causing a harm that is all-things-considered permissible on lesser-evil grounds when all other things are equal. We know that duties not to do harm are generally more stringent than duties not to allow harm. But we also know that causing certain harms may be permissible on lesser-evil grounds. The philosophical question the Conundrum captures is thus whether the mode of agency or the type of rights transgression should determine what agents ought to do when all other things are equal. That is, should our actions be guided by the distinction between doing and allowing harm, or the distinction between whether innocent people's rights would be wrongfully or justifiably transgressed? All other things being equal, is it better to *allow* a rights *violation*, or to *commit* a rights *infringement?*

Generally speaking, we mustn't do harm to prevent another person from inflicting an equal harm.[47] Consider

> *Watchtower:* Evil Villain has kidnapped innocent Victim, whom she intends to throw from a watchtower to kill him. Racing up the narrow spiral staircase, you encounter an innocent bystander on his way down. The staircase is too tight for you to run past him - your only options are to turn around and climb back down, leaving Victim to his fate, or to grab the innocent bystander and hurl him out the window, clearing the way for you to climb the tower and rescue Victim.

All other things being equal, the constraint against doing harm outweighs the duty to rescue. Your duty not to kill the innocent bystander therefore outweighs your duty to prevent Victim from being killed. So you turn around and climb back down. In this case, you have no lesser-evil justification for killing the innocent person, because killing one person to avoid

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[47] There are different ways of explaining this. I assume that this comes down to basic deontological constraints. See, for instance, Thomas Nagel, *The View from Nowhere* (OUP, 1986), 175-77; David McNaughton and Piers Rawling, 'Agent-Relativity and the Doing-Happening Distinction,' *Philosophical Studies* 63 (1991): 167-185. See also McMahan, *Killing in War,* 142.

letting another person die would be disproportionate. In many cases, we even think that killing an innocent person is impermissible when this would prevent five others from being killed. Hence, it is impermissible for you to throw a person in front of the trolley to prevent it from running over five innocent others.

To eliminate the possibility that the constraint against harming only outweighs duties to rescue in the absence of a lesser-evil justification for harming, imagine the following.

> *Trolley Tunnel:* An evil wrongdoer has tied an unknown number of innocent victims onto the trolley tracks inside a tunnel. You can divert the trolley away from the tunnel and onto a second set of tracks, but this would kill an innocent bystander as a side effect. While you don't know how many Victims are tied to the tracks, you know, for a fact, that the number is that which would render killing an innocent person proportionate in a fact-relative sense. (So, suppose that the number of people in the tunnel equals that for which threshold deontology would deem it permissible to kill an innocent person as a side effect - five, ten, hundreds, thousands . . .)

There is no question that killing the innocent person would be proportionate in light of the number of innocent victims you'd save. In this scenario, you either allow the innocent victims in the tunnel to be murdered, or you kill the innocent bystander as a justified side effect of saving the others. That is, you either allow rights violations or you commit a rights infringement. Does the constraint against *doing* harm to the innocent person still outweigh your duty not to *allow* the innocent victims to die? Now all things are equal besides the mode of agency and the nature of the rights transgressions. But knowing that killing the bystander would be all-things-considered permissible still doesn't answer the question of what you ought to do, if we take seriously the moral asymmetry between doing and allowing.

Rather than revealing which consideration should ultimately have greater sway over what agents ought all-things-considered to do, weighing the worseness of *doing* harm compared to *allowing* harm against the worseness of *wrongful* harm compared to *justified* harm, I suggest, indicates that the whole is greater than the sum of its parts. The weight of different considerations relative to one another may well vary depending on the moral circumstances of the case, and the following chapters will examine a number of possibilities. First, however, it is worth making explicit an aspect of the Intervener's Conundrum which will also accompany us throughout the remainder of the thesis.

The Separateness of Persons

Inherent in the Intervener's Conundrum is what I'll occasionally refer to as the *problem of the separateness of persons*. Innocent people who would be harmed as an unintended side effect of a just intervention are not necessarily the same as those who would otherwise be harmed by perpetrators of atrocity crimes. This means that unintended harms to innocent people cannot generally be justified by appealing to the fact that, were one to do nothing, those people would be harmed anyway.

To illustrate, imagine a Venn digram with two circles - the first representing innocent people who would be killed in atrocity crimes and the second representing people who would be killed as an unintended side effect of the intervention. The space in which the circles overlap might be smaller or larger. The fact that the two circles don't overlap and that different people would die as a side effect of an intervention than would be killed in the event of non-intervention is the problem of the separateness of persons.

In essence, the fact that the people whom interveners would harm as a side effect aren't necessarily the same as those whom they would allow to be harmed in the event of non-intervention means that harm isn't overdetermined for individuals. The problem of the separateness of persons consequently poses a distinct obstacle to the justifiability of military acts that will foreseeably kill innocent people as a side effect insofar as, if the two circles overlapped perfectly, and the people whom interveners would kill as a side effect would otherwise be killed anyway, their foreseen deaths as a side effect of the intervention would not weigh as heavily against any military act that would cause their unintended deaths.[48] This issue will resurface in Chapters 4, 5, 6, and 8.

Looking Ahead

The following chapters roughly orient themselves in relation to issues concerning the Conundrum's two main prongs. That is, *either* potential interveners cause harms to innocent people, which, besides sending just combatants into harm's way, includes harming innocent civilians as a side effect of the intervention, *or* they fail to prevent perpetrators from committing atrocity crimes, and allow them to inflict horrifying human suffering. The first prong of the dilemma will inform discussions concerned with the principles determining the

[48] For related discussion, see Frances Kamm, 'Baselines and Compensation,' *San Diego Law Review (*2003): 1367-1386.

just distribution of risks of harm between non-liable individuals (Chapters 4, 5, and 6). The second prong of the dilemma will inform discussions examining what, if any, bearing the alternative of allowing atrocity crimes to be committed has on the permissibility of exposing non-liable people to risks of harm during an AHI (Chapters 4 and 6), and what, if anything, this implies for potential resulting post-intervention rectificatory obligations (Chapter 8).

6. Conclusion

This chapter began by asking whether duties to rescue others from wrongful harm can take the form of duties to harm in their defence. I suggested that duties to rescue others may indeed transmute into duties to harm in their defence. I then discussed a main objection to the view that rescuing can be required even if this requires defensive harming. I suggested that the mere fact that agents might feel an aversion to harming doesn't render harmful rescues supererogatory in cases in which targets are liable to be harmed, unless they are only minimally responsible. I also suggested that, contrary to the agent-of-death objection, it is not agents' mere aversion to harming, but rather the fact that victims of non-compensable harms would be wronged, albeit all-things-considered permissibly, that can render harmful rescues supererogatory.

It is, in part, this possibility, I suggested, which generates the Intervener's Conundrum - the quandary between either intervening and foreseeably harming innocent people as a side effect, or not intervening and allowing atrocity crimes to be perpetrated. Indeed, one main reason why armed humanitarian interventions are so controversial is that they involve foreseeable and often unavoidable harms to innocent people. A central difficulty this raises, and to which the following three chapters are dedicated, thus concerns how we should think about the just distribution of harm between non-liable people - that is, just intervening combatants, civilians whose rescue constitutes the just goal of the intervention, and neutral bystanders.

But first, the following chapter will offer an in-depth examination of how permissions to harm in self-defence and duties to harm in other-defence interact in light of the requirement to minimise harm.

3. Necessity and Other-Defence

1. Introduction

This chapter examines what implications the possibility of third-party other-defence has on victims' own permission to harm in self-defence. Cases in which multiple defensive agents could avert a threat to an innocent victim raise the critical question - what if it is unnecessary for a victim to inflict a particular harm because a third party can avert the threat in a less harmful manner?

My aim in this chapter is to defend the view that the requirement to minimise harm can extend across multiple defensive agents. The upshot of this is that there may be cases in which victims are prohibited from harming threats in self-defence, and third-party rescuers are required to harm threats in victims' defence, if rescuers can avert the threat to victims in a less harmful way than victims themselves could. This is a feature of the ethics of defensive harming which has so far remained obscure in mainstream discussions.

However, it has important implications. Whether the requirement to minimise harms can extend across defensive agents may determine how we answer three key questions about the permissibility of harming in cases in which multiple defensive agents could avert the same threat of harm. These are (i) to what harms threateners make themselves *liable* when multiple agents could avert their attack, (ii) what harms it is *permissible* for different agents to inflict on liable targets and innocent bystanders, and (iii) on what *grounds* third parties may be permitted, or required, to use force in others' defence.

This chapter discusses how answers to these questions may vary depending on whether the requirement to minimise harm can extend across multiple defensive agents. The argument proceeds in four main steps.

I will explain the basic relationship between victims' and third parties' permissions to harm in victims' defence (Section 2), distinguish between agent-centred and target-centred conceptions of the requirement to minimise harm, and examine the implications of extending this requirement across multiple agents (Section 3). I will argue that this requirement primarily serves to minimise the harms suffered by targets of defensive acts, and not to minimise harms any particular agent inflicts. On this basis, I will suggest that a third party may be required to

intervene when she can defend the victim by causing less harm than the victim would cause in self-defence, especially when those who would otherwise be harmed are not or only minimally liable (Section 4). Finally, I will argue that there are cases in which victims may be required to refrain from using force in self-defence to spare innocent bystanders when rescuers could defend victims in less harmful ways, even if this increases risks of harm to victims (Section 5).

Assumptions and Clarifications

When a person is under attack and a third party intervenes to come to their rescue, this is an instance of other-defence. Cases of other-defence can structurally differ from self-defence in at least two ways. If malicious Aggressor threatens to harm Victim, and Victim or Rescuer can harm Aggressor in Victim's defence, Victim would harm her in self-defence and Rescuer would harm her in other-defence. This is a difference in defensive agents. If Aggressor threatens both Victim and Rescuer, Rescuer could harm Aggressor in both self-defence and in Victim's defence. In this case, Rescuer has two different justifications for harming Aggressor. Although the second type of case is more common in armed conflict, I focus, for the sake of clarity, on the type of case in which Rescuer harms Aggressor exclusively in other-defence.

For the purposes of this discussion, I will assume that the costs third-party rescuers would incur by acting in other-defence are not prohibitively high, and that they are therefore required to rescue. The demands placed on third parties in the cases discussed here therefore do not bear on whether they are under a duty to rescue in the first place.[1] For the most part of the discussion, I will also assume that Rescuer is able and willing to intervene, and that Victim knows this. I therefore set contingent issues of coordination and agreement between defensive agents aside, except where I address them explicitly.

2. The Relationship Between Permissions to Harm in Self-Defence and Other-Defence

How is Rescuer's permission to harm in Victim's defence related to Victim's own permission to harm in self-defence? A common assumption is that Rescuer's permission to

[1] For an account of duties to rescue which sidesteps the problem of extreme demandingness altogether, see Zofia Stemplowska, 'Doing More Than One's Fair Share,' *Critical Review of International Social and Political Philosophy*, 19 (2016), 591-608.

harm in Victim's defence presupposes Victim's own permission to harm in self-defence. 'The two kinds of justification would seem to stand or fall together,' as Richard Norman put it; 'if I am justified in killing to save my life, then surely also someone else is justified in doing the same thing on my behalf.'[2] Judith Jarvis Thomson similarly suggests that self- and other-defence share the same source, and that 'the permissibility of X's killing Y in self-defense goes hand in hand with the permissibility of Z's killing Y in defense of X.'[3]

It is worth disambiguating what it means for justifications to harm in self- and other-defence to 'stand or fall together,' or to 'go hand in hand.' It does not mean that Rescuer's permission to harm in Victim's defence rests on Victim's own permission to harm in self-defence, such that Victim's permission to harm Aggressor in self-defence is a necessary condition for Rescuer to be permitted to harm Aggressor in Victim's defence. Nor does it mean that Victim's permission to harm in self-defence is a sufficient condition for Rescuer's permission to harm in Victim's defence, such that, if Vicim is permitted to kill Aggressor in self-defence, Rescuer is automatically permitted to kill Aggressor in Victim's defence.

This is because Victim and Rescuer are both independently subject to necessity and proportionality considerations. In cases in which all other things are not equal, Victim's and Rescuer's permissions to harm Aggressor in Victim's defence may come apart for contingent reasons. Thus, there may be cases in which Victim is permitted to kill Aggressor in self-defence, but Rescuer is prohibited from killing Aggressor in Victim's defence, and vice versa. Although both Victim's and Rescuer's harmful acts are constrained by the same principles, differences in their external, contingent circumstances will yield different permissions. To the extent that the circumstances determining what is necessary and proportionate vary for different agents, their respective permissions to use defensive force will differ accordingly. Since permissions to inflict defensive harm are individualised and self-standing, then, a third party's permission to harm in a victim's defence is neither contingent on nor automatically entailed by the victim's own permission to harm a threatener in self-defence.

Victim's and Rescuer's permissions to harm in Victim's defence do, however, share the same source in Victim's right not to be harmed. It is worth noting that Rescuer's duty to assist Victim's defence corresponds not with Victim's permission to harm in self-defence, but with Victim's right not to be harmed. Victim's right not to be harmed is a necessary, though not a

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[2] Richard Norman, *Ethics, Killing, and War* (CUP, 1995), 131.

[3] Judith Jarvis Thomson, 'Self-Defense,' *Philosophy & Public Affairs* 20 (1991): 283-310, 306.

sufficient, condition for both Victim's and Rescuer's permissions to harm Aggressor in Victim's defence. Typically conceived of as a claim right, the right not to be harmed confers both duties of non-interference and duties of assistance on others.[4] Accordingly, as the previous chapter explained, if Aggressor threatens to violate Victim's right not to be harmed, Victim may enforce Aggressor's obligation not to harm him by engaging in self-defence, and Rescuer may incur a duty to assist Victim's defence by enforcing Aggressor's obligation not to harm Victim. Both Victim's and Rescuer's permissions to harm in Victim's defence thus obtain only if, and because, Victim has a right not to be harmed. Rescuer's permission to harm in Victim's defence thus need not derive from Victim's own permission to harm in self-defence, but merely presupposes Victim's right not to be harmed.[5]

With this in mind, we can now examine what, if any, bearing Rescuer's ability to avert Aggressor's threat has on Victim's own permission to harm Aggressor in self-defence if Rescuer's ability to save Victim renders Victim's harmful act unnecessary. Since the permissibility of defensive acts is subject to requirements to minimise harm, permissions to inflict defensive harm are contingent on which defensive options are available to agents. In cases in which multiple defensive agents could avert a threat to an innocent victim, the remainder of the chapter argues, their respective duties and permissions are interdependent.

3. Two Conceptions of Necessity

Permissions to harm in self- or other-defence are constrained, among other considerations, by the necessity requirement.[6] The necessity constraint seeks to minimise harm to targets of defensive acts by permitting agents to inflict no more harm than is necessary.[7] It does this in two ways. It demands that agents inflict harm *only if* this is necessary, and that they inflict *no more* harm than is necessary to avert a threat. If a harm is unnecessary, it is impermissible to inflict it. The necessity requirement is thus integral to justifications for

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[4] See Helen Frowe, *The Ethics of War and Peace* (Routledge, 2011), 26-29.

[5] Nancy Ann Davis has similarly suggested that third parties' permissions for harming in victims' defence are not grounded in victims' permission to act in self-defence. While victims of wrongful threats of harm may be entitled to assistance, Davis thinks, third parties' justifications for defending them must be grounded not in victims' own permission to use defensive force, but must appeal to some unspecified corollary right. On my account, it's clear what this corollary right is - namely, victims' right not to be harmed. See Nancy Ann Davis, 'Abortion and Self-Defense,' *Philosophy & Public Affairs* 13 (1984): 175-207, 187.

[6] I use 'requirement' and 'constraint' interchangeably in this context.

[7] Conceptions of the necessity requirement vary. For discussion, see Seth Lazar, 'Necessity in Self-Defense and War,' *Philosophy & Public Affairs* 40 (2012): 3-44; Jeff McMahan, 'The Limits of Self-Defense' in Christian Coons and Michael Weber (eds), *The Ethics of Self-Defense* (OUP, 2016).

defensive harms. It seeks to ensure that there is nothing else an agent can do besides inflicting defensive harm to avert a threat, and that the agent is using the least harmful option available in doing so. The necessity constraint thus ensures that the defensive harm is inflicted for the sole purpose of averting an unjust threat, as opposed to, for instance, retributive reasons.[8]

We can distinguish between two normative functions the requirement to minimise harm might fulfil. First, it might ensure that no agent inflicts more harm than it is necessary *for her* to inflict to avert the unjust threat. I will refer to this as the *agent-centred* conception of the necessity requirement. Second, the necessity requirement might ensure that targets of defensive acts suffer no more than the *overall* minimum amount of harm necessary to avert the threat they pose. I will refer to this as the *target-centred* conception of the necessity requirement.

The agent-centred necessity requirement constrains individuals' acts with regard to the harm which it is necessary for *them* to inflict to avert an attack. The requirement, on this view, applies intrapersonally, looking only to the actions a particular agent could perform in averting a threat, without reference to what other agents might be able to do. The agent-centred conception of the necessity requirement thus applies to individuals severally, constraining their actions only with reference to other actions they could perform. If X can avert an attack by inflicting either ten or five units of harm, and Y can avert the same attack by inflicting three or four units of harm, an agent-centred conception of necessity will permit X to inflict five units of harm, and Y to inflict three units of harm. It will not tell us anything about whether X or Y should act. The fact that Y can avert the attack in a less harmful manner than X goes unheeded by an agent-centred view of necessity. Since agent-centred necessity demands that individuals take the least harmful of those courses of action available *to them,* Y's options have no bearing on what it is permissible for X to do.

The purview of the target-centred conception is broader. The purpose of target-centred necessity is not to constrain individuals' actions for their own sake, but to ensure that targets do not suffer more harm than is necessary *all-things-considered.* On a target-centred conception, the necessity requirement thus serves primarily to minimise the degree of harm suffered by the target of the defensive action, irrespective of who inflicts it. For this reason, the target-centred conception may apply interpersonally, to multiple agents with one accord.

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[8] For discussion, see Victor Tadros, *The Ends of Harm* (OUP, 2011), 53.

Thus, if X could avert an attack by inflicting either ten or five units of harm, and Y could avert the same attack by inflicting only three units of harm, a target-centred, interpersonal view of necessity would extend to both X and Y, and consequently permit only the infliction of three units of harm, all other things being equal. Thus, while an agent-centred conception of the necessity requirement permits X to inflict five units of harm, a target-centred application would countermand X's permission, insofar as Y can avert the same threat in a less harmful way, rendering the greater harm which X would need to inflict unnecessary.

This interpersonal application of the target-centred conception does not treat X and Y as a 'pair' or group agent. It still constrains the harmful acts of individuals qua individuals. However, unlike the agent-centred conception, it is sensitive to other agents' options. The moral jurisdiction of the target-centred necessity requirement is thus broader than that of the agent-centred conception, extending *across* defensive agents. As I will discuss below, the main implication of this is that what it is necessary, and hence permissible, for one agent to do may, at least in a fact-relative sense, be contingent on what it is possible for another agent to do. In certain cases, this means that Victim may be prohibited from harming Aggressor in self-defence if Rescuer could save Victim by causing less harm than Victim would cause in self-defence.

There may be a difference between what agents ought to do in a fact-relative sense and what it is permissible for them to do in an evidence-relative sense. What Victim and Rescuer are permitted to do in an evidence-relative sense will depend on their ability to communicate and coordinate their actions, and on what it is reasonable for each agent to believe about the other. If Victim cannot know that Rescuer will come to his defence, the fact that Victim's act of self-defence is unnecessary on a fact-relative basis has no bearing on what it is permissible for him to do on an evidence-relative basis. One possible view is therefore that the necessity constraint is target-centred in a fact-relative sense but that, given epistemic constraints and uncertainty about what others will do, the agent-centred conception will nonetheless apply in most cases. Thus, although victims may, on a fact-relative basis, be required to refrain from harming threats in self-defence if a third party will avert the attack in a less harmful manner, it is nonetheless generally permissible for victims to inflict greater harms on aggressors than third parties might be able to inflict, given conditions of uncertainty. I will return to this below.

First, we will take a closer look at the target-centred conception of the necessity requirement.

3.1 Two Arguments for Target-Centred Necessity

The possibility of applying the necessity requirement interpersonally only arises in cases in which more than one agent could avert the same threat of harm. Since mainstream discussions of the necessity requirement typically focus on cases that feature just one defensive agent, the target-centred conception has largely been ignored. However, there are two reasons for taking its possibility seriously. The first lies in the nature of liability-based justifications for defensive harming.

Generally speaking, justifications for defensive harming are forward-looking. The actions they justify seek to avert or prevent the infliction of wrongful harms. Defensive harming is thus not concerned with treating people according to what they are due. Liability-based justifications are no exception. Liability-based justifications are neither concerned with questions of desert, nor do they seek to bring about justice. Their function is to determine on whom unavoidable harms should fall.[9] Although they generally presuppose a certain degree of moral or causal responsibility for bringing about a threat of harm, responsibility is not relevant for its own sake. Its primary function is to indicate a normative difference between a threat and her victim in bringing about an unjust threat of harm.[10] Liability-based justifications for harming thus result from a normative asymmetry between agents, which determines onto whom unavoidable harms should fall.

Since liability-based justifications serve no punitive function, it is generally permissible to inflict only the degree of harm necessary to avert the threat. This is true irrespective of the fact that a target's liability makes it fairer for her than someone else to suffer some harm. Even if a target has made herself liable to be defensively harmed, general duties of

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[9] For discussion, see Rodin, 'Justifying Harm,' *Ethics* 122 (2011): 74-110.

[10] See McMahan, *The Ethics of Killing: Problems at the Margins of Life* (OUP, 2002), 401-2, and his 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15 (2005): 386-405, and *The Ethics of Killing*, 401-2; Norman, *Ethics, Killing, and War,* 122-3; Rodin, 'Justifying Harm,' 75, 95; Stephen De Wijze, Matthew H. Kramer, and Ian Carter (eds), *Hillel Steiner and the Anatomy of Justice: Themes and Challenges* (Routledge, 2009), 97 (n.3); see also Montague, 'Self-Defence and Choosing Between Lives'; Ryan, 'Self-Defence, Pacifism and the Possibility of Killing'; Wasserman, 'Justifying Self-Defence'; Smart, 'Understanding and Justifying Self-Defence.'

beneficence require that her interests be respected.[11] For this reason, harms to her must be minimised, even if she is fully culpable.

Liability consequently justifies harms not in relation to whether they are deserved, but primarily in relation to whether they are necessary. While liability is thus binary in one sense, in that potential targets are ether liable or not, it also has a scalar dimension. Targets can be liable to different degrees of harm. For instance, one might be liable to *n* amount of harm, but not to a harm that exceeds *n*.

This presumption against harming liable targets more than necessary to avert the threat they pose suggests that we should adopt a target-centred conception of necessity. This is because liability-based justifications' concern with necessity is ultimately specified in relation to targets of the defensive act, and not in relation to agents. That is, liability-based justifications themselves are fundamentally target-centred. What harms it is permissible to inflict on a target is determined by what harms it is necessary to inflict to avert her threat of harm. This is distinct from the question of what harms it is necessary *for a particular agent* to inflict to avert the threat of harm. There may be independent grounds for asking the latter question in cases in which we are concerned with ensuring that agents do not inflict more harm than it is necessary for *them* to inflict. But, since the ultimate aim is typically the instrumental one of averting the threat, the target-centred conception of necessity coheres more naturally with the instrumental nature of justifications for defensive harming than an agent-centred conception of necessity would.

The second argument in favour of target-centred necessity concerns the moral function of the necessity constraint itself. In essence, the necessity constraint assesses the means available to agents in averting a threat of harm. Of the options available to agents, it generally permits inflicting no more harm than is necessary. But what happens to be necessary to avert an attack may be completely out of agents' control. After all, whether one happens to have access to a weapon, what else one might be able to do in the circumstances, or how vulnerable the attacker happens to be, may depend on contingent circumstances which are largely beyond one's own agency. Insofar as the form which a defensive act may permissibly take is

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[11] See Firth and Quong, 'Necessity, Moral Liability, and Defensive Harm'; Michele Madden Dempsey, 'Against Liability: A Reason-Based Account of Self-Defense,' in Christian Coons and Michael Weber (eds), *The Ethics of Self-Defense*, (OUP, 2016), 211–32; David Rodin, 'The Lesser Evil Obligation,' in Saba Bazargan-Forward and Samuel C. Rickless (eds), *The Ethics of War: Essays*, (OUP, 2017), 28–45; Adil Ahmed Haque, *Law and Morality at War* (OUP, 2017), 120.

not tied to people's own agency to begin with, but contingent on external circumstances, there is no principled reason to restrict the necessity consideration to the defensive harms a particular agent could inflict.[12]

Since what harm it is permissible to inflict is determined by factors that lie beyond agents' control in any case, there is no reason, in principle, why the necessity constraint's jurisdiction should be limited to what options a particular agent has available, rather than extending to what other agents might do. That is, since agents cannot generally control what it is necessary for them to do in any given case, we might as well include other defensive agents' options in the necessity consideration. What it is necessary for Victim to do may thus, in a fact-relative sense, depend on what Rescuer will do, and vice versa.

Insofar as the primary aim is to avert a threat using the least harm possible, what matters, as far as the necessity constraint is concerned, is how much harm Aggressor suffers - not who inflicts it. Insofar as the necessity requirement is concerned, the moral difference between *Victim* inflicting five units of harm and *Victim* inflicting ten units of harm on Aggressor is therefore the same as the difference between *Victim* inflicting five units of harm on Aggressor and *Rescuer* inflicting ten on the other.

3.2 The Scope of Target-Centred Necessity

I indicated earlier that the necessity requirement's purview may extend across multiple defensive agents. Below, I will suggest that this provides distinct positive reasons for third parties to act in victims' defence in cases in which third parties can avert a threat of harm by causing less harm than victims. But first, it is necessary to clarify the scope of this constraint. In particular, it is distinct from the notion that defensive agents must seek to minimise harm among multiple targets of defensive acts.

The target-centred conception of necessity applies only to cases in which *multiple agents* can fend off the *same target*. It does not extend to cases in which one agent must decide which one of multiple acts of rescue to perform, based on which act would cause the least harm overall.[13] Consider

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[12] However, there may be contingent reasons, some of which I address below.

[13] This isn't to say that we can't conceive of such a constraint in general - just that the agent-centred conception of necessity as outlined here isn't such a constraint. For a view according to which states should alleviate poverty instead of fighting wars on roughly such grounds, see Kieran Oberman, 'War and Poverty,' *Philosophical Studies* 176 (2019): 197-217.

> *Trap Door:* Victim is standing on a trap door above a crocodile swamp. Villain is about to pull the lever that will make Victim plummet to his death. Victim can save his life only if he shoots and kills Villain. However, Rescuer can easily prevent Villain from pushing the button by breaking Villain's finger.

Now consider

> *Trap Doors:* Victim A is standing on a trap door above the crocodile swamp. Villain A is about to pull the lever to kill Victim A. Victim B is standing on a trap door elsewhere, and is also being eyed by hungry crocodiles. Villain B is about to pull the lever killing Victim B. Rescuer can either save Victim A's life by killing Villain A, or she can save Victim B's life by breaking Villain B's finger. Both Victims are equally innocent, and both Villains equally culpable. The only difference between the two acts of rescue is the amount of harm that would be required to save a life.

In *Trap Door*, it is, on the agent-centred conception of necessity, unnecessary for Victim to kill Villain. We should therefore prefer that Rescuer break Villain's finger. In *Trap Doors,* by contrast, the agent-centred conception of necessity is silent. It does not demand that Rescuer save Victim B rather than Victim A on account of the fact that this would require her to cause less harm overall. This is a view one might hold independently. But it is not implied by the agent-centred conception of necessity which I've outlined.

The assumption underlying the target-centred view is that the necessity constraint may seek to limit harm across defensive *agents*. This does not entail that the necessity constraint must also seek to limit harm suffered across different *targets*. This is because the necessity constraint seeks to compare different means of achieving the same end. It is not concerned with assessing which one of several possible ends to pursue. In *Trap Door*, there is only one end - saving Victim - whereas, in *Trap Doors*, there are two distinct ends - saving Victim A and saving Victim B. In *Trap Door,* both Victim's and Rescuer's respective acts would achieve the same just goal of saving Victim's life. The necessity constraint accordingly compares Victim's act of lethal self-defence to Rescuer's less harmful act of breaking Villain's finger in Victim's defence. In *Trap Doors,* by contrast, Rescuer is faced with two independent just aims - saving Victim A and saving Victim B. The fact that she can save Victim B in a less harmful way than Victim A is, as far as the necessity constraint is concerned, irrelevant. Since Rescuer is dealing with two morally independent, unrelated victims, and hence two morally independent just goals, the necessity constraint applies to each act of defence severally. Since both victims are innocent, Rescuer has a moral reason to give each an equal chance of survival. This might

require her to flip a coin.

One might object that Rescuer has a competing moral reason to save Victim B, since his rescue could be achieved in a less harmful way than rescuing Victim A. We might thus think that Rescuer can achieve one of two equally good ends, and that, all other things being equal, performing the less harmful rescue is the morally better option.[14] This may be correct, if we assume that the reduction of harm overall, even to liable people, is a good thing. But it is not implied by the target-centred conception of necessity as I've described it. For the target-centred conception of necessity to cohere with the view that Rescuer should perform the less harmful of two different acts of rescue, we would need to redefine the end of Rescuer's act to consist in saving one innocent life, such that the separateness of persons between victims becomes irrelevant. But, since both victims are innocent, it seems to me that the importance of the separateness of persons outweighs that of minimising harm across liable threateners.

Thus, if Rescuer can save a life by causing a death or by breaking a finger, it may well be all-things-considered impermissible to cause the death. But for this to be the case, both acts of defence would need to serve the same purpose, that is, save the same life. If Rescuer can save Victim from being killed by Villain by either killing or injuring Villain, then Rescuer may only injure Villain. However, if Rescuer must choose between two different victims, and hence two distinct ends, the necessity requirement does not demand that harms be minimised across Villains, and that Rescuer save the victim whose rescue would require a smaller amount of defensive force. This might well be true independently, but it would require a distinct explanation. The target-centred conception of the necessity constraint that I have proposed makes no such demand.

In sum, target-centred necessity seeks to minimise harm to the same target; it does not seek to minimise harms across targets. This is because the necessity requirement is concerned with different means of achieving the same end. Since, in *Trap Door*, there is only one just goal, but different ways of achieving it, it matters that the less harmful act still achieves the same just goal of saving Victim's life. The moral facts of the case in *Trap Doors*, however, are different. In this case, Rescuer could pursue one of two independent just goals. Rescuer's choice is thus not between several ways of achieving the same end, but, given the separateness of persons, she is faced with two distinct ends: saving Victim A and saving Victim B. If

[14] I am grateful to Jeff McMahan for pressing me on this.

Rescuer is faced with two distinct, potential targets and two independent liability considerations, target-centred necessity doesn't aggregate harm between them.[15] Accordingly, the target-centred necessity requirement applies to targets as individuals. It only demands that the target of one's defensive act be made to suffer no more harm than is necessary to avert her attack. It therefore only comes into action in cases in which there are several ways of averting the same threat - that is, different means of achieving the same end.

4. Minimising Harm to Targets

Here's what we've seen so far. The permissibility of inflicting defensive harm is subject to what defensive options are available. It is impermissible to inflict more harm than is necessary to avert a threat. Insofar as the overall permissibility of a defensive act is a function of what it is all-options-considered necessary to do, I have begun to suggest, the necessity requirement's purview may, in principle, extend to both victims' and third parties' options in averting a threat.

The upshot of a target-centred conception of necessity is that Victim's and Rescuer's respective permissions to use force in Victim's defence become interdependent, insofar as what it is necessary for Victim to do to avert a threat is sensitive to what options are available to Rescuer, and vice versa. It follows that, in cases in which one agent could avert the threat in a less harmful manner than the other, she is, in a fact-relative sense, morally required to do so, whereas the other agent is morally prohibited from acting. This means that there may be cases in which victims are, in a fact-relative sense, prohibited from harming in self-defence when third parties could avert the threat by inflicting less harm than victims would need to inflict in self-defence.[16] Consider how this applies to duties to minimise harms to targets of defensive acts:

> *Conscientious Driver*: Driver, who always keeps his car well maintained and always drives carefully and alertly, decides to drive to the movies. On the way a freak accident occurs that causes his car to veer out of control in the direction of a pedestrian. The out-of-control car will now kill the pedestrian unless the

[15] This is different from cases in which multiple individuals pose a collective threat, and one could inflict different amounts of harm on different aggressors. For discussion of this type of case, see F.M. Kamm, *Ethics for Enemies* (OUP, 2011), 133-134; McMahan, 'Liability, Proportionality, and the Number of Aggressors,' in Saba Bazargan and Samuel Rickless (eds), *The Ethics of War*; Patrick Tomlin, 'Distributive Justice for Aggressors,' *Law and Philosophy* 39 (2020): 351–379. See also Kamm's discussion on sacrificability in her *Intricate Ethics* (OUP, 2007) 255.

[16] I leave aside victims' potential agent-relative prerogative here.

pedestrian destroys the car with a grenade, thereby killing Driver.[17]

According to McMahan's (agent-)responsibility-based account of liability, Driver is liable to defensive harm, because he voluntarily undertook to drive and is, to that extent, responsible for the threat posed to Pedestrian.[18] This creates an ever-so-slight moral asymmetry between Driver and Pedestrian, which provides the latter with a liability-based justification for killing the former in self-defence. Recall that liability has nothing to do with desert. In this case, it is simply unfortunate for Driver that he is more responsible than Pedestrian for bringing about the threat of harm. Now consider

> *Conscientious Driver II*: Everything is the same as in Conscientious Driver I, with the addition of Rescuer. Rescuer can, and will, push a button that will trigger spike strips on the road, deflating Driver's tires and saving Pedestrian's life. This would merely injure Driver.

Since the defensive act serves solely to avert the threat which Driver poses to Pedestrian, and not to punish Driver, I take it that harms to Driver ought to be minimised, even if he has made himself liable to defensive harm. A scenario in which Driver is mildly injured by Rescuer is preferable to one in which he is killed by Pedestrian, even if Driver voluntarily engaged in the potentially risky act of driving. However, on an agent-centred conception of the necessity requirement, we would be indifferent between Pedestrian killing Driver and Rescuer injuring Driver, since each act is necessary when considered in isolation. On the target-centred view, by contrast, necessity's purview will extend to both Pedestrian's and Rescuer's options in averting the threat posed by Driver. What is necessary to stop Driver's car is, on this view, determined with reference to both Pedestrian and Rescuer. Insofar as Rescuer is able and willing to push the button, a target-centred view of the necessity requirement will tell us that, since it is unnecessary for Pedestrian to kill Driver, it is impermissible for him to do so.

The target-centred conception of necessity is compatible with both main approaches to explaining why individuals ought not inflict more defensive harm than necessary even on those whose threats a defensive act is meant to avert. That is, the target might be *wronged* by

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[17] McMahan, *Killing in War*, 165.

[18] For the sake of the discussion, we might as well assume that Pedestrian is sitting in a park or is in a pedestrian zone, far away from where cars should be. McMahan's assumption is that Pedestrian is not engaging in a risky activity.

being made to suffer gratuitous harms; and it might be all-things-considered *impermissible* to inflict gratuitous harms, even if the target has no right against being harmed more than necessary. Which view we adopt will depend on our view of the relationship between necessity and liability - specifically, of whether necessity is *internal* or *external* to liability.

On *internalist* views of necessity, a person is only liable to harms that are necessary as part of the defensive action. Liability to a harm automatically presupposes that this harm is necessary. Unless inflicting a defensive harm will 'prevent, delay, or ameliorate' the threatened harm, the target cannot be liable to it, and would be wronged by being made to bear it.[19] Which rights a target forfeits is thus determined not only with reference to facts about herself, but with reference to what it is necessary for the victim to do to defend herself. On internalist views, a target's liability is thus contingent on the options available.

On a target-centred conception of necessity that applies across multiple defensive agents, a target's liability may consequently be sensitive to what it is necessary for different agents to do. In *Conscientious Driver II,* on a target-centred conception of necessity that is internal to liability, Driver is only liable to the harm necessary to avert the threat she poses. Since it is not necessary for Pedestrian to kill Driver, Driver is only liable to be injured by Rescuer. If Pedestrian threatens to kill Driver nonetheless, Pedestrian wrongs Driver, and may thereby make himself liable to counter-attack. On an agent-centred conception, by contrast, Driver would be liable to be killed by Pedestrian and liable to be injured by Rescuer. On internalist views, the difference between agent-centred and target-centred necessity thus has a direct bearing on persons' liability. In cases with multiple defensive agents, what harms targets are liable to, and what harms may hence be inflicted on them without wronging them, will thus differ depending on whether we adopt an agent-centred or a target-centred view of necessity.

On *externalist* views, by contrast, necessity is external to liability. Liability is thus exclusively determined by internal facts about the target. Facts external to the individual, such as necessity, have no bearing on her liability. A person can accordingly be liable to, that is, have

[19] Rodin, 'Justifying Harm,' 77, 93. See also McMahan, *Killing in War*, 8-10. Victor Tadros and Patrick Tomlin also treat necessity as internal to liability in their work.

no right against, harms that are not necessary as part of the defensive action.[20] Accordingly, targets may not be wronged by having unnecessary harms inflicted on them, although this may be all-things-considered impermissible.[21] If necessity is external to liability, the question of whether harming Aggressor is necessary has no bearing on whether she would be wronged by being thus harmed. What rights she has is distinct from what it is permissible to do to her. On externalist views, then, necessity does not constrain liability from within, but functions as an external constraint on what it is permissible to do. It is therefore all-things-considered impermissible to inflict a harm if it is unnecessary, irrespective of the degree of harm to which an individual may have made herself liable. Although harming her unnecessarily would therefore not wrong her, a defensive action nevertheless remains impermissible if it is unnecessary.

On externalist views, whether we adopt a target-centred or agent-centred view of necessity consequently has no bearing on a target's liability. In *Conscientious Driver II*, we might thus grant that Driver has made himself liable to defensive harm, but hold that - insofar as necessity is determined by both Pedestrian's and Rescuer's options - it is both-options-considered impermissible for Pedestrian to kill Driver, insofar as this is unnecessary, irrespective of what rights Driver might have forfeited.

What's at stake in asking how necessity relates to liability is thus not whether it is permissible to inflict unnecessary harms, but whether people would be wronged by being unnecessarily harmed. While only internalists assume that the infliction of unnecessary harms wrongs targets of the defensive action, both views prohibit it. On internalist views of necessity, this is because targets are wronged by having unnecessary harms inflicted on them. On externalist views, it is because it is all-things-considered impermissible to harm more than necessary, even if targets would not be wronged.

The distinction between agent-centred and target-centred conceptions of necessity is compatible with both internalist and externalist views of how necessity relates to liability. On a target-centred, internalist conception, whether one agent has a liability-based justification for

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[20] For a defence of this view, see Helen Frowe, 'Noncombatant Liability in War' in *How We Fight: Ethics in War* (OUP, 2014), 185-6, and her *Defensive Killing: An Essay on War and Self-Defence* (OUP, 2014), Ch 4 (esp 91, 106). See also Joanna Mary Firth and Jonathan Quong, 'Necessity, Moral Liability, and Defensive Harm,' *Law and Philosophy* 31 (2012), 673–701.

[21] However, Frowe suggests, an aggressor may be permitted to defend herself non-harmfully against unnecessary harms. (Frowe, *Defensive Killing*, 91, 106.)

harming will depend on whether another agent can avert the threat in a less harmful manner. This is why, on an internalist, target-centred view of necessity in *Conscientious Driver II,* Driver is only liable to be injured, and Pedestrian would consequently wrong him by killing him. On a target-centred, externalist conception of necessity, by contrast, a target's liability remains unaffected by what options agents have available, but necessity nonetheless determines what it is all-things-considered permissible to do. This is why, in *Conscientious Driver II,* Pedestrian would act all-things-considered impermissibly in killing driver, even if Driver would not be wronged.[22]

We have now discussed two main implications of the target-centred conception of necessity in cases in which multiple defensive agents are available. First, it may extend across multiple defensive agents. Second, and consequently, what harms it is permissible for one person to inflict will depend on what options are available to another. It follows that it may be all-things-considered impermissible for one person to inflict a defensive harm when another could avert the threat in a less harmful manner. This, I indicated earlier, is true at least in a fact-relative sense. Given conditions of uncertainty, however, it may generally be unlikely that victims will, in many real-world cases, actually be prohibited from defending themselves, even if others could rescue them in less harmful ways. Victims may thus retain their evidence-relative permissions to harm in self-defence. To this we now turn.

Uncertainty

In cases in which Victim can defend himself only by killing Aggressor, and Rescuer can defend Victim by merely injuring Aggressor, the application of the necessity constraint to the actions of Victim is complicated in the following way. If Victim knows that Rescuer will save him if he does not engage in self-defence, then Victim's engaging in self-defence is prohibited by the necessity requirement. However, if Victim cannot know that Rescuer will save him, then Victim's act of self-defence, while still prohibited by the necessity requirement in a fact-relative sense, will be permissible in an evidence-relative sense. What Victim is permitted to do thus depends on what Victim reasonably believes Rescuer will do, and vice versa.

In real-world situations of self- and other-defence, agents must act in conditions of

[22] To the extent that Aggressor would be permitted to engage in counter-defence against Victim to defend herself against harms to which she is not liable, Rescuer's duty might also serve to protect Victim from counter-defence by Aggressor, which would be justified if Victim threatened Aggressor with unnecessary defensive harms.

considerable uncertainty. For example, Victim might believe that there is only a 90% chance that Rescuer will defend him. Rescuer may be deliberating and may not yet have made up her mind about whether to intervene. It might also simply be indeterminate if she will indeed rescue Victim. In light of this, there are three considerations worth bearing in mind.

First, we might conclude that, in most cases, in light of uncertainty about others' decisions, it is exceedingly unlikely that what victims are, on an evidence-relative basis, permitted to do will indeed be affected by what other agents will do. For example, we might think that, insofar as victims may treat their own lives with a certain degree of partiality, their agent-relative prerogative permits them to prioritise their own life such that they are permitted to engage in defensive harm, even if - in a fact-relative sense - the necessity requirement would prohibit this on the grounds that there are less harmful defensive options available.[23] Unless victims are reasonably certain that third parties will avert the attack, they therefore have no pro tanto duty to refrain from engaging in self-defence.

Second, we might identify ways in which agents could dispel some uncertainty, for example by influencing others' actions. If Victim can force or incentivise Rescuer to repel Aggressor's attack in a way that is significantly less harmful than Victim's own defensive action would be, he might be required to do so, so long as this would not be unreasonably costly. This might be true especially in cases in which the harms to be minimised would not fall exclusively on liable targets, but also on innocent bystanders, more on which below. What Victim ought to do may thus depend not merely on what he can reasonably believe Rescuer will do. But what Rescuer will do may be influenced by what Victim does to begin with. In some cases, what one agent is permitted to do thus depends on what she can make others do. For instance, most people think that military humanitarian interventions, which entail significant risks to innocent civilians, can only become permissible once other, non-military forms of intervention, such as economic sanctions or diplomatic pressure, have been exhausted. These views rely on presumptive duties to pressure other agents to take actions that will preclude the need for more violent measures.

Third, as I will suggest below, if Rescuer can avert a threat in a less harmful way than

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[23] Those who believe in agent-relative prerogatives to harm will likely find the demands of an interpersonal, target-centred necessity constraint overly demanding. They might hold that victims' permissions to harm in self-defence are, in any case, grounded in some degree of partiality which may counteract the requirement to minimise harm. For the purposes of this argument, I will remain agnostic on the existence of agent-relative permissions to harm.

Victim, Victim might be required to bear the extra risk of relying on Rescuer in cases in which there is uncertainty about Aggressor's liability, and if the threat Victim faces is that of a compensable harm. In addition, Victim may be required to bear certain risks to avoid harming innocent bystanders as a side effect of his self-defensive act in cases in which the harms with which he is threatened are compensable. This carries a further implication. A target-centred necessity constraint may itself generate duties for agents to engage in defensive acts to minimise harms. This is most clearly the case if different agents would cause different degrees of harm to innocent bystanders as a side effect of averting the same threat of harm. The final section discusses this implication.

5. Minimising Harm to Bystanders

Consider

> *Trap Door II:* Victim is standing on a trap door above the crocodile swamp. Villain is about to pull the lever to kill Victim. Victim can save his life only by forcefully pushing Villain away. Villain would knock over innocent Bystander as a side effect, who would consequently have two of her toes bitten off by an irritated crocodile.

Since the harm Bystander would suffer is significantly smaller than the lethal harm against which Victim is defending himself, it is permissible for Victim to infringe Bystander's right not to be harmed. Although Bystander has a right not to be harmed, Victim has a lesser-evil justification for harming her as a side effect of her defensive act, given that the lethal harm he would suffer is significantly more severe than the harm of losing two toes which Bystander would suffer. Victim's act of self-defence is, in other words, proportionate.[24] Now consider

> *Trap Door III:* Everything is the same as in *Trap Door II*, except for the fact that Rescuer can easily push Villain away from the lever, saving Victim's life, without knocking over innocent Bystander, whose set of toes would remain complete.

Although Victim's defensive act is proportionate, it is unnecessary. If the necessity requirement extends across both Victim and Rescuer, it is unnecessary for Victim to harm Bystander as a side effect. Given that Bystander is innocent and has no duty to sacrifice her toes, even though forcing her to do so would not violate the proportionality requirement, it seems that the duty to minimise harms to innocent people requires Victim to refrain from

[24] For example, McMahan, *Killing in War*, 23. For an explanation of how both liability and lesser-evil justifications are ultimately concerned with questions of proportionality, see Rodin, 'Justifying Harm,' 97.

acting, given that Rescuer can save him without harming Bystander. Thus, even if Victim's self-defensive act is proportionate, he may be all-things-considered required to refrain from acting if Rescuer can and will avert the threat without harming Bystander. Even if Victim's self-defensive act is proportionate in the wide sense, we might thus think that Rescuer owes Bystander a duty to avert the threat to Victim in a way that does not harm Bystander.[25] After all, Bystander retains her right not to be harmed.

Victim's self-defensive act can thus satisfy the wide proportionality requirement and yet fail to meet the necessity requirement. While being eaten by crocodiles is a substantially greater harm than losing a couple of toes, this consideration is orthogonal to the fact that Rescuer can save Victim without harming Bystander. Insofar as minimising harms to innocent people is paramount, it may therefore be all-things-considered impermissible for Victim to perform the defensive act, even if the harm this would cause to innocent others would, ordinarily, be proportionate.[26]

If Victim's defensive act would infringe Bystander's right not to be harmed, but Rescuer's defensive act would not, or do so to a lesser degree, then this may render it all-things-considered impermissible for Victim to harm Bystander, and provide Rescuer with a positive reason to intervene - not merely to protect Victim's right, but also Bystander's right not to be harmed unnecessarily as an albeit proportionate side effect of Victim's defence.

It is generally impermissible for third parties to kill more bystanders in defending victims than victims would be permitted to kill in defending themselves.[27] However, if third parties can cause *less* harm, or *fewer* deaths, as a side effect of defending victims than victims would be permitted to cause in the absence of third parties, third parties' ability to minimise harm to innocent individuals provides a positive reason for third parties to act and a reason for victims to refrain from doing so. Beside the duty to assist victims' defence, third parties' duty to rescue may thus be partially grounded in a more general duty to minimise harms to innocent bystanders - harms these bystanders would otherwise suffer as a proportionate side effect of victims' own defensive acts. It may thus be that third parties are effectively required

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[25] Bear in mind that wide proportionality is a necessary and not a sufficient condition.

[26] To be precise, in light of the uncertainty consideration discussed earlier, it is in a fact-relative sense that Victim is prohibited from acting in ways that would proportionately harm bystanders when Rescuer could protect Victim without harming bystanders at all. Rescuer is thus, in a fact-relative sense, required to prevent harms to bystanders which Victim has an evidence-relative permission to inflict.

[27] For example, McMahan, 'The Just Distribution of Harm Between Combatants and non-combatants,' *Philosophy & Public Affairs*, 38 (2010): 342-379, 364-5.

to prevent harms to innocent bystanders which it would be proportionate for victims to inflict.

This may also be the case if the harms Victim and Rescuer would respectively cause as a side effect of Victim's defence would not fall on the same bystanders. Consider

> *Trap Door IV:* The situation is the same as in *Trap Door II* - Victim can save himself by causing Bystander to lose two toes as a side effect. Alternatively, Rescuer can save Victim by causing a different bystander to lose just one toe as a side effect. Both bystanders are innocent.

Given that Rescuer can save Victim in a way that will cause less harm to an innocent person than Victim's act of self-defence would, it may be these-things-considered impermissible for Victim to defend himself. This is despite the facts that (a) causing Bystander to lose two toes would be proportionate in the circumstances, and that (b) Rescuer would harm a different bystander. Since both bystanders are equally innocent, and there is nothing that morally distinguishes them, there is no moral reason why Victim's rather than Rescuer's bystander should bear the proportionate cost of Victim's defence. Insofar as Rescuer is independently justified in carrying out the defensive act, the fact that she would harm a different bystander than Victim is therefore irrelevant.

This is consistent with my earlier argument that the necessity constraint may extend across multiple defensive agents only insofar as they act in pursuit of the same goal. Since both Victim and Rescuer aim to defend Victim against the same threat of harm, Victim's act of self-defence that would cause Bystander to lose two toes as a side effect and Rescuer's act of other-defence that would cause a different bystander to lose one toe as a side effect practically function as two different means of achieving the same defensive aim, as far as the necessity requirement is concerned.

This indicates that the wide proportionality constraint is, in a central aspect, impervious to questions of necessity. A defensive act may not be necessary but still satisfy the wide proportionality requirement, such as Victim's causing Bystander to lose two toes as a side effect of saving his life. Unlike the necessity constraint, which may extend across defensive agents to compare alternative means of averting a threat of harm, the proportionality requirement is primarily concerned with the consequences of an act of defence in

comparison to the consequences of non-performance of that act.[28] In a case in which both Victim and Rescuer could avert a threat to Victim, they are therefore both independently constrained by the proportionality requirement. Thus, in *Trap Door IV,* given the difference in the significance of harm with which Victim is threatened and which each bystander would suffer as a side effect of Victim's defence, it would be proportionate for Victim to cause his bystander to lose two toes, and it would be proportionate for Rescuer to cause her bystander to lose one toe. Proportionality considerations thus remain agent-centred even when necessity considerations are not.

However, proportionality may also be sensitive to the outcomes of others' acts. Thus, in *Trap Door III*, Rescuer's ability to avert the threat without harming Bystander might bear on the proportionality of Victim's own self-defensive act. Since proportionality is not determined by comparing available options, but by weighing up the consequences of performing and not performing some harmful act, the relevant proportionality calculation may specify the relevant counterfactual as one in which Rescuer acts in Victim's defence and Bystander is left unscathed.[29] Thus, insofar as non-performance of Victim's act will result in Rescuer saving Victim without harming Bystander, this may render Victim's act of harming Bystander disproportionate in the circumstances.

This reveals that one of the factors to which wide proportionality considerations are sensitive is the moral difference between justified and wrongful harms others will cause as a result of one's action or inaction. Although wide proportionality is primarily concerned with comparing consequences, it is nonetheless sensitive to how outcomes are brought about. For example, wide proportionality considerations are sensitive to the moral asymmetry between doing and allowing harm, and the moral difference between intended and unintended harms.[30] It is thus fitting that they should also be sensitive to the moral difference between just and unjust harms others will cause as a result of one's own action.

In cases of intervening agency in which others will cause wrongful harm if one averts an unjust threat of harm to oneself, wide proportionality with regard to one's defensive act is

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[28] For discussion of the difference between the necessity and proportionality constraints, see McMahan, 'Proportionate Defence,' 132.

[29] The matter of specifying relevant counterfactuals for the sake of proportionality calculations is highly complicated. For discussion, see David Mellow, 'Counterfactuals and the Proportionality Criterion,' *Ethics & International Affairs* 20 (2006): 439 - 454.

[30] Chapter 5 discusses this in more detail.

not affected. Consider

> *Arms:* Villain threatens to chop off both of Victim's arms. Victim could fight off Villain by stabbing her. However, if Victim defends himself, Villain's friends will chop off the arms of five other innocent people.[31]

Does the fact that five other innocent people will suffer severe wrongful harms render Victim's defensive act disproportionate? The main reason to think that it does not is that Villain's friends would be acting wrongfully. They would themselves be violating stringent moral constraints. This should have no bearing on the proportionality of Victim's own defensive act. Wide proportionality is thus impervious to others' agency when this is wrongful. The reason why wide proportionality in the *Trap Door* cases is sensitive to the consequences of Rescuer's acts is that Rescuer is acting justifiably. Rescuer is not violating any moral constraints, so her actions may be counted in Victim's wide proportionality calculation. By contrast, in cases of intervening agency in which others will violate independent moral constraints and cause *wrongful* harms as a result of one's own defensive act, this has no bearing on the wide proportionality of one's own defensive act.

Causing Proportionate Harm

The possibility of other-defence also has implications for cases in which victims are prohibited from engaging in self-defence on the grounds that this would cause disproportionate harm to innocent bystanders. Consider

> *Trolley:* Victim is stuck on the trolley tracks. He could pull the lever diverting the trolley away from himself and onto another set of tracks, but this would kill five innocent bystanders as a side effect.

In this case, Victim's defensive act satisfies the necessity requirement - there is nothing else he could do to save his life - but fails to meet the proportionality requirement. It is impermissible to kill five innocent people to save oneself, so Victim is required to let himself be killed. Now consider

> *Trolley II:* Everything is the same as in *Trolley*, with the addition of Rescuer, who

[31] Based on Frowe, *Defensive Killing*, 129. For discussion of intervening agency in this context, see Kimberly Kessler Ferzan, 'Omissions, Acts, and the Duty to Rescue,' in Dana Kay Nelkin and Samuel C. Rickless (eds), *The Ethics and Law of Omissions* (OUP, 2017), 227.

> can divert the trolley onto a third set of tracks where it will merely bruise another innocent bystander.

Grant that the act of bruising an innocent bystander is proportionate, as Rescuer will thereby avert a substantially greater harm to Victim. If Victim is prohibited from performing a defensive act because this would cause disproportionate harm to innocent bystanders, and Rescuer can easily intervene to avert the threat in a way that will cause only proportionate harm to bystanders, it seems that Rescuer is required to perform the defensive act which Victim is prohibited from performing. Third parties may thus be required to intervene to defend victims who are prohibited from acting in other-defence on the grounds that this would cause disproportionate harms to innocent bystanders. In this case, Rescuer would not be acting on a duty to minimise harms to bystanders, but on an ordinary duty to rescue Victim from a wrongful threat of harm. In cases in which Victim is prohibited from harming in self-defence because this would violate the wide proportionality constraint, Rescuer may therefore be required to defend innocent Victim, so long as this will only proportionately harm bystanders as a side effect.

What this shows is that requirements to minimise harms to targets and bystanders do more than impose constraints against harming. Rather than merely regulating *how* agents avert threats of harm, duties to minimise harms to both targets of and innocent bystanders to defensive acts may provide third parties with positive reasons for intervening - not only to rescue threatened victims, but also to minimise harms to others. Rescuer's permission to intervene therefore not only obtains independently of Victim's permission, but may, in fact, be generated by Victim's lack of a permission to harm in self-defence.

This brings us to the final complication. In some cases, the possibility of third-party other-defence may require Victim to bear additional risks of harm to spare innocent others, which Victim would not be required to bear in the absence of the possibility of being rescued.

Minimising Proportionate Harms

I noted earlier that real-world and epistemic constrains render it unlikely that victims could be prohibited from defending themselves on the basis of less harmful options being available to third parties. This is true especially in cases in which the threat of harm to victims

is severe. In some cases, however, victims may be required to bear some additional cost to avoid harming innocent bystanders as a side effect of their self-defensive act if the harms with which they (victims) are threatened fall below a certain threshold. Consider

> *Trolley III:* Victim is stuck on the trolley tracks, with the trolley approaching. Victim will be killed by the trolley unless he diverts it onto the other tracks, where it will break innocent Bystander's leg. Rescuer, who could stop the trolley and save Victim's life without harming Bystander, seems to be taking her time. Victim estimates that Rescuer will be able to stop the trolley in time to save him, but cannot be certain.

I take it that it is permissible for Victim to divert the trolley himself. Since the threat of harm to Victim is lethal and the harm to Bystander proportionate, Victim is not required to bear the risk of lethal harm in waiting for Rescuer, which would spare Bystander. Now consider

> *Trolley IV:* Victim is stuck on the trolley tracks, with the trolley approaching. The trolley will run over and break both of Victim's legs unless he diverts it onto the other tracks, where it will break innocent Bystander's foot. Rescuer, who could stop the trolley and save Victim without harming Bystander, seems to be taking her time. Victim estimates that Rescuer will be able to stop the trolley in time, but cannot be certain.

In this case, Victim may be required to bear the increased risk of being injured himself to spare innocent Bystander, even if harming Bystander as a side effect of diverting the trolley would be proportionate. This is because the harm Victim would suffer, if the risk were realised, is, broadly speaking, compensable. After a certain amount of time, he will have fully recovered. While the same is true for innocent Bystander, Victim is, in this situation, subject to the general constraint against harming. In combination with the fact that Bystander is innocent, the likelihood of Rescuer's success in stopping the trolley may therefore require Victim to bear the risk of being compensably harmed rather than inflicting an albeit proportionate harm on an innocent person.[32]

David Rodin has made a similar suggestion in a different context. He has suggested that victims may have 'justice-based reasons' to refrain from engaging in harmful self-defence to protect their right not to be harmed, and instead to 'defer vindication of rights to post facto

[32] I discuss questions of compensability, and their bearing on wide proportionality, in a working paper ('The Compensability Condition for Proportionality,' available upon request).

redress' where the harms victims would suffer are compensable.[33] This is because inflicting defensive harm can be morally risky, insofar as it is often not obvious whether one's target is indeed morally liable to the harm one would inflict.

What is troubling about uncertainty about a target's liability is the risk of inflicting harm on a person to which she is not liable. The same is true if one inflicts harm on innocent bystanders, irrespective of whether the harm would be proportionate. Except, in this case, we know that innocent bystanders are not liable. In many cases, they consequently acquire claims to be compensated for having their rights harmfully infringed. If Rodin is right that morally innocent agents can be required to bear an actual harm, for which they are then compensated, to avoid the risk of inflicting harms on targets to which these targets may not be liable, then agents can also be required to bear the mere *risk* of a compensable harm to avoid inflicting harms on innocent bystanders to which bystanders are, as a matter of certainty, not liable.

Finally, in addition to bystanders' innocence and uncertainty about target's liability, there is a third reason why Victim might be required to bear some additional risk in relying on Rescuer to minimise harm. This is that targets may be liable on the basis of only minimal responsibility, such as when a threat is merely agent-responsible (as opposed to, say, culpable). For example, in *Conscientious Driver II*, if Pedestrian could save his life either by killing Driver or by merely injuring Driver and suffering a small harm himself, then Pedestrian ought to suffer a small harm himself, given that Driver is merely minimally responsible for posing the threat. For the same reason, Victim may be required to bear the added risk of relying on Rescuer to act in cases in which the target's liability is based on minimal (agent-)responsibility - at least if the harm with which Victim is threatened is compensable. What the latter part of the discussion has thus shown is that there are at least these three reasons why the possibility of third-party other-defence may require agents to bear additional risks of harm to spare innocent others.

6. Conclusion

The permissibility of defensive acts is subject to requirements to minimise harm to both targets and bystanders. Permissions to inflict defensive harm are consequently contingent on which defensive options are available to agents. In cases in which multiple

[33] Rodin, 'Justifying Harm,' 107. Non-compensable harms include death, torture, rape, and grievous bodily injury, but where precisely we draw the line is a question I'll leave open here.

defensive agents could avert the same threat to an innocent victim, I have suggested, their respective duties and permissions are, in a fact-relative sense, interdependent. As a consequence, if it is unnecessary for Victim to inflict a particular harm in self-defence because Rescuer can easily avert the threat in a less harmful manner, it may be impermissible for Victim to act, and obligatory for Rescuer to do so. Third parties may thus incur distinct positive reasons for performing defensive acts, by virtue of the fact that this minimises harms, compared to alternative, more harmful acts available to other defensive agents, including victims themselves.

To conclude, this chapter has revealed two things. First, other-defensive harming may be required not merely as a result of ordinary duties to rescue victims as discussed earlier, but also as a result of duties to minimise harms to targets and bystanders. Second, rather than merely regulating the way in which agents perform defensive acts by limiting the amount of harm they may permissibly cause, the requirement to minimise harm may provide distinct grounds for third parties to intervene in other-defence when they can thereby minimise harms to both liable targets and innocent bystanders.

4. Harming Beneficiaries

1. Introduction

Humanitarian interventions over the last couple of decades have resulted in large numbers of civilian casualties as well as the destruction of countless homes, businesses, and vast infrastructure. Interventions in Bosnia, Kosovo and Libya, for instance, caused the deaths of over a thousand civilians, whereas not one single casualty was suffered by interveners.[1] Should we take this as an indication that the distribution of risks of harm *in bello* wasn't just?

Consider NATO's intervention in Kosovo in 1999. The prospective intervening countries were faced with a critical dilemma. On one hand, pressure to intervene was significant after global inaction in the face of the atrocities committed in Rwanda five years earlier. On the other hand, the US was also under significant pressure not to expose their own combatants to risks of lethal harm, after the gruesome killing of 18 American soldiers during the intervention in Somalia in 1993.[2] There was a sense among the public that, as Samuel P. Huntington had previously claimed, 'it is morally unjustifiable and politically indefensible that members of the [United States] armed forces should be killed to prevent Somalis from killing one another.'[3]

The alliance's response to this challenge in Kosovo was to rule out ground forces, and fly at altitudes out of reach of Serbian anti-aircraft weapons. This, however, not only had the desired effect of reducing risks to combatants; it also reduced precision in targeting as pilots were unable to do their own reconnaissance. This significantly increased the risk of collateral harm to civilians. Whilst this strategy was successful in the sense that NATO forces suffered no casualties over the course of the war, this came at the cost of many civilian lives. An estimated 500 civilians were killed by the NATO intervention originally intended to protect

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[1] For example, Bruce Cronin, *Bugsplat* (OUP, 2018); Cronin, 'Killing Civilians in Order to Save Them: The Dark Side of Humanitarian Intervention,' *FLACSO-ISA Joint International Conference Presentation*, Buenos Aires (July 2014); Paul H. Wise, 'The Epidemiologic Challenge to the Conduct of Just War: Confronting Indirect Civilian Casualties of War,' *Daedalus* 146 (2017): 139-154.

[2] Jeff McMahan, 'The Just Distribution of Harm Between Combatants and non-combatants,' *Philosophy & Public Affairs* 38 (2010), 342-379, 342.

[3] Samuel P. Huntington, 'New Contingencies, Old Roles,' 2 Joint Forces Quarterly (1992), 338. See also Robert H. Jackson, 'The Political Theory of International Society,' in K. Booth and S. Smith (eds), *International Relations Theory Today* (Polity, 1995), 123.

innocent civilians.[4]

This kind of case is by no means exceptional. It is standard practice for militaries to seek to minimise risk to their own forces to the extent legally permissible, a policy in the context of force protection usually described as risk transfer.[5] This chapter challenges a view which has been advanced to justify transferring risks from intervening combatants to certain civilians in armed humanitarian interventions. This view holds that certain civilians' immunity to being harmed as a side effect may be diminished by their prospects of benefiting from the intervention. Against this, I argue that mere beneficiary status is not morally salient when the benefit consists in the mitigation or prevention of wrongful harms. My principal claim is that, to the extent that individuals stand to benefit only by virtue of being victims of wrongful threats of harm, their expected benefit of being rescued does not justify their exposure to additional risks of harm. On its own, beneficiary status is therefore inadequate as a distributive principle for determining the permissibility of risk imposition. Instead, I suggest that, in those cases in which it is indeed fairer to harm beneficiaries rather than non-beneficiaries, this is explained by the difference between compensable and non-compensable harms. What is really doing the justificatory work, I will suggest, is that harms that are readily compensable weigh less heavily in wide proportionality assessments. This, rather than beneficiary status itself, explains why it is sometimes more just to expose expected beneficiaries rather than others to threats of unintended harm.

The argument proceeds as follows. Section 2 outlines the view in question, the Beneficiary Principle (BP). Sections 3 and 4 each raise an objection to the BP; the first questions its applicability to collectives, and the second its moral coherence. Section 5 proposes what seems to me a more plausible position, which explains why harming beneficiaries is, in some cases, fairer than harming non-beneficiaries when neither are liable. Section 6 concludes.

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[4] Human Rights Watch, *The Crisis in Kosovo,* available at: https://www.hrw.org/reports/2000/nato/Natbm200-01.htm [accessed 14 October 2018]; Cronin, 'Killing Civilians,' 18, 30; Jeff McMahan, 'Humanitarian Intervention, Consent, Proportionality,' in *Ethics and Humanity,* ed. N. Ann Davis, Richard Keshen and Jeff McMahan (OUP, 2010), 44-72, 64.

[5] Martin Shaw, *The New Western Way of War: Risk-Transfer War and Its Crisis in Iraq* (Polity, 2005); Tony Pfaff, 'Peacekeeping and the Just War Tradition,' *Strategic Studies Institute*, 2000.

Assumptions and Clarifications

For the purposes of this discussion, I'll use 'civilians' and 'non-combatants' interchangeably. 'Bystanders' are persons who are not involved in the conflict; they neither contribute to nor are affected by it, and do not stand to benefit from the intervention. They might be residents in the target party or individuals in neighbouring states who are in no danger. 'Beneficiaries' or 'to-be-liberated civilians' are individuals in whose defence the intervention is carried out.[6] They are the feared victims of atrocity crimes who are usually, but not necessarily, civilians. They are expected beneficiaries insofar as the intervention's aim is to protect them from harm they would otherwise suffer. Although persons other than potential victims of atrocity crimes may actually benefit from an intervention, I'll use the term to refer to those individuals in whose protection the intervention is conducted.[7] By 'beneficiaries', I therefore mean *intended* or *expected* beneficiaries, as opposed to *actual* beneficiaries, unless otherwise specified.[8] For the purposes of this discussion, the relevant distinction will be between beneficiaries and non-beneficiaries. Whether these non-beneficiaries are bystanders or just intervening combatants is, as far as this chapter is concerned, irrelevant.[9]

One might wonder whether the Beneficiary Principle is motivated at least in part by the assumption that intervening combatants simply shouldn't have to bear certain costs of the intervention, given ordinary limits on individuals' duty to rescue. If this were the case, we wouldn't be faced with the claim that beneficiaries *qua beneficiaries* should bear the costs of their own rescue. My aim here, therefore, is not to give an account of the conditions under which intervening combatants ought to bear greater risks to protect civilians. This question is orthogonal to the question of which principles we should use to determine this, and will be the subject of the following chapter

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[6] Øverland terms beneficiaries 'to-be-liberated-civilians' and refers to bystanders as 'third parties.' ('High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?,' in Paolo Tripodi and Jessica Wolfendale (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Ashgate, 2011), 69-86, 71). I use 'beneficiaries' and 'to-be-liberated civilians' synonymously.

[7] I will set aside the distinction between expected beneficiaries of the intervention as a whole and expected beneficiaries of particular, risky actions, such as a particular strike or operation. For discussion, see McMahan, 'The Just Distribution of Harm,' 363.

[8] There may be important differences between expected and intended beneficiaries, and the labels are ambiguous with regard to whose expectations or intentions are relevant, and whether it is objective probabilities or reasonable beliefs that matter. As my objections to the BP do not rely on any particular iteration of the general principle, I will put these questions aside. For discussion, see Lars Christie, 'Distributing Death in Humanitarian Interventions' in Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard (eds), *Who Should Die?: The Ethics of Killing in War* (OUP, 2018), 186-201.

[9] The following chapter addresses relevant differences.

Lastly, I make no assumption that it is impermissible in general to expose beneficiaries to grave risks of harm in the course of an intervention, or to afford them only sub-optimal protection. Nor is it my aim to challenge the view that some innocent individuals' claim to protection may legitimately be weaker than that of others. I take issue solely with the view that non-liable individuals' claim to protection is contingent on whether they stand to benefit from being rescued.

2. The Beneficiary Principle

The Beneficiary Principle (BP) captures the common intuition that, when a determinate amount of risk of harm must be borne by either beneficiaries or non-beneficiaries in an armed humanitarian intervention (AHI), it should fall on beneficiaries *because they stand to benefit*.[10] Here are three formulations which rely on this intuition.

The first is by Jeff McMahan:

> It may not be wrong for combatants to fight in ways that involve a lower risk to themselves but expose non-combatants to new risks, provided that the non-combatants are nevertheless expected beneficiaries of the defensive action – that is, provided that the action's reduction of the risks they face from the original threat exceeds the risks to which the action itself exposes them.[11]

On this view, it is permissible for intervening combatants to expose non-combatants to certain risks which intervening combatants could bear themselves, so long as those non-combatants nonetheless stand to benefit from the acts carrying the risk. Gerhard Øverland has defended a similar position, placing the emphasis more explicitly on beneficiaries' interests:

> The civilian population of a nation may accordingly have good reason to accept a certain level of risk if it means getting rid of the government. These civilians may have a lot to win by a humanitarian intervention; it is after all essentially done in order to help protect them from a bad regime. In such cases, if it means putting to-be-liberated civilian lives at risk, it could be permissible because it is in their

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[10] Gerhard Øverland, 'Contractual Killing,' *Ethics* 115 (2005): 692-720, and 'High-Fliers'; Jeff McMahan, 'Humanitarian Intervention, Consent, and Proportionality' and 'The Just Distribution of Harm,' 364; Helen Frowe, *Defensive Killing* (OUP, 2014), 146-7; Kaila Draper, *War and Individual Rights: The Foundations of Just War Theory* (OUP, 2015), 160-5.

[11] McMahan, 'The Just Distribution of Harm,' 359. He later suggests that beneficiary status may be counterbalanced, and possibly outweighed, by factors such as interveners' professional duties and the asymmetry between doing and allowing harm. We return to this question in the following two chapters.

> interest that we do so.[12]

Thus, individuals who would benefit from an intervention have reasons for accepting its concomitant risks because it is in their own interest to be protected from the unjust threats posed by their government. Kaila Draper has appealed to a similar notion, according to which

> intended beneficiaries, even the ones who will ultimately be killed, are actually better off (in terms of expectable benefit) at the outset of the war, because, for each individual, the small chance of being killed as a side effect of the liberation effort is more than compensated for by the high likelihood of reaping the benefits of liberation.[13]

These proposals share the assumption that prospective beneficiaries of an intervention are, by virtue of being beneficiaries, less immune to being harmed as a side effect than those who do not stand to benefit. The BP thus captures the idea that standing to benefit may diminish individuals' immunity to collateral harm, and ultimately weaken the prima facie constraint against harming the innocent, even if only as a side effect. Thus, the BP effectively implies that the constraint against putting the lives of beneficiaries at risk is weaker than that against putting the lives of bystanders at risk.[14] What this means, in McMahan's words, is that '[i]n trade-offs between harms to just combatants and harms to noncombatant beneficiaries, the immunity of the non-combatants is diminished by their status as beneficiaries.'[15]

While the BP has clear intuitive appeal, it is not immediately obvious why standing to benefit should bear on morally innocent people's moral status in such a way that harming them becomes permissible when it wouldn't be if they did not stand to benefit. None of the mentioned accounts that rely on the BP specify what it is about benefiting that effectively undermines innocent individuals' rights against being harmed. Advocates of the BP insist that beneficiaries, rather than non-beneficiaries, should be exposed to risks of collateral harm, *because it is they who stand to benefit*. But, to provide a solid justification for harming innocent people, the BP must be supported by a substantive theory which can explain *why* their standing to benefit constitutes a justification for exposing them to risks of harm.

In what follows, I will do two things. First, I will suggest that the BP, in its existing form, not only fails to offer such a justification but is also vulnerable to two serious

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[12] See Øverland 'High-Fliers,' 75.

[13] Draper, *War and Individual Rights,* 160.

[14] Lars Christie, 'Distributing Death in Humanitarian Interventions' in Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard (eds), *Who Should Die?: The Ethics of Killing in War* (OUP, 2018), 186-201, 191.

[15] McMahan, 'The Just Distribution of Harm,' 373.

objections. I will then propose that we can explain the main intuition captured by the BP by appealing to an alternative principle, according to which proportionality requirements are sensitive to whether harms are compensable, which overcomes these objections.

3. The Problem of Collective Risk

Although the BP's intuitive appeal may seem evident in cases in which an individual is exposed to some risk of harm in her own interest and to her own benefit, it does not apply as straightforwardly to cases in which a group is exposed to some risk of harm, which will benefit most of its members but make the rest worse off.

Consider first a single-person case, in which malicious Aggressor culpably threatens to kill Victim. You can save Victim in one of two ways. You can either break Victim's arm as a side effect of rescuing him, or you can break Bystander's arm as a side effect of rescuing Victim. According to the BP, you ought to choose the option that will harm Victim as a side effect rather than Bystander, because Victim will still be overall better off with a broken arm, whereas harming Bystander as a side effect would only make Bystander worse off.[16]

Let's grant, for the sake of argument, that this is right. Imposing the risk of being harmed as a side effect of rescuing Victim on Victim himself seems fairer than imposing it on Bystander. Given that the harm of a broken arm is offset by the overall benefit, the BP seems to offer a plausible explanation for why some inevitable amount of harm should be inflicted on Victim as the beneficiary of the defensive action, rather than Bystander. This explanation is that Victim will, as a matter of fact, be better off after suffering the harm concomitant with the rescue than he would have been in the absence of the rescue.[17]

However, this is considerably less straightforward in cases in which we are dealing with multiple *intended* beneficiaries, some of whom will foreseeably *actually* be made worse off. In his discussion of the 1999 Kosovo intervention, McMahan suggests that 'Albanian Kosovar civilians were the expected and, *as a group*, *actual beneficiaries* of the intervention,' and that 'NATO combatants were *therefore* entitled to shift some of the costs of the intervention to those who would, unlike themselves, benefit from it.'[18] On this view, the permissibility of exposing a group of to-be-liberated civilians to risks of lethal harm is grounded in the

[16] Based on McMahan, 'The Just Distribution of Harm,' 361.
[17] McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 67.
[18] Emphasis added, 'The Just Distribution of Harm,' 373.

expectation that the group will derive a net benefit from being rescued - even if this means that some individuals will actually be made worse off.

But killing some members of a group as a side effect of rescuing other members of that group is not the same as breaking an individual's arm as a side effect of saving his life. To ascribe beneficiary status to collectives in the way McMahan's formulation suggests, we would need to presume some Walzerian conception of a 'collective life of the community,' according to which killing some individuals as a side effect of rescuing the rest of the group would, in all relevant respects, be like injuring an individual as a side effect of saving her life.[19]

But we can safely assume that this is not what McMahan has in mind. He has convincingly - and rightly - argued against the collectivisation of moral status 'in a way that is independent of what individuals are actually doing.'[20] Problematically for advocates of the BP, however, this is precisely what it does in stipulating that what justifies unintentionally harming certain individuals is their expected membership in the vaguely defined group of beneficiaries. Collectivist iterations of the BP thus run the risk of conflating benefiting from being rescued with group membership. Taking seriously individuals' rights and the separateness of persons consequently precludes incidental membership in the collective of 'expected beneficiaries' from diminishing individuals' immunity to collateral harm. As McMahan has argued, [t]he idea that people can be liable to attack, or immune from attack, merely by virtue of their membership in a group . . . is both false and morally repugnant.'[21] I contend that the same reasons which ground this type of objection to collectivism must bear on the BP's applicability in collective cases. If individuals' immunity to harm can only be determined by their own actions and decisions, and not by their involuntary membership in some morally arbitrary group, then belonging to the collective of expected beneficiaries should have no bearing on their claim to protection either.

This is also why beneficiaries do not, by standing to benefit, make themselves liable to harm. Their beneficiary status is entirely independent of their moral agency. As victims of unjust threats, they are beneficiaries through no choice or fault of their own. Thus, they have

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[19] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, 1977), Chapter 4; McMahan, *Killing in War*, 212.

[20] As McMahan explains, if liability is a function of action rather than membership in some collective, then the same must be true for immunity. ('Liability and Collective Identity: A Response to Walzer,' *Philosophia* 36 (2006), 13-17, 15.)

[21] McMahan, *Killing in War*, 209.

done nothing, by virtue of standing to benefit from being liberated, to forfeit their right not to be harmed. It is also worth noting that, on many views, not even innocent threats make themselves liable to harm.[22] Many philosophers therefore hold that, when all other things are equal, it is impermissible to kill innocent threats and bystanders (whether intentionally or as an unintended side effect), essentially because there is nothing that morally distinguishes them from innocent victims. But if what renders it impermissible to harm innocent threats and bystanders is their lack of responsibility for threats posed, the same reasoning must apply to beneficiaries, whose standing to benefit as victims of wrongful threats of harm is hardly comparable to the moral mechanism that results in liability to harm.[23] That is, if circumstances for which individuals are not morally responsible cannot generate the type of moral asymmetry between innocent victims and innocent threats, which would render innocent threats liable to defensive harm, these circumstances cannot generate the relevant moral asymmetry between innocent beneficiaries and non-beneficiaries either.[24]

If what justifies risk imposition is the expectation that the individuals exposed to this risk will be better off as a result, then it is a problem that some individuals will actually be made worse off. In cases in which not all intended beneficiaries will actually benefit, and some will foreseeably be made significantly worse off, the BP's intuitive appeal is severely weakened. One way of describing this is by pointing out that we are dealing with a different type of risk in cases in which collectives are concerned. Whilst the relevant uncertainty in the single person case concerns *whether* a particular individual will be harmed if she is exposed to a certain risk, the relevant uncertainty in the collective case concerns the question *who* will be harmed - that is, which individuals, and how many, will be harmed or killed.

This generates what I'll refer to as the problem of collective risk (PCR). The PCR arises from the fact that not all potential beneficiaries will actually benefit from the rescue operation,

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[22] For instance, Jeff McMahan, 'Self-Defence and the Problem of the Innocent Attacker,' *Ethics* 104 (1994), 252-90, 265-6, 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15 (2005): 386-405, and Section 4.1.5 of *Killing in War;* Michael Otsuka, 'Killing the Innocent in Self-Defence,' *Philosophy & Public Affairs* 23 (1994): 74-94, 80; Kimberly Kessler Ferzan, 'Justifying Self-Defense,' *Law and Philosophy* 24 (2005): 711-749; David Rodin, *War and Self-Defense* (Clarendon Press, 2002), 79-89.

[23] There are conceptions of liability, according to which liability tracks the mere absence, rather than the forfeiture, of a right. (See, for instance Victor Tadros, 'Orwell's Battle with Brittain: Vicarious Liability for Unjust Aggression,' *Philosophy & Public Affairs* 42 (2014): 42-77.) On this view, beneficiaries might lack a right not to be harmed without having done anything to forfeit it. Such a view, however, would still beg the question as to why beneficiaries should lack the right to be harmed in the first place.

[24] Christie, 'Distributing Death,' 193; James Pattison, 'Bombing the Beneficiaries: The Distribution of the Costs of the Responsibility to Protect and Humanitarian Intervention' in Don E. Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP, 2014), 113-129, 124.

and that some people will actually be made worse off if the risk to them is realised. In what follows, I'll discuss what seems to me the strongest defence of the BP against the PCR.

3.1 The *Ex Ante* Contractualist Defence

To defend the BP, one might respond to the PCR as follows. What matters is not that each individual is actually made better off *ex post*, but merely that individuals' chance of benefiting is improved *ex ante*.[25] Some of McMahan's and Øverland's formulations can be read to point in this direction.[26] On this conception of the BP, the relevant benefit consists in the *ex ante* reduction of individuals' overall risk of being harmed, rather than an actual *ex post* benefit. What matters, accordingly, is the ability to justify the risky action to each potential beneficiary *ex ante*.

We might conceive of the BP similarly to how Johann Frick describes an *ex ante* rule, 'the adoption of which, at some time t1, is in everyone's individual interest, but which licenses or requires some agent to act at a later time t2 in a way that benefits some but significantly burdens others.'[27] Accordingly, *before* the rescue operation (at t1), it is in all beneficiaries' individual interest that it be carried out; however, it licenses combatants *during* the rescue operation (at t2) to adopt means, such as dropping bombs from high altitudes with limited precision, which will harm some individuals as a side effect. What distinguishes *ex ante* rules, and what distinguishes the *ex ante* justification of the BP from its *ex post* version, is, in Frick's words, that '[t]he locus of social risk . . . is not in the *effects* of the agent's actions at t2, which may be perfectly predictable. Rather, it is the result of not knowing, ex ante, whether one will be among those benefited or burdened by the *application* of the rule at t2.'[28] This point is key - 'not knowing, ex ante, whether one will be among those benefited or burdened.'

This condition may hold the solution to the PCR. Since individuals do not know whether they themselves will actually benefit or be made worse off, they have reason to consent to incurring the risk concomitant with the rescue operation. One might thus defend the BP on the grounds that the fact that some people will be made overall worse off *ex post* poses no obstacle to the view to begin with. This is because what matters is that it is uncertain

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[25] I am grateful to Jeff McMahan for urging me to consider this.

[26] Especially McMahan, 'The Just Distribution of Harm,' 359-60, 363; Øverland, 'High-Fliers,' 84. See also Draper, *War and Individual Rights*, 160.

[27] Johann Frick, 'Contractualism and Social Risk,' *Philosophy & Public Affairs* 43 (2015): 175-223, 180, 188, 202.

[28] Frick, 'Contractualism and Social Risk,' 202.

who will ultimately benefit or be killed as a side effect. And it is this uncertainty that grounds the justification of additional risk imposition to all affected individuals, including *ex post* non-beneficiaries. The *ex ante* likelihood of any person benefiting from the risky action is, on this view, more important than the foreseeable outcome that some individuals will likely be killed.

Proponents of the BP could thus claim that potential beneficiaries face a gamble and have reason to accept a comparatively small risk of being killed as a side effect of an AHI in order to have a larger chance of surviving the unjust threat posed by, for instance, a genocidal regime. A contractualist *ex ante* defence of the BP could thus appeal to the notion that it is in beneficiaries' own interest that they be exposed to additional risks of being harmed as a side effect of a rescue operation which would decrease their overall risk of harm, and that it is therefore permissible to impose this risk on them.[29]

On this view, although some of those individuals will actually be severely harmed or killed as a side effect, this does not compromise the BP's *ex ante* justifiability. So long as it is uncertain which individuals will be killed rather than rescued, no particular person has a reason for complaint, and it will be in each beneficiary's own interest to accept the risk.[30] On this view of the BP, the PCR poses no real challenge, insofar as it is irrelevant whether and for whom the risk eventuates *ex post*. But there are at least two reasons to be sceptical of this defence of the BP.

3.2 Two Worries About the *Ex Ante* Contractualist Defence

The first reason to be sceptical of the BP as an *ex ante* rule is that it seems to implicitly change the purpose the BP is taken to fulfil. Rather than providing a justification for imposing risks of harm on some people rather than others, the BP as an *ex ante* rule effectively offers us a view of how to fairly distribute risks amongst a fixed, specified group of individuals, by permitting risk imposition on those who stand to benefit. Although this may render the BP appealing in certain contexts, it doesn't do what the BP purports to do - namely, explain why it is fairer to harm some people rather than others.

The BP's *ex ante* appeal derives from its potential to present a fair distribution of risk amongst a given group of innocent individuals, but it does not provide a cogent justification

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[29] For instance, Øverland, 'High-Fliers,' 80. I set the distinction between what is in individuals' interest in the fact-relative sense and in the evidence-relative sense aside.

[30] See Frick's 'argument from the single-person case,' 'Contractualism and Social Risk,' 187.

for exposing certain individuals to greater risks than others. The fact that victims' identities are unknown behind the contractualist veil of ignorance not only explains why no person has a reason to reject the risky action, but it also fulfils some distributive ideal by treating morally indistinguishable individuals as having morally equal statuses.

For example, if the choice is between, on the one hand, harming a particular person while not harming nine others, and, on the other hand, exposing all ten people to a 1/10 risk of harm, *ex ante* contractualism is right that the latter option is preferable, assuming that all ten are equally morally innocent. But this is fairer only because there is no particular person who is less immune to harm than any of the others. Exposing everyone to the same 1/10 risk of harm therefore brings about a more just distribution of risk on egalitarian grounds. Choosing the option in which we do not know who will be harmed is the right thing to do in this case because this allows us not to violate any particular person's right not to be harmed. In this case, not knowing who will be harmed is both what makes it possible for there to be no one who could reject the principle on personal grounds, and what makes everyone equal in terms of facing the same degree of risk.

If this is right, the BP's primary *ex ante* appeal in fact lies in a desirable side effect - that of justly distributing risks amongst innocent individuals - rather than in the purpose it claims to fulfil - that of justifying why certain innocent individuals, *rather than others*, can be made to bear risks in the first place. That is, rather than giving grounds for why individuals' beneficiary status may diminish their immunity to collateral harm, it suggests that a fair distribution of risks is one that equalises chances of benefiting for all individuals. While this may be true in many cases, it doesn't actually explain why beneficiary status should diminish individuals' immunity to collateral harm.

A further reason to remain sceptical of the BP in light of the *ex ante* contractualist defence is more practical. This is that *ex post* considerations must enter into deliberations about whether it is permissible to impose risks of harm on innocent people in war. Taking seriously the requirement of proportionality, for instance, requires interveners to take into account impersonal considerations such as predictions that a certain number of non-liable individuals will be killed. A contractualist view of the BP, however, would prohibit precisely these types of appeals to impersonal principles, including the expectation that there will be

unspecified non-liable individuals who will be killed as a side effect.[31] Moreover, it is a standard requirement of the *jus ad bellum* that belligerents be committed to establishing a just peace once hostilities have ceased, which requires combatants to take into account a host of *ex post* considerations. *Ex post* justifiability must therefore be accounted for in *ex ante* justifications.

We now turn to a second type of objection to the BP.

4. The Problem of Overemphasising Benefit

While the first objection to the BP concerned its applicability, the second objection is principled. This is that the BP overstates the normative significance of beneficiary status. The BP's main assumption, as McMahan puts it, is that 'the degree to which non-combatants are morally immune in war depends in part on whether they are bystanders to military action or expected beneficiaries of it.'[32] But the BP is ultimately insensitive to how individuals come to be in a situation in which they would benefit from being rescued. The beneficiaries with whom the BP is concerned are by definition victims of wrongful threats of harm, whose rescue constitutes the very purpose of a just intervention. What the BP neglects is that their benefit consists in the prevention of a wrong which they have a right not suffer in the first place. For this reason, I argue, it is implausible to justify exposing people to risks of being harmed as a side effect of a rescue operation by appealing to the fact that rescuing them will benefit them, insofar as they are beneficiaries only on account of being victims of wrongdoing. Insofar as the benefit people stand to derive consists in the prevention or mitigation of a harm which they have a right not to suffer, standing to benefit is not normatively significant in the sense that it can diminish people's immunity even to unintended harm.

Here is the main worry. The BP effectively suggests that the benefit of being rescued can diminish one's immunity to harm. But in assuming that individuals' beneficiary status provides a distinct justification for imposing risks on them rather than others, the BP practically implies that it is the very fact that those individuals have already suffered unjust threats of harm which permits exposing them to further risks of being harmed.[33] The BP

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[31] Ibid., 196-7.

[32] 'The Just Distribution of Harm between Combatants and non-combatants,' 363.

[33] This comes up in Frowe's discussion of Christie's view, but is not discussed in detail. (*The Ethics of War and Peace*, 159.)

seems insensitive to the fact that there is more that morally sets beneficiaries apart from other non-liable individuals than the fact that they stand to benefit from being rescued. What also distinguishes them from others is the fact that they are already victims of serious wrongdoing.

The main problem, therefore, is that the BP treats the counterfactual against which the benefit is measured - a scenario in which threatened people are not rescued - as a valid baseline for the comparison that implies that people will be benefited by being rescued. But this baseline is flawed, in that it describes a counterfactual in which those people are severely wronged. Thus, if individuals would not benefit but for the fact that they are victims of injustice, and the benefit itself consists in not suffering a serious harm which they have a right not to suffer, the fact that they stand to benefit from not suffering the injustice has no bearing on the permissibility of exposing them to further risks of harm. After all, it is hard to see how individuals' rights against being harmed could effectively be vitiated by the very fact that they are already victims of injustice.

For this reason, the BP fails to provide a valid justification for imposing risks of collateral harm on non-liable people *qua* beneficiaries. Standing to benefit from the mitigation or prevention of an injustice should therefore be extraneous to innocent individuals' moral status, contrary to what the BP postulates. If individuals would not benefit but for the fact that they are victims of wrongdoing, this negates the weight we could otherwise ascribe to the benefit they would derive from being rescued.

The assumption that beneficiaries must 'bear the costs of their own defence' is consequently open to doubt in cases in which individuals' rescue is necessitated by the fact that they are, through no fault of their own, victims of wrongdoing.[34] They are therefore under no enforceable obligation, by virtue of standing to benefit, to bear the lethal risks of their own rescue. The upshot of this is that risks of harm to beneficiaries, whose benefit consists in being rescued from harms which they have a right not to suffer, are not automatically offset on the grounds that suffering these risks is concomitant with having their chances of liberation and survival increased.

One might object that imposing risks of harm on prospective beneficiaries is nonetheless *pro tanto* fairer than imposing it on non-beneficiaries, insofar as individuals who stand to benefit from the risky action have reason to consent to bearing the risk, whereas non-

[34] 'The Just Distribution of Harm,' 360-1.

beneficiaries, who would be exposed to risks of harm without standing to benefit, have no reason to do so. One problem with such a consent-based view is that it would need to rest on the assumption that beneficiaries' likelihood of benefiting is increased *to the extent that* they bear the concomitant risks of harm. It would thus assume that the risk of harm and chance of benefiting are interdependent in such a way that beneficiaries' bearing the risk of being harmed is a necessary condition for their chances of benefiting to be increased.[35] If this were the case, beneficiaries would indeed have strong reasons to consent to the risk.

However, the risk and the benefit need not fall on the same individuals. For beneficiaries' chance of survival to be increased, it is merely the case that *someone* must bear the risk of being harmed as a side effect; it is not necessary that the risk be imposed on *them*. In fact, their chances of benefiting would be increased to a greater degree if the risk were borne by others. If what matters is what beneficiaries have reason to accept, then the fact that they have *stronger* reasons to accept an alternative in which others shoulder greater risks refutes the assumption that they would consent to being exposed to significant risks of harm.[36] Since it is not the case that individuals must suffer a new risk for the original risk to be reduced, their consent to the new risk cannot be presumed. Of course, it might still be fairer to impose the risk on beneficiaries for other reasons, but this would not be explained by their presumed consent. Presumptive consent, then, provides no support for the BP.

To be clear, nothing in what I have argued so far entails that beneficiaries have a greater claim to protection than non-beneficiaries.[37] All I have argued is that beneficiary status does not tip the balance between beneficiaries and other non-liable individuals in cases in which the benefit consists in not suffering a harm which beneficiaries in any case have a right not to suffer, when all other things are equal. The upshot of this is that, all other things being equal, beneficiaries' claims to protection are just as strong as those of bystanders. Beneficiaries would consequently have the same complaint as innocent bystanders if they were made to bear the risks concomitant with an action aimed at preventing or mitigating a wrong they have a right not to suffer. Contrary to what advocates of the BP suggest, therefore, beneficiaries *would* be wronged by being made to bear certain risks of being harmed as a side effect if these

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[35] For instance, McMahan, 'The Just Distribution of Harm,' 359–60.

[36] See Pattison, 'Bombing the Beneficiaries,' 123-4.

[37] A plausible argument in favour might appeal to the value of frustrating wrongdoers' plans. See Tom Parr, 'The Moral Taintedness of Benefiting from Injustice,' *Ethical Theory and Moral Practice* 19 (2016): 985-997; Jeff McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' 60.

risk impositions were justified by appeals to the expectation that those civilians would benefit compared to how they would fare in the absence of an intervention.[38]

My argument neither entails that it is, as a general matter, impermissible to expose prospective beneficiaries to threats of harm nor that prospective benefits play no role in determining on whom risks of harm should fall. Questioning the moral scope and foundation of the BP doesn't entail that expected benefits have no bearing on questions of what it is all-things-considered permissible to do, as the following section will suggest. My point so far has merely been that, in cases in which the benefit consists in not suffering a harm which one has a right not to suffer, this expected benefit doesn't justify imposing further risks of harm. That is, the benefit that consists in, for instance, not being killed in a genocide doesn't do any justificatory work with regard to the permissibility of imposing risks of collateral harm on vulnerable people who would otherwise become victims of atrocity crimes.

5. Benefit and Proportionality

The above argument is compatible with the view that it is generally fairer to harm someone as a side effect of an action which might benefit her than to harm someone as a side effect of an action which can only benefit others. While I have argued that this is open to doubt in cases in which this benefit consists in the prevention of a wrongful harm which people have a right not to suffer in the first place, there might also be a different explanation for the intuition underlying the BP. One way to interpret the BP is that beneficiaries are automatically compensated for being exposed to risks of harm by having their chances of liberation and survival increased, whereas bystanders, who do not stand to benefit, would merely be harmed without being compensated for this. This is what Draper seems to have in mind in arguing that 'for each individual, the small chance of being killed as a side effect of the liberation effort is more than compensated for by the high likelihood of reaping the benefits of liberation,' and what McMahan suggests when he argues that, '[w]hen a burden is borne by someone who on balance benefits from it, it is compensated for in a way that it is not when it is borne by someone who derives no benefit.'[39]

What is driving these intuitions, I suggest, is not actually some principle that, when all

[38] For claims that they would not be wronged, see Øverland, 'High-Fliers,' 76, and McMahan, 'The Just Distribution of Harm,' 363.

[39] Draper, *War and Individual Rights*, 160; McMahan, 'Self-Defence Against Justified Threateners,' 120.

other things are equal, it is fairer to harm beneficiaries, *by virtue of their status as beneficiaries*, rather than non-beneficiaries, but something subtly different. This is that different types of harm have different weights in wide proportionality calculations.

Harms to non-liable people are most commonly justified on lesser-evil grounds. Lesser-evil justifications, as mentioned before, effectively result from a comparative assessment of different states of affairs, aggregating considerations such as the number of people to be saved, the gravity of harm to be prevented, and the seriousness of the wrong to be averted. But the wide proportionality requirement, which constrains lesser-evil justifications, is also sensitive to deontological considerations, such as the difference between doing and allowing harm, and the moral difference between harming intentionally and harming as an unintended side effect.[40] An additional consideration, I suggest, which is not usually made explicit, is that of whether or not a harm is compensable. In essence, non-compensable harms to innocent people weigh more heavily in proportionality assessments than harms that are readily compensable. And it is this consideration, I suggest, that explains our intuitions about the BP.

Whether or not a harm is compensable constitutes a distinct consideration in wide proportionality calculations. Harms to innocent people that are non-compensable are more difficult to justify than harms that are compensable. This recognition, I suggest, allows us to maintain the plausible intuition that, in some cases, it seems fairer to harm those who will later be compensated for suffering harms, while avoiding the problematic implication that it is morally preferable to harm those who are already victims of wrongful threats of harm because they stand to benefit from not suffering those harms.

Here's why. Individuals whose rights are infringed acquire a claim to compensation.[41] In cases in which rights infringements are compensable, matters are relatively straightforward. The infringed right is, as David Rodin puts it, 'transmuted into a right to compensation.'[42] However, in cases in which harms are non-compensable - such as in the case of death, grievous bodily injury, or rape - this precludes the possibility of such a transmutation, because, in these cases, 'the harm inflicted departs the system of rights altogether.'[43] As

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[40] We will return to this in the following chapters.

[41] For instance, Judith Jarvis Thomson, 'Some Ruminations on Rights,' in William Parent (ed), *Rights, Restitution, and Risk* (HUP, 1986), 51; Thomson, *The Realm of Rights* (HUP, 1990), 122; Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life,' *Philosophy & Public Affairs* 7 (1978): 102. Chapter 8 discusses this in more detail.

[42] David Rodin, 'Justifying Harm,' *Ethics* 122 (2011), 107-8.

[43] Ibid.

Richard Norman put it, 'there is truth in the cliché of the finality of death: once you're dead, you're dead, and nothing further can compensate for the loss.'[44]

The problem, of course, is that many harms inflicted in armed conflict are of the non-compensable kind.[45] For this reason, the most plausible view seems to me one on which compensability constitutes a distinct consideration in wide proportionality calculations. On this conception of the wide proportionality requirement, constraints against inflicting non-compensable harms on innocent people are significantly more stringent than constraints against inflicting harms that are readily compensable. Note that this steers clear of both objections I levelled against the BP earlier. My proposed view neither jeopardises the separateness of persons nor implies that people's immunity to harm can be diminished as a result of their already being victims of serious wrongdoing.

Since non-compensable harms cannot meaningfully be offset, the threshold at which wide proportionality is met is essentially higher for non-compensable harms. The corollary of this is that the proportionality threshold for compensable harms is comparatively lower. And the implication of this is that harms to those who will later be compensated are easier to justify than harms that will remain uncompensated *ex post*. If I am right that wide proportionality is sensitive to the difference between compensable and non-compensable harms, this explains the intuition why, in many cases, it seems fairer to harm those who stand to benefit than those who do not; and it explains this without grounding the permissibility of harming innocent people in the mere fact that they would benefit from being rescued.

Consider McMahan's observation that 'the proportionality constraint on causing unintended harm to the beneficiaries [of a humanitarian intervention] is less restrictive than the constraint that governs the infliction of unintended harms on other innocent civilians who are not among the beneficiaries of the intervention.'[46] If my suggestion is right, this description blurs the picture. McMahan's formulation may be accurate in many cases; however, it obscures the fact that the proportionality constraint isn't less restrictive with regard to harming beneficiaries than non-beneficiaries merely by virtue of the former's

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[44] Richard Norman, *Ethics, Killing, and War* (CUP, 1995), 137. We might think that there are different degrees of compensability, insofar as there are cases in which we can't provide something strictly equivalent to what was lost, but something different. See Robert Goodin's distinction between 'means-replacing' and 'ends-displacing' compensation in Goodin, 'Theories of Compensation.' I discuss this in greater detail in a working paper ('The Compensability Condition for Proportionality in War,' available upon request).

[45] Chapter 8 returns to this.

[46] McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' 69.

standing to derive a benefit. Rather, the actual normative work happens under the surface: Rights infringements give rise to claims to compensation. Standing to benefit is therefore morally salient insofar as this indicates that the harm in question must be compensable.

Insofar as people stand to derive a net benefit, this may well offset harms in assessments of wide proportionality.[47] The real crux, however, isn't whether or not people stand to benefit, although this is what it looks like on the surface; the real crux is whether or not harms inflicted on non-liable people are compensable. This is what the proportionality requirement is sensitive to. Since compensable harms are significantly easier to justify than non-compensable harms, wide proportionality calculations will, in many cases, yield that harms should fall on those who will also derive a net benefit, insofar as these harms are offset by prospective benefits in the proportionality calculation. While McMahan notes that it is clearer that beneficiaries, rather than bystanders, should be made to bear the costs of their defence in cases in which beneficiaries actually derive a net benefit rather than being made worse off, if my argument is right, this is an understatement.[48] That beneficiaries should be made to bear these risks is clear *only* in cases in which they are actual net beneficiaries.

One might object by pointing out that there are cases in which people can be required to pay for benefits which they have a right to be provided with, even if lack of provision would wrong them. For example, national defence and healthcare might be such benefits. If people can be required to pay for benefits to which they have a right in some cases, why should a similar consideration not apply to victims of atrocity crimes, and require them to bear some of the cost of their own defence?

This type of objection would miss the point. Nothing in my argument suggests that intended beneficiaries may not be made to bear some of the risks involved in their own defence. My principal point is the considerably narrower one that imposing risks of serious harm on non-liable people cannot plausibly be justified on the grounds that they, rather than others, stand to benefit from their rescue, when this benefit is that of not suffering wrongful harms which they have a right not to suffer.

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[47] There is a deeper question about what types of benefits we should count in these calculations. For discussion, see for instance, Saba Bazargan-Forward, 'Compensation and Proportionality in War' and McMahan, 'Proportionate Defence,' both in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP, 2017). For helpful conceptual discussion, see Seana Valentine Shiffrin, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm,' *Legal Theory* 5 (1999): 117-148.

[48] McMahan, 'The Just Distribution of Harm,' 360-1; and 'Humanitarian Intervention, Consent, Proportionality,' 67.

What's at stake isn't what it is ultimately all-things-considered permissible to do for intervening combatants determining how to distribute risks of harm. What's at stake is what justifications they have available for imposing risks of harm on non-liable people. That is, the question isn't what it is permissible for combatants to do to beneficiaries, but on what grounds they may justify imposing costs on beneficiaries. It may well be fairest to make certain civilians rather than others bear certain costs of the AHI, but then the explanation must rest on something other than the fact that those civilians are the ones who stand to benefit from being rescued. In this case, an egalitarian distribution that disperses risks as widely as possible, insofar as this decreases the risk of harm to any individual, might be preferable.[49]

6. Conclusion

To conclude, this chapter questioned the claim that non-combatants' immunity in military interventions is diminished by their beneficiary status, and argued that constraints on inflicting unintended harm on beneficiaries ought to be no less restrictive than those governing the causing of unintended harms to other non-combatants. The aim of this chapter was to throw doubt on the claim that vulnerable civilians' beneficiary status bears on interveners' permission to expose these civilians to risks of collateral harm in AHI. I argued that, if non-liable individuals would not stand to benefit but for the fact that they are victims of wrongdoing, and the expected benefit consists in not suffering a wrongful harm which they have a right not to suffer, this negates the weight we could otherwise ascribe to the benefit they would derive from being rescued. Instead, I suggested that compensability figures in wide proportionality assessments, and that this explains why, in many cases, costs should fall primarily on beneficiaries rather than non-beneficiaries. None of what I have argued entails that it is never permissible to impose risks of harm on intended beneficiaries of AHI. What I have argued is that it is not their beneficiary status on which their immunity depends.

The following chapter will explore whether non-liable civilians who are exposed to risks that could be otherwise distributed are permitted to use defensive force against just intervening combatants.

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[49] The following Chapter will return to this.

5. Self-Defence Against Just Interveners

1. Introduction

This chapter examines under which, if any, conditions innocent civilians who are at threat of being killed as an unintended side effect of a just armed humanitarian intervention may use lethal force against just interveners in self-defence. Consider the following scenario, based on a frequently discussed example:

> *Intervention*:[1] Intervening combatants are waging a just war of humanitarian intervention. Their mission involves bombing a military facility. If this operation succeeds, it will save the lives of 100 innocent civilians, who would otherwise be killed. The explosion will foreseeably and unavoidably catapult some heavy debris away from the target site, but the interveners have some control over the direction in which the debris will travel. They have two options:
>
> Option 1: The debris will kill five neutral bystanders to the intervention.
> Option 2: The explosion will send the debris towards the interveners' own planes, thereby killing five of them.

Suppose that Interveners choose Option 1. Is it permissible for Bystanders to employ lethal defensive force against Interveners to avoid being killed as a side effect?

I make the following two assumptions. On one hand, Interveners have a lesser-evil justification for performing the action that threatens to kill Bystanders as a side effect. Hence, they act all-things-considered permissibly in targeting the military facility. On the other hand, Bystanders are morally innocent - that is, they have a right not to be harmed. People are usually permitted to protect this right by employing necessary and proportionate defensive force against those who threaten to transgress it. This raises the question - how should we determine if it is permissible for innocent civilians at threat of being killed as an unintended side effect of a justified armed humanitarian intervention (AHI) to use lethal force in self-defence against those justifiably posing this threat?

Existing accounts have proposed views according to which it is either permissible or impermissible for Bystanders to use lethal defensive force against Interveners in the above

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[1] Commonly referred to as the 'tactical' or 'strategic bombers' - see Jeff McMahan, 'Self-Defense and the Problem of the Innocent Attacker,' *Ethics*, 104 (1994): 252-290; 'Self-Defense Against Justified Threateners' in Helen Frowe and Gerald Lang (eds), *How We Fight: Ethics in War* (OUP, 2014), 132.

case.[2] By contrast, this chapter proposes that the answer depends on highly variable constellations of at least six associated considerations. These include:

a) whether Interveners make themselves liable to defensive harm, which depends on
b) whether Interveners are failing to bear costs they have a duty to bear;
c) to what extent agents can be expected to bear the costs of their moral choices;
d) whether preventing the 100 civilians' rescue would render Bystanders' defensive act against Interveners disproportionate, which in turn depends on
e) how heavily the consequences of others' omissions to which one is causally connected weigh in proportionality assessments; and
f) on what, if any, grounds Bystanders might be required to bear costs for the sake of the intended beneficiaries of the AHI.

Whether Bystanders are permitted to kill Interveners in self-defence will vary depending on which combination of considerations applies in any given case. My aim in this chapter is therefore not to present a knock-down argument either in favour or against civilians' permissions to harm just combatants in self-defence to avoid being harmed as a side effect of an AHI. Nor, indeed, is it to defend a particular view of why self-defence against innocent, non-responsible, or justified threats might be permissible in certain cases. Rather, my aim is to illuminate typically unappreciated complexities in the principles governing the permissibility of innocent civilians engaging in self-defence against intervening combatants justifiably posing threats of 'collateral' harm.

To this purpose, I will distinguish the main central question from three subsidiary questions. The main question is what considerations determine whether Bystanders may permissibly use defensive force against Interveners. The three subsidiary questions are:

1) Whether just interveners can make themselves liable to defensive harm by threatening to transgress innocent civilians' rights not to be killed, despite being all-things-

[2] For example, Jeff McMahan, 'Self-Defense and the Problem of the Innocent Attacker'; McMahan, 'Self-Defense Against Justified Threateners' in Helen Frowe and Gerald Lang (eds) *How We Fight: Ethics in War* (OUP, 2014), 104 -137; Jonathan Quong, 'Killing in Self-Defense,' *Ethics* 119 (2009): 507–37; Quong, 'Liability to Defensive Harm,' *Philosophy & Public Affairs* 40 (2012): 45–77; David Rodin, 'Justifying Harm,' *Ethics* 122 (2011): 74-110; Uwe Steinhoff, 'Rights, Liability, and the Moral Equality of Combatants,' *The Journal of Ethics* 13 (2012): 339–366; Steinhoff, 'Justifying Defense Against Non-Responsible Threats and Justified Aggressors: the Liability vs. the Rights-Infringement Account,' *Philosophia* 44 (2016): 247–265.

considered permitted to do so (considerations (a)-(c) above);

2) to what extent preventing the 100 civilians from being rescued by Interveners limits Bystanders' permission to engage in self-defence (considerations (d) and (e)); and
3) whether Interveners' claim to immunity and Bystanders' permission to protect their rights not to be harmed might be diminished or fortified by other moral factors (considerations (b) and (f)).

My account seeks to advance relevant debates in these three respects. Correspondingly, I defend three main claims:

1) Justified threats are not automatically exempt from liability to defensive harm, because whether justifications defeat liability is a case-specific matter, and contingent on the strength of agents' positive moral reasons for harming.
2) Causing others to allow harm only carries decisive weight in proportionality assessments if others' omission is a side effect of an act intentionally performed. It is, consequently, possible that causing Interveners to fail to rescue the 100 other civilians doesn't render Bystanders' defensive act against Interveners disproportionate and impermissible on these grounds. This means that Bystanders do not, in all cases, have a duty to let themselves be killed lest they prevent the larger number from being rescued.
3) Historical responsibility for the conditions that now necessitate an intervention to rescue the 100 civilians does not diminish individual combatants or bystanders' immunity. However, Interveners are required, by virtue of their profession, to bear significant risks to minimise harms to civilians, and Bystanders may permissibly be exposed to risks which they have no duty to incur in cases in which this reduces the overall risk of wrongful harm to innocent individuals. Self-regarding agent-relative prerogatives, moreover, may excuse, but not justify, harming non-liable others.

Rather than presenting one generalisable principle, this chapter aims to throw light on the considerations at stake when just combatants pose justified risks to civilians which civilians have no duty to bear.

The discussion is divided into five main parts. Section 2 specifies the conditions under which having a lesser-evil justification for harming exempts just combatants from liability to defensive harm, and the conditions in which they might make themselves liable despite having

a lesser-evil justification. Section 3 examines three considerations which might prohibit just combatants from imposing risks on civilians which combatants could bear themselves: rectificatory duties, professional duties, and the pursuit of national interests. Section 4 establishes under what conditions preventing Interveners from rescuing the 100 civilians would render Bystanders' defensive act against Interveners disproportionate and hence impermissible. Section 5 assesses three considerations which might require Bystanders to bear risks of harm for the sake of the intended beneficiaries of the intervention: rectificatory duties, an egalitarian distribution of risks, and overall harm reduction. Section 6 finally delineates the role agent-relative prerogatives might play in permitting innocent civilians to engage in self-defence against just combatants. Section 7 concludes.

Concessive Harms and Other Assumptions

I will refer to harms justifiably inflicted on non-liable persons on lesser-evil grounds as *concessive harms*. While morally innocent victims' lack of liability *pro tanto* precludes actions that foreseeably harm them, lesser-evil justifications rest on the assumption that victims' right not to be harmed can be overridden by the moral value of preventing a significantly greater harm to other innocent people.[3] Lesser-evil justifications effectively serve to justify harms to non-liable people *despite* the fact that they are not liable - hence *concessive* harms. Victims of harms justifiably inflicted on lesser-evil grounds are thus harmed *concessively*.

While liability-based justifications allow defensive agents to enforce their targets' obligations not to harm, lesser-evil justifications permit harmful acts *despite* the fact that expected victims are not liable to this harm. Liable targets have no right not to be harmed, and hence do not suffer a rights transgression by being made to suffer harms to which they are liable. Victims of concessive harms, by contrast, justifiably have their rights infringed. In concessive agency, the innocent victim's right not to be harmed thus presents a potential obstacle to the justification for harming, but is judged to be superable. The harmful action is consequently performed despite the harm this will cause to the victim.

We might compare *concessive* agency to the classes of agency that Warren Quinn

[3] On the nature of lesser-evil justifications, see David Rodin, 'The Lesser-Evil Obligation,' in Saba Bazargan-Forward and Samuel C. Rickless (eds), *The Ethics of War: Essays* (OUP, 2017), 28–45; Helen Frowe, 'Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley,' *Philosophical Quarterly* 68 (272) (2018): 460-480.

describes as *opportunistic* and *eliminative* agency.[4] Opportunistic harming involves using the victim as a means to one's defensive action - for example, by using an innocent bystander as a human shield; eliminative agency involves harming a victim who poses an (innocent) obstacle to one's defence against or escape from harm; for example, by pushing an innocent bystander out of one's way to escape an attacker. Concessive agency supplements this categorisation by capturing the type of agency that involves harming an innocent victim - either intentionally or unintentionally - despite her lack of liability, but all-things-considered permissibly on the basis of a lesser-evil justification. I'll thus use 'concessive harms' as a more concise way of saying 'harms justifiably inflicted on innocent people on lesser-evil grounds.'

Lastly, except where indicated otherwise, I assume that there are no special relationships between just interveners, the intended beneficiaries of their military actions, and innocent bystanders. I'll also assume that the bystanders have nothing to do with the humanitarian crisis necessitating intervention, and would remain unaffected by the intervention, were it not for the risk of collateral harm.

2. Do Lesser-Evil Justifications Defeat Liability?

Can just intervening combatants make themselves liable to defensive harm by posing justified threats of collateral harm to non-liable civilians? On one hand, Interveners are all-things-considered justified in killing Bystanders as a side effect of the rescue operation. On the other hand, Bystanders are morally innocent, retaining their right not to be harmed, and would therefore be wronged by being killed. In what follows, I'll outline two opposing positions, which differ over which of these two considerations is decisive. I'll suggest that neither is fully satisfying, because whether agents who have a lesser-evil justification for harming make themselves liable to defensive harm is not a binary yes/no matter, but case-specific. On my view, the critical factor lies in the extent to which agents can be expected to bear the costs of their moral choices - what I'll refer to as the burdens of lesser-evil judgements.

2.1 The Exemption View

Several philosophers assume that lesser-evil justifications automatically render agents

[4] See Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect,' *Philosophy & Public Affairs* 18 (1989): 334–51, 344. See also Jonathan Quong, 'Killing in Self-Defense,' 525-7.

immune from liability to defensive harm.[5] As Jonathan Quong puts it, 'moral justification ought to defeat otherwise valid instances of liability to defensive harm.'[6] I'll refer to this as the *exemption view*. On the exemption view, Interveners do not make themselves liable insofar as they are all-things-considered justified in posing the threat. Jeff McMahan, for example, holds that Interveners' lesser-evil justification effectively renders them immune from liability to be defensively harmed by Bystanders.[7] Since Interveners have a lesser-evil justification for carrying out the operation that exposes Bystanders to risks of being killed, he assumes, they do not forfeit their rights against being harmed. For this reason, he argues, it is impermissible for Bystanders to kill Interveners in self-defence, even if this would not thwart Interveners' just mission of saving the other 100 innocent civilians.[8]

Although I will argue that there are at least some cases in which lesser-evil justifications do not exempt agents from liability to defensive harm, I'll mention one consideration which McMahan doesn't make explicit, but which renders the exemption view compelling in many cases.

One way to think about the exemption view is as taking lesser-evil justifications to impose certain constraints on potential victims of concessive harms. It is commonly thought that, when using defensive force against an excused, or partially excused, aggressor, one is required to use lesser force, and to accept greater risks of harm to oneself, than one would be required to bear in fending off a fully responsible aggressor.[9] In cases in which a threat is not only morally innocent, but indeed morally justified, we might think that their justification for posing a threat effectively fortifies their immunity. After all, not only are they *permitted* to pose the threat, but they have positive moral reasons for doing so. If aggressors' partial excuses can require defensive agents to be more restrictive in their use of force, then threateners' justification, *a fortiori*, requires defensive agents to be especially restrictive in their use of force.

If the exemption view is correct, Bystanders have no liability-based justification for

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[5] For example, McMahan, 'Self-Defense Against Justified Threateners,' 109; McMahan, 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15 (2005): 386–405, 399; Jonathan Quong, 'Liability to Defensive Harm.'

[6] Quong, 'Liability to Defensive Harm,' 69.

[7] McMahan, 'Self-Defense Against Justified Threateners,' 109.

[8] McMahan, 'Self-Defense Against Justified Threateners,' 109; 136. McMahan used to hold that the innocent civilians may permissibly defend themselves against the just combatants. For his former view, see McMahan, 'Self-Defense and the Problem of the Innocent Attacker,' 275 and his 'The Basis of Moral Liability to Defensive Killing, 388–89. For his more recent, contrary view, see McMahan, 'Self-Defense Against Justified Threateners.'

[9] For example, McMahan, *Killing in War*, 158; Rodin, 'Justifying Harm,' 85.

killing Interveners in self-defence, despite the fact that Bystanders are not liable to the harm Interveners will cause. On the exemption view, so long as Interveners have a lesser-evil justification for posing threats of harm, they do not thereby make themselves liable to defensive harm.

2.2 The Liability View

The exemption view stands in contrast to what I'll refer to as the *liability view*. According to the liability view, the fact that Interveners have a lesser-evil justification is compatible with the possibility of liability to defensive harm. David Rodin, for example, has suggested that Interveners make themselves liable to defensive harm, despite the fact that they have a lesser-evil justification. The assumption here is that people can make themselves liable to defensive harm whenever they threaten to transgress an innocent person's rights, even when they would justifiably infringe, rather than violate, a right.[10] On this view, having a lesser-evil justification is therefore compatible with being liable to defensive harm.

In the above case, Interveners' actions, as Rodin puts it, 'are not wrong, all things considered, but still they *wrong* the civilians, in the sense that they infringe their rights.'[11] Interveners can consequently make themselves liable to defensive harm, such that they would not be wronged by being defensively harmed by Bystanders.[12]

While I share the view that having a lesser-evil justification for harming is compatible with wronging victims whose rights one permissibly infringes, I think Rodin reaches the conclusion that Interveners make themselves liable to defensive harm for the wrong reason. Rodin suggests that lesser-evil justifications do not exempt agents from liability to defensive harm because they also do not generally exempt agents from liability to pay compensation.[13] But, while lesser-evil justifications are indeed compatible with both liability to compensate and liability to defensive harm, as Rodin suggests, we cannot, as a general matter, infer the latter from the former.[14] After all, the two types of liability are distinct. The grounds of liability to compensate are significantly broader than the grounds of liability to defensive harm. For

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[10] Rodin, 'Justifying Harm,' 84, 98.

[11] Rodin, 'Justifying Harm,' 87, original emphasis.

[12] Nonetheless, Rodin suggests that Bystanders have an all-things-considered lesser-evil obligation not to kill Interveners in self-defence. (See Rodin, 'Justifying Harm,' 86-7.) I address this below.

[13] Rodin, 'Justifying Harm,' 86-7.

[14] Jonathan Quong has a different view. On his account, liability to pay compensation indicates liability to defensive harm. See Quong, 'Liability to Defensive Harm,' 40, 45–77, 46.

example, it is possible to incur duties to compensate for a harm without having been liable to defensive harm.[15] Since liability to defensive harm cannot automatically retrospectively be inferred from liability to compensate, we should take the assumption that lesser-evil justifications must be compatible with liability to defensive harm insofar as they are also compatible with liability to compensate with a grain of salt. Nonetheless, I think Rodin is right to assume that lesser-evil justifications do not categorically defeat liability to defensive harm. The following section will explain why.[16]

But first, let's take stock. According to the exemption view, Interveners do not make themselves liable because they are all-things-considered justified in posing the threat. According to the liability view, Interveners do make themselves liable insofar as they infringe Bystanders' rights, irrespective of the fact that this is all-things-considered permissible on lesser-evil grounds. Both views are compatible with the position that victims of concessive harms may be wronged, even if they are harmed all-things-considered permissibly on lesser-evil grounds. What is up for debate is not whether victims of justified rights infringements can thereby be wronged, but whether justifiably infringing innocent people's rights can cost one one's right not to be harmed. What the exemption view and the liability view thus disagree about is whether (a) Interveners are *exempt* from liability because they have a lesser-evil *justification*, or whether (b) Interveners make themselves *liable* because they *wrong* victims.

On my view, this choice is not the whole story. Rather, given the distinct nature of lesser-evil justifications, the exemption view might apply in some cases, and the liability view in others. The answer to whether justified threateners can make themselves liable to defensive harm is therefore some version of 'it depends.'

2.3 The Equilibrial View

I propose what we might call the *equilibrial view*. What sets the equilibrial view apart

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[15] One main reason for this is that liability to defensive harm generally presupposes at least some degree of responsibility for an unjust threat; whereas one can incur compensatory obligations in the absence of any responsibility for the harm to be remedied.

[16] McMahan, by contrast, insists that 'even if the general claim that justification excludes all forms of liability is false, it may still be true that justification excludes liability to defensive harm, and that is all that is necessary to rule out the claim that the [justified] bombers are liable to defensive action' (McMahan, 'Self-Defense Against Justified Threateners,' 119; see also McMahan, 'The Conditions of Liability to Preventive Attack' in D. K. Chatterjee (ed), *The Ethics of Preventive War* (CUP, 2013), 135–36). But what is necessary to rule out the claim that Interveners are liable to defensive harm is that justification *always* excludes liability to defensive harm - and this, as I suggest, is not the case.

from its two counterparts is that it neither precludes nor asserts concessive agents' liability to defensive harm as a general matter. Instead, it holds that concessive agents may make themselves liable to defensive harm in some cases but not in others.

Lesser-evil justifications for harming may vary significantly with regard to the strength of agents' positive moral reasons for acting. Roughly speaking, an act is justified if there is an all-things-considered positive moral reason to perform it. Justifications thus provide agents with more powerful reasons for acting than permissions, which merely indicate that the act is not wrong; and justifications provide agents with weaker reasons for acting than obligations, which indicate that the act is morally required.[17] On this spectrum, some lesser-evil justifications might fall towards the side of permissions, such as in cases in which there are all-things-considered positive moral reasons for acting, whereas others might fall towards the side of obligations, namely in cases in which agents are thought to be required to act on a lesser-evil justification.[18] Lesser-evil justifications thus span a broad spectrum. While there is no doubt that harming is permissible when a lesser-evil justification obtains, people may reasonably disagree about how strong agents' positive moral reasons are for acting on lesser-evil justifications in any given case.[19]

Lesser-evil justifications involve wholesale assessments of the comparative moral value of differing outcomes and the ways in which they are brought about. Since the proportionality calculations which serve as constraints on lesser-evil justifications are sensitive to a multitude of considerations and judgements, which I'll shortly address, I submit that agents who appeal to the lesser evil to justify harming innocent people may be required to bear the consequences of their moral choices. In addition to the burden of justification, this might manifest itself as a lack of immunity from liability to defensive harm.[20]

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[17] See, for instance, Jeff McMahan, 'The Basis of Moral Liability to Defensive Killing.'

[18] While I am generally sceptical about the view that agents can be required to act on lesser-evil justifications, especially in cases that involve harming innocent people as a means, I will remain agnostic on the matter for the purpose of this discussion. For defences of duties to act on lesser-evil justifications, see Helen Frowe, 'Lesser-Evil Justifications for Harming,' and David Rodin, 'The Lesser-Evil Obligation.'

[19] Indeed, this is part of the Intervener's Conundrum discussed in Chapter 2 - while it may be all-things-considered justified on lesser-evil grounds to harm innocent people as a side effect of carrying out an AHI, it is not always obvious how this should be weighed against the alternative of allowing harm by failing to carry out a harmful rescue.

[20] The basic thought about the burden of justification here assumes something similar to what Rawls describes as the 'burdens of judgement' - that is, the 'hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement' (John Rawls, *Political Liberalism* (Columbia University Press, 1996), 55-56). While he has in mind political life, I think similar burdens arise in the context of lesser-evil judgements more generally.

To be clear, lack of immunity doesn't automatically amount to liability. To suggest, *contra* the exemption view, that agents are *not exempt* from liability whenever they have a lesser-evil justification for harming is one thing, and what I'm doing. To claim that agents *actually* make themselves liable whenever they threaten to harm innocent people on lesser-evil grounds would be quite another.

Moral Uncertainty and Reasonable Disagreement

Lesser-evil justifications, although consequentialist in outlook, are highly complex, due to their sensitivity to deontological constraints on harming. The proportionality considerations that constrain lesser-evil justifications are informed by various deontological distinctions concerned with moral differences in which outcomes are brought about - such as the distinctions between intention and foresight, or doing and allowing harm. Lesser-evil justifications consequently rest on a number of distinct moral judgements that ultimately determine whether harms to non-liable people are proportionate.

Insofar as people may reasonably disagree about any number of these constitutive considerations - about whether they matter, and how much they matter - they may reasonably disagree about whether the harm in question is proportionate.[21] In these cases, I submit, agents are effectively required to bear the costs of their moral choices. This might manifest itself as the burden of justification in the face of reasonable disagreement, and as a lack of immunity from liability to defensive harm in cases in which fundamental rights are at stake.

Suppose, for example, that, in the above case, Interveners have a third option available, such that they could do one of the following:

> Option 1: The debris will kill five neutral bystanders to the intervention.
> Option 2: The explosion will send the debris towards the interveners' own planes, thereby killing five of them.
> Option 3: The explosion will spare the bystanders, but will kill one of the interveners.

Suppose that Interveners choose Option 1. Arguably, this is still proportionate, insofar as allowing 100 innocent civilians to be murdered by their regime would still be a significantly

[21] It's perhaps worth pointing out that these disagreements are alive and well among philosophers. For illustrative discussion, see, for instance, McMahan, 'Proportionate Defence'; Thomas Hurka, 'Proportionality in the Morality of War,' *Philosophy & Public Affairs* 33 (2004): 34–65; Hurka, 'Proportionality and Necessity' in Larry May (ed), *War: Essays in Political Philosophy* (CUP, 2008).

greater evil, compared to killing five Bystanders as an unintended side effect. Choosing Option 1 is thus permissible. Nonetheless, on some views - given the availability of Option 3 - Interveners have a stronger moral reason, possibly even a duty, to choose Option 3.[22] Insofar as people may reasonably disagree about which course of action Interveners ought to choose all-things-considered, we might think that Interveners' lesser-evil justification is not automatically immunity-conferring, even if choosing Option 1 was permissible.[23] Thus, insofar as there may be reasonable disagreement about whether agents have a stronger moral reason to act differently, even when a lesser-evil justification obtains, this lesser-evil justification may not exempt them from liability.

A different way of putting this is to say that, while on the exemption view, a fact-relative lesser-evil justification precludes liability in a fact-relative sense, the equilibrial view assumes that, on an evidence-relative level, there may be genuine uncertainty about the adequacy of lesser-evil justifications in some cases, for two reasons. First, even if there is moral certainty about what the right course of action is in a fact-relative sense, there may be empirical uncertainty, in an evidence-relative sense, about how to weigh different considerations in wide proportionality assessments. Second, there may be moral uncertainty about what the right course of action is in a fact-relative sense. In both cases, people might reasonably disagree both about whether a lesser-evil justification holds water, and about whether agents ought to have acted differently even if they did not act impermissibly. What follows from this, I submit, is that agents who appeal to a lesser-evil justification for harming innocent people effectively forfeit their claim to immunity from liability with their moral choice to transgress innocent people's rights not to be harmed. The basic assumption is that transgressing innocent people's rights not to be harmed, even in cases in which this is all-things-considered permissible, has moral costs. And these can manifest themselves in the form of a lack of immunity from liability to defensive harm.[24]

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[22] See Section 4.1 of Chapter 7.

[23] One explanation might be that killing five innocent bystanders as a side effect wasn't necessary, even if it was proportionate.

[24] They can also manifest themselves as liability to compensation. Given the context, I'm assuming that the threatened harms are non-compensable. If the harms threatened are easily compensable, agents may not make themselves liable to defensive harm but primarily to pay compensation to the innocent victims of their rights infringements. Whether agents make themselves liable to defensive harm or compensation will therefore likely depend on the severity of the concessive harm threatened. If the harm is compensable, this generates compensatory obligations; if it is non-compensable, agents might make themselves liable to defensive harm.

The Burdens of Lesser-Evil Judgements

Agents may be required to bear the costs of their moral choices. In some cases, mere agent-responsibility for a threat of harm can result in liability to defensive harm.[25] If what is effectively bad option luck can generate liability to defensive harm, then threats posed as a result of a deliberate lesser-evil calculation, *a fortiori*, can too. In such cases, one's liability to defensive harm is not an instantiation of an enforceable duty to act otherwise, as is the case with liability-based justifications for harming responsible threats. Rather, it is the moral consequence of the choice one made, as an autonomous moral agent, to - albeit permissibly - transgress innocent people's rights not to be harmed.

Agents are not immune from liability to defensive harm in cases in which they are under no obligation to perform an action that harms innocent people, but permissibly do so on lesser-evil grounds. Consider

> *Three-Option Trolley*:[26] There are three tracks. The trolley is going down the middle tracks, heading straight towards the five victims. You are trapped on the tracks to the left, and a bystander is trapped on the tracks to the right.
>
> You have three options:
> i) Do nothing and let the trolley kill the five.
> ii) Divert the trolley towards the bystander on the right.
> iii) Divert the trolley to the left, thereby saving the five and sparing the bystander, but killing yourself.

Suppose that you are not required to divert the trolley, but that it is permissible for you to divert it towards the bystander on lesser-evil grounds. (That is, assume that killing the bystander as a side effect of saving the five is proportionate; or increase the number of victims until the relevant threshold is met.) Thus, although you could permissibly (i) do nothing and let the five die, you choose (ii) to divert the trolley towards the bystander to save the greater number. Although you acted all-things-considered permissibly on the basis of a lesser-evil justification, I submit that your lesser-evil justification doesn't exempt you from

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[25] See, for instance, McMahan's discussion of the 'conscientious driver' in McMahan, 'The Basis of Moral Liability to Defensive Killing,' 393. In fact, responsibility-based accounts of liability in general are implicitly based on the assumption that individuals must bear the costs of their own actions, in that these accounts demand that the aggressor bear the unavoidable costs of the threat they pose. For discussion, see Richard Norman, *Ethics, Killing, and War* (CUP, 1995), 124-7. For a critique of McMahan's (agent-)responsibility-based account of liability, see Seth Lazar, 'The Responsibility Dilemma for *Killing in War*,' *Philosophy & Public Affairs* 38 (2010): 180-213.

[26] Based on Thomson's 'Bystander's Three Options.' See Thomson, 'Turning the Trolley,' 371-2. McMahan calls it the 'Three-Option Trolley case' in 'Self-Defense Against Justified Threateners,' 136.

liability to defensive harm insofar as you could have permissibly done nothing, or diverted the trolley towards yourself. Your moral choice to transgress an innocent person's right for others' good strips you of immunity from liability to be harmed to prevent the harm you, albeit permissibly, threaten to inflict.[27]

By contrast, Judith Thomson thinks that you must choose option iii). Since killing five is worse than killing one, she stipulates, option i) is out of the question, leaving options ii) and iii). You ought to let yourself be killed, she argues, because you ought not to make someone else pay for the cost of your good deed of saving the five.[28] Rodin similarly suggests that Interveners' liability in the above case is explained by 'the principle that one is required to bear the costs of one's own action even when one responds appropriately to objective moral reasons.'[29]

Neither Thomson nor Rodin further explain the notion of being required to bear the costs of one's own action. Presumably, part of the principle's appeal stems from the fact that it offers a plausible explanation of what happens in cases in which two or more incompatible courses of action look appropriate. In these cases, bearing the costs of one's autonomous moral choices, the burdens of one's lesser-evil judgements, can mean not being exempt from liability to defensive harm if one non-compensably, albeit permissibly, chooses to transgress innocent people's rights. Even if agents do not act wrongfully in threatening to inflict concessive harms, they may thus incur certain costs on account of the fact that they could have acted differently, in the sense that they were not *required* to transgress innocent people's rights.

In cases in which agents could not have acted differently, something like the exemption view might hold. Suppose that, in *Three-Option Trolley,* Thomson is right that you are required not to let the five die. In this case, it is, on my view, open to question whether you are indeed required to let yourself be killed. Insofar as you are required to divert the trolley, and it is merely as a result of bad luck that you and bystander are finding yourselves in your respective positions, it seems fairest to flip a coin between yourself and bystander.[30] This is because, in diverting the trolley, you are conforming with a moral obligation. Diverting the trolley was

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[27] McMahan, by contrast, argues that you are permitted to divert the trolley towards the bystander, saving the five and sparing yourself. (McMahan, 'Self-Defense Against Justified Threateners,' 134.)
[28] See Thomson, 'Turning the Trolley,' 371-2.
[29] Rodin, 'Justifying Harm,' 87; see also McMahan, *Killing in War*, 47-9.
[30] See Victor Tadros, *The Ends of Harm*, 119.

not, morally speaking, optional but required; and so you make no choice for which you could be required to bear the cost.

Duties, unlike justifications and permissions, leave no moral leeway, in the sense that it is wrong not to conform with one's all-things-considered duties. For this reason, it seems that one cannot forfeit one's right not to be harmed by complying with a moral duty. In cases in which agents are morally required to carry out an act that poses a threat to innocent people, agents are therefore exempt from liability to defensive harm.[31]

If this is right, people can make themselves liable to defensive harm for justifiably threatening to infringe innocent people's rights in certain circumstances, contrary to what the exemption view suggests. Yet, contrary to the liability view, people do not automatically make themselves liable whenever they threaten to transgress innocent people's rights. In cases in which they are morally required to perform the act that might harm innocent people as a side effect, it seems that they are indeed exempt from liability to defensive harm.

In sum, on the equilibrial view, lesser-evil justifications for harming neither automatically preclude nor entail liability to defensive harm. This is for two reasons. First, there may be reasonable disagreement about what constitutes the morally best option even in cases in which the wide proportionally requirement is met. Second, as autonomous moral agents, we are required to bear the costs of our moral choices, which may include lesser-evil judgements.[32] This might take the form of not being exempt from liability to defensive harm, even if one has a lesser-evil justification for harming, in cases in which the strength of one's positive moral reasons for non-compensably harming non-liable people is contestable. Therefore, agents are not, as a general matter, exempt from liability merely by virtue of having a lesser-evil justification for harming.

The mere fact that Interveners in the above example have a lesser-evil justification for harming Bystanders, then, does not automatically exempt them from liability to defensive harm. However, for Interveners to actually make themselves liable to defensive harm, a number of conditions - including the necessity and proportionality requirements - would need to be met. What this would look like in the above type of case remains, for the moment, an

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[31] I set complications arising from situations in which duties seem to conflict aside. Presumably, the same thought applies there - insofar as we choose with which one of two or more incompatible duties to conform, we bear the burdens of our judgement.

[32] Combatants may not be acting on their own moral choices. I address some related concerns below and in Chapter 6.

open question.

3. Immunity-Limiting Considerations

Even if just intervening combatants do not make themselves liable to defensive harm by posing justified threats of unintended harm to non-liable civilians, there are distinct reasons why they may be required to incur certain risks of harm themselves to minimise foreseeable harms to civilians.[33] This matters because, insofar as combatants fail to bear risks of harm which they are morally required to bear, this may support Bystanders' permission to use defensive force. I will consider three potential grounds for intervening combatants' duties to bear risks of harm: rectificatory obligations of the intervening party, combatants' professional responsibilities, and the pursuit of national interests as part of the intervention.

3.1 Rectificatory Duties

Many philosophers assume that responsibility for the conditions of injustice which necessitated an intervention plays a central role in grounding interveners' duties to incur certain costs of the intervention. For example, Øverland states: 'The intervening party could previously have supported the corrupt regime and for that reason had some contribution-based responsibility to intervene. That would give the intervening party an increased responsibility to shoulder risk.'[34] Correspondingly, in his discussion of NATO's Kosovo intervention, McMahan indicates that the NATO members' lack of responsibility for the violence in the Balkans in the early 1990s at least made it less obvious that they had to bear significant risks to 'rescue strangers for whose plight they bore no responsibility.'[35] Moreover, James Pattison assumes that 'the distribution of the costs of intervention should also reflect the culpability of the rescuers.'[36]

But the relationship between duties to intervene *ad bellum* and duties to bear greater risks *in bello* is less straightforward than these views suggest. Being required to intervene necessarily entails a duty to incur certain costs of the intervention. However, and somewhat counterintuitively, we have reasons to resist the claim that intervening combatants from a

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[33] For discussion, see Seth Lazar, *Sparing Civilians*; Adil Haque, *Law and Morality at War*.
[34] Øverland, 'High-Fliers,' 77. See also McMahan 'The Just Distribution of Harm,' 366, 372-3.
[35] See McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 65.
[36] Pattison, 'Bombing the Beneficiaries,' 115.

responsible party are required to bear greater risks to minimise harms to civilians than combatants intervening on the grounds of a general duty to rescue.

The fundamental question is whether the strength of the *ad bellum* duty to intervene affects what *in bello* costs intervening combatants are required to bear. While Øverland supposes that a rectificatory duty to intervene entails 'increased responsibility to shoulder risk,' this is true only in a very specific and limited set of cases. We have reason to be cautious about the assumption that there is a direct correlation between the strength of an intervening party's responsibility to intervene on one hand and the level of risk which intervening combatants must bear to minimise harms to civilians on the other.

Grant that moral, causal, or historical responsibility for conditions of injustice can give rise to duties to rescue, which may, in certain cases, take the form of humanitarian intervention. For example, responsibility for supporting the target party's corrupt regime and sustaining its ability to stay in power might generate a duty to address the rights violations this regime commits or condones, which is distinct from the general duty to rescue that applies to the international community at large. In cases in which the intervening party bears some responsibility for the injustice necessitating humanitarian intervention, this raises the question of whether its responsibility for conditions of injustice not only gives rise to duties to rescue but also requires Interveners to bear greater risks of harm during the intervention. That is, does an intervening party's responsibility for the injustice generate duties for its combatants to bear greater risks of harm during the intervention which would not otherwise obtain?

Call the assumption that a stronger duty to intervene *ad bellum* entails a duty to bear higher costs *in bello* the *correlation thesis*. If the correlation thesis is right, the threshold at which it becomes permissible to shift risks of harm from intervening combatants to civilians is higher for combatants whose country is complicit in the humanitarian crisis which justified the intervention than for combatants from countries that have no particular rectificatory obligation in addition to the general duty to rescue.

One main concern about the correlation thesis is that it seems to compel individual combatants to take greater risks to their lives for wrongs their state committed, and for which they themselves are in no way responsible. Insofar as intervening combatants are not individually morally responsible for their country's (past) wrongdoing, we might think, they shouldn't have to bear greater risks of harm during the intervention than if their country did

not have special rectificatory duties.

One response to this is that it is true but irrelevant that those combatants who have to risk their lives for others are in no way individually responsible for the injustice that necessitated the intervention. Their duty to bear risks of harm is primarily grounded in their professional obligations as combatants.[37] Combatants are generally expected to fight any just war their country orders them to fight, and it is then their job to risk their lives in protection of others. Intervening combatants' duty to bear risks of harm thus does not presuppose any individual liability resulting directly from the intervening state's responsibility for the injustice. Intervening combatants' duty to bear risks during the intervention is therefore only indirectly linked to their country's responsibility for the injustice that necessitated the intervention, in that a basic duty of justice to address wrongdoing is what justifies the intervention *ad bellum*.

For this reason, the correlation thesis applies only in a very limited set of circumstances, and only for incidental rather than principled reasons. According to the correlation thesis, intervening combatants are required to bear risks of harm themselves rather than shifting them to civilians in cases in which an intervening party is in some way complicit in the injustice which required the intervention. This assumption holds specifically in cases in which victims of the injustice necessitating intervention shouldn't be made to bear the costs of their own rescue. This is the case when the civilians in question are victims of the original injustice that required the intervention and those on whom risks will fall unless Interveners bear these risks themselves.

As I argued in Chapter 4, it is impermissible for interveners to shift risks of harm to civilians on the grounds that civilians stand to benefit when their benefit consists in being rescued from harms they have a right not to suffer. Exposing these beneficiaries to risks of harm must therefore be justified on other grounds. The question raised by the correlation thesis in these cases is whether what is decisive is that (a) beneficiaries shouldn't be made to bear the costs of their own rescue, or that (b) interveners should bear the risks concomitant with the intervention. That is, it *either* matters that it is *not beneficiaries* who bear the costs of their rescue, because they have already been wronged, *or* that it is interveners who bear the risks of their military action, because their country was in some sense responsible for the injustice. If, as I argued, what matters is that beneficiaries are spared the additional risk, in the

[37] See McMahan, 'Humanitarian Intervention, Consent, and Proportionality,' 69; 'The Just Distribution of Harm,' 366-7, 369-70.

absence of an alternative justification, interveners must bear the risk themselves. This is the specific type of case in which I think the correlation thesis holds. The issue with its applicability beyond this is that it makes it look like interveners should bear the risk simply because of their party's responsibility for the injustice. But this obscures the fact that the reason why interveners have a duty to intervene is the same reason why beneficiaries shouldn't be made to bear the costs of their own rescue.

For this reason, the correlation thesis doesn't tell us anything about the permissibility of shifting risks to Bystanders when this is an option. In cases in which the civilians in question are otherwise unrelated bystanders, the correlation thesis fails to determine whether intervening combatants are required to bear the risk of being harmed as a side effect as a result of their country's responsibility for the injustice requiring the intervention. The consideration which prohibits risk imposition on beneficiaries doesn't apply to bystanders. This leaves the second potential explanation mentioned above, namely that interveners must bear the risk because their country is responsible for the injustice, and that interveners are therefore prohibited from transferring the risk to others. But this generates the worry raised above, that intervening combatants would effectively be required to bear risks of harm not merely by virtue of their contractual, professional obligations, but by virtue of their country's wrongdoing. Having consented to the former but lacking any responsibility for the latter, requiring them to bear risks on the distinct grounds of their country's past wrongdoing would be unfair.

In sum, historical responsibility for conditions of instability and injustice can give rise to duties to rescue, without this entailing a distinct duty for interveners to bear risks of harm *in bello* which would not otherwise obtain. Since intervening combatants themselves bear no moral responsibility for the injustice in which their country is complicit, their duty to bear risks of harm must be grounded in considerations other than their party's particular rectificatory obligation to intervene. This straightforwardly results from their role-based, professional obligations as combatants.

3.2 Professional Duties and the Pursuit of National Interests

Combatants are, by virtue of their profession, required to bear significant risks to minimise the harms they might cause to civilians as an unintended side effect of their military

actions. Members of the military generally have contractual obligations to expose themselves to risks to save others' lives.[38] As McMahan notes, this is what 'they have pledged to do and are paid to do.'[39] In addition, Pattison points out, combatants who have voluntarily joined the military are compensated for the high demands of their profession *ex ante*. If the contract is fair, they are therefore 'required to live up to the terms of their agreement and therefore accept greater risks.'[40] Combatants are, in this respect, like other professional rescuers, such as the police, firefighters, bodyguards, and lifeguards, whose contractual obligations include bearing certain risks of being harmed for the sake of protecting others.

Contrary to what might be objected, whether combatants have consented to fighting wars of AHI when they joined the military has no bearing on what risks they are required to bear in a just AHI.[41] This is for two reasons. First, national wars of self-defence in the traditional sense have become rare, and engagements on other countries' territory the norm, particularly for those states that have the capacity to conduct military interventions.[42] The expectation that one would only be required to fight wars of national self-defence is therefore outdated.[43] Second, fighting just wars of AHI can be required by duties to rescue. Often, duties to rescue require us to bear costs to which we have not consented. Our permission to refuse to bear certain costs in these cases is generally grounded in the fact that these costs are excessively high - not in the fact that we haven't consented to bearing them.[44] For these reasons, combatants are required to bear risks of harm regardless of whether they are defending fellow nationals in a just war of self-defence against an unjust aggression or

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[38] See George Lucas, 'From *jus ad bellum* to *jus ad pacem:* Rethinking Just War Criteria for the Use of Military Force for Humanitarian Ends' in Don E. Scheid and Deen K. Chatterjee, *Ethics and Foreign Intervention* (CUP, 2004), 78. See also Pattison, 'Bombing the Beneficiaries,' 120, 127-9.

[39] McMahan, 'The Just Distribution of Harm,' 366–67, 372-3. On this account, the NATO combatants who were bombing targets in Serbia from high altitudes which resulted in scores of civilian casualties were 'failing to do their job properly.' Thus, the decision to assign ultimate priority to the safety of NATO forces was wrong partly because this was inappropriate for 'professional warriors.' Also see McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 68-9.

[40] Pattison mentions benefits including a pension scheme, healthcare, and free higher education. (Pattison, 'Bombing the Beneficiaries,' 117, 123.)

[41] For discussion, see Pattison, 'Bombing the Beneficiaries,' 118. See also Martin L. Cook, '"Immaculate War": Constraints on Humanitarian Intervention,' in Anthony F. Lang Jr. (ed), *Just Intervention* (Georgetown University Press, 2003), 145–54.

[42] Whether these engagements are justified is questionable, but irrelevant here.

[43] For discussion of why combatants can generally be expected to fight wars of humanitarian intervention, see Baker and Pattison, 'The Principled Case for Employing Private Military and Security Companies in Interventions for Human Rights Purposes,' *Journal of Applied Philosophy* 29 (2012): 1-18; Pattison, *Humanitarian Intervention and the Responsibility to Protect*, 110–12. Also see McMahan, 'Humanitarian Intervention,' 69–70.

[44] Pattison even suggests that combatants may be ordered to bear greater costs than they ordinarily have a professional obligation to bear. See 'Bombing the Beneficiaries,' 119-20, 123.

whether they are protecting vulnerable people from atrocity crimes abroad. Wars of humanitarian intervention qua wars of humanitarian intervention thus do not relativise combatants' general professional duty to bear risks to minimise the harm they might cause to innocent people as a side effect of their actions. What matters is whether combatants consented to incurring their role's professional requirements.[45] These are no less demanding in wars of AHI than in wars of national self-defence.

One final reason why it may be impermissible to expose civilians to greater risks to ensure the security of intervening combatants is that intervening parties may pursue national interests in addition to humanitarian goals.[46] In many cases, it is permissible for interveners to pursue national interests alongside humanitarian goals, especially when these aims overlap.[47] To the extent that the intervening party is pursuing national interests which are distinct from humanitarian goals, the intervening party's prospect of deriving a benefit from the intervention may put additional constraints on the permissibility of shifting risks of harm to civilians.

Still, the question of the conditions under which it is all-things-considered permissible for Bystanders to use lethal force in self-defence is a long way from resolved.

4. Rescue Prevention and Proportionality

Just as saving 100 innocent lives renders Interveners' act of killing the five Bystanders proportionate, we might think, preventing the 100 civilians' rescue would render Bystanders' act of repelling Interveners disproportionate and hence impermissible. But there is more than meets the eye. We must clarify how preventing the 100 civilians' rescue as a side effect of harming Interveners in self-defence might affect the permissibility of Bystanders' defensive action.

Suppose, for the moment, that Bystanders could repel Interveners without harming

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[45] Combatants who did not enlist voluntarily but are coerced to fight against their will are often excused for the threats they pose in wars. In comparison to combatants who freely chose to join the military, the 'professional' duty of coerced combatants to bear greater risks to minimise harms to civilians might be weakened (see McMahan, 'The Just Distribution of Harm,' 367-9). However, as Lazar and Haque have pointed out, it is generally easier for combatants to avoid being harmed than it is for civilians to do so, which may ground a distinct duty to bear greater costs to spare civilians. See Seth Lazar, *Sparing Civilians* and Adil Haque, *Law and Morality at War*.

[46] I take McMahan to acknowledge as much in stating that 'beneficiaries of defensive action can be expected to share the risks and burdens of their defense with their defenders,' and adds, 'except when the defenders are equally the beneficiaries of their own action.' ('The Just Distribution of Harm,' 374.)

[47] For example, Simon Caney, *Justice Beyond Borders* (OUP, 2005), 226-262.

them, but that this would prevent Interveners from rescuing the 100 other civilians. May Bystanders repel Interveners to avoid being killed as a side effect, thereby preventing Interveners from saving the 100 other civilians, or are Bystanders required to let themselves be killed as a side effect of the 100 other civilians' rescue?

The wide proportionality requirement constrains harms inflicted on people who are not liable.[48] Wide proportionality thus functions as a constraint on lesser-evil justifications for harming. Generally speaking, a harmful defensive act must not cause disproportionate harm to innocent others, meaning that the harm averted by the defensive act must be significantly greater than the harm inflicted on innocent people as a side effect.[49] This is why, as McMahan puts it, 'innocent people are not permitted to defend themselves against being killed if in doing so they would unavoidably kill an equal or greater number of innocent bystanders as a side effect.'[50]

But, as indicated above, wide proportionality calculations involve significantly more than assessments of the comparative moral value of different states of affairs one could bring about. They are also sensitive to *how* harms are brought about.[51] The proportionality constraint is attuned to critical deontological considerations, such as the distinctions between intention and foresight, and different modes of agency - that is, harms brought about through positive agency (things we *do*) and harms brought about through negative agency (things we *allow*).[52] Hence, the proportionality requirement is more stringent in cases in which innocent people are harmed intentionally than in cases in which innocent people are harmed as an unintended side effect, and less stringent in cases in which agents fail to prevent harms than in cases in which agents inflict harm themselves.

Wide proportionality is thus sensitive to the fact that morality generally requires agents to go to greater lengths to avoid doing harm than to avoid allowing harm.[53] By using lethal force against Interveners, however, Bystanders would not *kill* the 100 civilians as a side effect

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[48] McMahan introduces the distinction between narrow and wide proportionality in *Killing in War*, 20-21; see also McMahan, 'Who is Morally Liable to be Killed in War,' *Analysis* 71 (2011): 544-559, 545; McMahan, 'Proportionate Defence' in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP, 2017).

[49] For instance, McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 67.

[50] McMahan, 'The Just Distribution of Harm,' 364-5.

[51] McMahan, 'Proportionate Defence,' 152.

[52] Rodin, 'Justifying Harm,' 78-9.

[53] For discussion, see Fiona Woollard, *Doing and Allowing* (OUP, 2015); Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing,' *Philosophical Review* 98 (1989): 287–312; Philippa Foot. 'The Problem of Abortion and the Doctrine of the Double Effect.' *Oxford Review* 5 (1967): 5–15.

of their defensive action. Nor, strictly speaking, would they let them die. After all, Bystanders have no means of rescuing the other civilians, and are therefore not omitting to do something which they might reasonably be expected to do.[54] Rather than allowing the 100 civilians to die, Bystanders are preventing their rescue by Interveners. While Bystanders would be required to let themselves be killed if their defensive act would *kill* the 100 civilians as a side effect, it is less obvious if they are also required to let themselves be killed to avoid preventing their rescue.

The salient question is whether Bystanders' defensive act against Interveners would be rendered disproportionate by the fact that it would prevent the 100 civilians' rescue as a side effect. I will suggest that the fact that Bystanders would prevent the 100 civilians' rescue renders Bystanders' self-defensive act against Interveners disproportionate in the wide sense only if they kill Interveners intentionally. If Interveners are killed as an unintended side effect of Bystanders' defensive action, the 100 civilians' deaths are heavily discounted, if not irrelevant, in the proportionality assessment. Consider the following two cases:

> *Hospital*: You walk down the road, as you see a driverless car hurtling around the corner and towards you. The car will run you over unless you blow it up with your grenade. However, the explosion would destroy a nearby hospital as a side effect, and kill 100 of its patients.
>
> *Blood Donor*: A 100 people need a certain amount of donated blood to survive. You are the only person in the surroundings whose blood has the required features. You stand in no special relationship to the 100. Donating the amount of blood required to save the 100 would kill you.

In line with mainstream assumptions, I take it that it is impermissible to kill the 100 as a side effect of saving yourself in *Hospital*, and permissible to refuse to sacrifice yourself in *Blood Donor*, because your negative duty not to kill in *Hospital* is weightier than your positive duty to aid the 100 patients in *Blood Donor*. Accordingly, the cost you must bear to prevent killing the 100 in *Hospital* is significantly higher (you have to let yourself be killed) than the cost you must bear not to let the 100 die in *Blood Donor* (it's permissible not to sacrifice yourself).[55]

Now consider

> *Courier*: 100 innocent people have been poisoned. They are all in the same hospital, waiting for the antidote that will save their lives. A courier is delivering

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[54] For discussion of the relevant conception of acts and omissions, see Patricia Smith, 'Bad Samaritans, Acts, and Omissions' in R. G. Frey, Christopher Heath Wellman (eds), *A Companion to Applied Ethics* (Blackwell, 2007); McMahan, 'Self-Defense Against Justified Threateners,' 111.

[55] For discussion, see Tadros, *The Ends of Harm*, 118.

> the antidote from the laboratory to the hospital. To get the antidote to the hospital in time, she has to drive as fast as is legally permissible. You are walking down the road as you see the courier car racing around the corner. The car will run you over unless you blow it up with your grenade. This will kill the driver and prevent the antidote from reaching the hospital. The courier was not driving over the speed limit and she had a lesser evil justification for posing the risks her fast driving created for other traffic participants. You stand in no special relationship to the 100 poisoned people.

While *Hospital* was a case of killing as a side effect, and *Blood Donor* one of allowing harm, *Courier* is a case of rescue prevention. Is it permissible to destroy the car and kill the courier to save your life, even if this will prevent the antidote from reaching the 100 poisoned patients? The answer in this case seems less obvious than in the following variation:

> *Courier*:* Everything is the same as in *Courier*, except for the fact that you haven't got a grenade with you. Instead, you can leap out of the car's trajectory into a nearby pond (and nowhere else). However, the splash from your jump into the water would hit the car's windscreen and cause the driver to crash into a nearby wall, killing her and preventing the antidote from reaching the hospital.

I take it that jumping into the pond in *Courier** is easier to justify than using your grenade in *Courier,* because you would cause the driver's death 'merely' as an unintended side effect of jumping into the pond. As Rodin puts it in reminding us that even lesser-evil justifications are sensitive to intentions, unintended harms 'do not instrumentalize their victims in the way that intended harms do.'[56] Harming the driver is not necessary to save yourself - if her windscreen wipers were to miraculously start, preventing her from crashing into the wall, you would be all the happier. In *Courier,* on the other hand, blowing up the car, thereby killing the driver, is the only alternative to letting yourself be killed. It thus seems permissible to jump into the pond in *Courier** because you can avoid being killed in a way that doesn't require intentionally killing the driver.

This, I suggest, indicates that, for particular harms occurring downstream of one's action to fall under the jurisdiction of the wide proportionality requirement, the defensive harm which is the primary subject of justification must be intended.[57] Thus, since causing the driver in *Courier** to crash is itself an unintended side effect of your jumping into the pond, the further side effect of her failing to reach the hospital must be a consideration that is

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[56] Rodin, 'Justifying Harm,' 103.

[57] Put differently, the claim is that wide proportionality is not perceptibly affected by unintended side effects of unintended side effects unless the principal action that causes the side effects whose side effects are in question is intended.

heavily discounted if it is included in the calculation determining if your act is proportionate. After all, in cases in which harms one brings about through the intervening agency of *others* affect the assessment of proportionality, they weigh significantly less than equivalent harms of which one is the approximate cause.[58] Harms one brings about through causing others to *omit* to rescue, then, must count even less in the assessment of wide proportionality, since the constraint against preventing people from being rescued is significantly less stringent than the constraint against killing.[59]

Consider in this context a point Victor Tadros makes about Thomson's *Three-Option Trolley* case mentioned earlier. Tadros disagrees with Thomson that you must let yourself be killed, because the resulting cost would fall onto the bystander merely as a side effect. Tadros suggests that we distinguish between bearing costs in service of a goal from imposing costs as a side effect, such that '[t]he fact that a person would not be willing to impose a cost on herself in *pursuing a goal* does not entail that she ought not to impose the cost on others *as a side effect*.'[60] Similarly, we might think that, in *Courier**, the fact that you are not willing to let yourself be killed to avoid preventing the 100 patient's rescue does not automatically entail that you mustn't impose the risk of harm resulting from your leap into the pond on the driver as a side effect.

In *Courier*, however, the combination of the following considerations indicates that it is all-things-considered impermissible for you to kill the driver. First, it is generally impermissible to kill another innocent person to save oneself. Second, as a side effect of violating your negative duty not to kill, you would be preventing the 100 patients from receiving their antidote. While you have no positive duty to sacrifice yourself to prevent 100 people from dying (such as in *Blood Donor*), you have a negative duty not to kill the driver, and not to interfere with her positive duty to rescue the 100.

This negative duty, however, only obtains in relation to the fact that you would intentionally kill the driver. In the above case in which you would prevent the rescue as a consequence of an unintended side effect of your action, this duty does not materialise. While you have to bear significant costs to avoid killing the driver, you are not required to bear significant costs to prevent her from crashing into the wall if you jump into the pond.

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[58] McMahan, 'Proportionate Defence,' 153.

[59] For related discussion, see McMahan, 'Killing, Letting Die, and Withdrawing Aid,' *Ethics* 103 (1993): 250-79.

[60] Tadros, *The Ends of Harm*, 120. Hence, it seems fairest to flip a coin between yourself and bystander.

Similarly, you have to bear significant costs to avoid killing the 100 as a side effect of your action, but you do not have to bear significant costs to prevent others from failing to rescue them. It is only in combination with your negative duty not to kill the driver that your duty not to prevent the 100 from being rescued generates an all-things-considered obligation not to kill the driver.

What thus distinguishes *Courier* from *Courier** is the negative duties which you would violate by killing the driver in *Courier*. In *Courier** there is a way to save yourself that wouldn't involve violating your duty to bear significant costs to avoid harming others. In *Courier*, by contrast, the only way to save yourself would require violating significant duties not to harm. Since you would kill the driver intentionally, preventing the 100 from being rescued weighs heavily in the proportionality assessment of your violation of your negative duty not to kill the driver.

This indicates that preventing the rescue of the 100 civilians carries decisive weight in the wide proportionality calculation of Bystanders' defensive act only if Bystanders would kill Interveners intentionally. If Bystanders kill Interveners as an unintended side effect of trying to escape the threat posed, the relevant proportionality consideration only extends thus far. However, if Interveners would be killed as an unintended side effect of Bystanders defensive action, the prevention of the 100 civilians' rescue might be so heavily discounted in the proportionality calculation that it might not render Bystanders' defensive action disproportionate in the wide sense. (Though, of course, killing Interveners might still be impermissible for other reasons.)

Suppose, then, that, Bystanders could shield themselves from the incoming debris by erecting a pop-up bunker. The debris from the explosion caused by Interveners would foreseeably ricochet off the bunker's roof and be deflected towards Interveners, killing them as a side effect.[61] If the above claim is correct, erecting the bunker would not necessarily violate the wide proportionality constraint. Since the prevention of the 100 civilians' rescue, in this case, would be morally removed from Bystanders' act by several degrees, this consequence would not necessarily render Bystanders' defensive act disproportionate.

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[61] We can compare this to ducking cases. (See, for instance, See Christopher Boorse and Roy A. Sorenson, 'Ducking Harm,' *The Journal of Philosophy* 85 (1988): 115-34.) We might also consider the distinction between redirecting an original threat and creating a new threat (see McMahan, 'Self-Defence and the Problem of the Innocent Attacker,' 252-3). Both manners of averting risks of harm in self- or other-preservation shift the risk away from oneself to another party who is not the person who originally posed the threat.

The claim that preventing the 100 civilians from being rescued is only relevant to assessments of proportionality in some cases, however, does not imply that it is not relevant to the permissibility of Bystanders' defensive action in general. There might be independent considerations that require Bystanders to bear certain costs of the other 100 civilians' rescue.

5. Obligations to Suffer Collateral Harms?

David Rodin has argued that Bystanders have an all-things-considered lesser-evil-obligation not to kill Interveners in self-defence.[62] Even if Interveners are liable, he suggests, it may nonetheless be all-things-considered impermissible for Bystanders to kill them 'because of the broader goods at stake in the mission' - that is, the lives which Interveners will otherwise be prevented from saving.[63] Although Bystanders have a right not to be killed, the prospect of saving 100 innocent civilians, on Rodin's view, requires Bystanders to let themselves be killed.

But is the claim that Bystanders have a lesser-evil obligation to let themselves be killed compatible with the fact that Bystanders would be wronged by being killed? Recall that victims of rights infringements can be wronged, even if agents act all-things-considered permissibly in committing these infringements. In claiming both, Rodin effectively suggests that Bystanders have a lesser-evil obligation to let themselves be wronged. But, if Bystanders are required to bear the risk of being killed as a side effect of Interveners' mission, then it is not clear why they would be wronged by being made to bear this risk. If Bystanders have a lesser-evil obligation to let themselves be killed, then it seems that, rather than wronging Bystanders, Interveners are enforcing this lesser-evil obligation. It is therefore open to doubt whether an appeal to lesser-evil obligations convincingly explains why it may be impermissible for Bystanders to act in self-defence, despite the fact that they would be wronged by being concessively harmed.

I'll examine three deeper explanations for why innocent civilians may be required to bear risks of being harmed as a side effect of a just intervention: (1) rectificatory duties, (2) an egalitarian distribution of risks, and (3) an overall reduction of wrongful harm. I'll challenge the first two and endorse the latter.

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[62] Rodin, 'Justifying Harm,' 99-100.
[63] Rodin, 'Justifying Harm,' 87.

5.1 Rectificatory Duties

While I have so far focused on bystanders who stand in no special relationship to the intended beneficiaries of the rescue, consider, for a moment, bystanders in the target party.[64] Bystanders in the target party generally comprise both persons who are neutral with regard to the unjust regime as well as individuals who are morally responsible for supporting the regime. Just as civilians can make themselves liable to harm by actively supporting an unjust war, these regime-supporting civilians' immunity to harm may be diminished by purposely supporting and voluntarily benefiting from a corrupt, rights-violating, atrocity-committing regime.[65] To the extent that these bystanders have failed in their duties to their fellow citizens who are now facing unjust threats of harm, they may be liable to bear some of the costs of their defence, such as risks of harm entailed by the intervention, even if most would not ordinarily be liable to intentional harm.

Consider now bystanders within a neighbouring country. A question that arises is what this bystander country's government may permissibly do to protect its citizens from being harmed as a side effect of the intervention in the target party. For example, would it be permissible for the bystander country's government to order its military to target Interveners to protect Bystanders from being killed as a side effect of the intervention in the neighbouring target party?

One starting point is the assumption that what it is permissible for individual bystanders to do differs from what it is permissible for their government to do on their behalf. Thus, even if the bystander country has special rectificatory duties to the target party's victims, which require the bystander country to bear certain costs of their rescue, this does not preclude the permissibility of individual Bystanders' self-defence. Conversely, in the absence of duties of the bystander country to the target party, Bystanders' government's associative obligations to its citizens might permit defensive action even if individual bystanders are required to bear the risk of being harmed as a side effect lest they prevent the rescue of 100 innocent others.

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[64] One might distinguish between neutral bystanders within the target party and neutral bystanders within neighbouring countries. However, on my view, differences in their respective moral duties to aid the 100 other civilians' rescue primarily result from differences in their capacity to fulfil these duties. The costs bystanders can reasonably be expected to bear thus do not necessarily vary depending on whether the intended beneficiaries are fellow nationals or foreigners.

[65] See Øverland, 'High-Fliers,' 70-72.

More generally, the bystander country might be required to bear some costs of its neighbouring country's victims' rescue as a result of having failed to discharge previous duties to prevent the injustice necessitating military intervention.[66] Insofar as people in the target party are facing wrongful threats of harm as a result of the bystander country's previous failure to discharge its duty to aid, the bystander country might incur duties to bear some of the cost of their rescue. Previous failure to discharge certain duties to rescue might thus generate the type of special relationship that grounds duties to bear certain costs of the intervention. These might include suffering the destruction of civilian property, infrastructure, cultural landmarks, and so on, insofar as the threatened damage is compensable.[67] It might also take the form of contributing financial resources to benefit victims of injustice, or contributing troops to support interveners' efforts; as well as opening neighbouring borders to people fleeing violence in the target party.

However, the bystander country's rectificatory duty to the target party's victims of injustice cannot entail a duty to incur risks of lethal harm to its non-liable civilian citizens. Although collectives such as states can incur certain remedial obligations in the absence of individual members' moral responsibility for the harm to be mitigated, individuals retain their right not to be harmed unless they have, through their responsible moral agency, forfeited this right. Innocent bystanders retain their negative right against being made to bear the risk of being harmed as a side effect of the rescue operation. While rectificatory obligations may thus be one source of the bystander country's general duty to bear certain costs of the 100 civilians' rescue, this does not translate into innocent individuals' duty to let themselves be killed.

5.2 Distributing Costs Equally

A second possibility is that Bystanders might be required to bear significant risks of being harmed if this is the fairest way to distribute the costs of the intervention. Even if Interveners are required to rescue the 100 civilians, and if Bystanders are not liable to harm, it may be that Interveners can permissibly require Bystanders to bear some of the costs of the rescue. Consider, for example, James Pattison's claim that risks of harm should be distributed

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[66] In addition, both individuals and states may incur duties as a result of other agents' failure to fulfil theirs. (For example, Zofia Stemplowska, 'Doing More Than One's Fair Share,' *Critical Review of International Social and Political Philosophy* 19 (2016): 592.) The 'responsibility to protect' may be taken to rest on the same premise.

[67] See Chapter 8.

equally between bystanders and beneficiaries of an AHI. He argues that, 'if there is an unavoidable, large cost, this should be split equally between the bystander and beneficiary.'[68] Pattison illustrates this with the following case, which I have simplified for our purposes:

> *Mine:*[69] Bob has accidentally stepped on a mine, and can be saved in one of two ways. Option 1 involves Bob being grievously injured, as a result of which he would no longer be able to live a flourishing life. No one else would be harmed. In Option 2, Bob and five innocent bystanders would each lose an arm, but each would still be able to lead a flourishing life. If Bob is not rescued, the mine will go off and kill him.

Pattison does not believe that Bob's standing to benefit from being rescued entails that he alone should bear the costs of his rescue.[70] This is because it is 'morally arbitrary' (that is, a result of bad brute luck) that Bob will benefit, just as it was arbitrary that it was Bob rather than one of the five others who accidentally stepped on the mine. Therefore, there is no reason why Bob, rather than anyone else, should bear the costs of his misfortune. The same, Pattison argues, is true in AHI.[71]

Pattison argues that costs of brute bad luck should be shared, to lessen their harmful effects and allow the greatest number of people possible to lead flourishing lives.[72] As he puts it:

> when the costs of brute bad luck are shared amongst several agents, the costs borne by each agent will be lower and all the agents may be able to lead flourishing lives, despite the costs. The costs of brute bad luck should be shared, where possible, equally, so that no particular agent will suffer a greater harm to his or her chances than any other, thereby not undermining the equality of opportunity.[73]

If Pattison is right, Bystanders can permissibly be made to bear certain costs of the rescue operation on account of the fact that the costs of the intervention should be distributed equally between beneficiaries and bystanders. However, this argument is not fully satisfying, for two reasons.

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[68] He thinks that this is the case even if the cost is higher than either has duty to bear. See Pattison, 'Bombing the Beneficiaries.' In Don E. Scheid, ed., *The Ethics of Armed Humanitarian Intervention* (CUP, 2014), 113-130, 125. I assume that we can extend this argument to not only to beneficiaries and bystanders but also to intervening combatants. This is compatible with Pattison's view. See 'Bombing the Beneficiaries,' 124.

[69] See Pattison, 'Bombing the Beneficiaries,' 125.

[70] Pattison, 'Bombing the Beneficiaries,' 125-6.

[71] As argued in Chapter 4, I too am sceptical of the moral salience of rescuees' benefit, though for a different reason. On my view, the issue is that the beneficiaries of AHI are victims of wrongdoing.

[72] Pattison, 'Bombing the Beneficiaries,' 125-6.

[73] Pattison, 'Bombing the Beneficiaries,' 126.

First, the proposal is ambiguous with regard to whether a particular distribution of risks of harm is fairest by virtue of being egalitarian, as suggested by the second sentence cited above, or insofar as this happens to result in conditions in which everyone affected will still be able to lead a flourishing life, as suggested by the first sentence. Since it is not a necessary condition for people to still be able to lead flourishing lives that risks of harm be distributed equally, the two considerations can come apart. In *Mine*, it is therefore unclear which of the three following points is decisive: (1) that Bob and the five bystanders should bear the same risk of being harmed as part of Bob's rescue, regardless of the outcome; (2) that all should suffer the same harm as an outcome, such that no one suffers more actual harm than anyone else; or (3) that all should still be able to lead flourishing lives as an outcome, which need neither presuppose an equal distribution of risk nor an equal distribution of actual harm.

Second, Pattison takes his argument for distributing costs of bad brute luck to apply to wars of AHI. But rescue cases like AHI, which respond to threats of *wrongful* harm, morally differ from cases in which individuals are victims of brute misfortune. An egalitarian principle might be appropriate for distributing the risks of rescuing victims of brute bad luck amongst a given group of potential risk bearers who are, in all relevant respects equal, if the victim's misfortune is not a morally salient distinguishing feature indicating that they should be the sole bearer of the costs of the rescue. However, as I argued in Chapter 4, cases in which the victim suffers a wrongful threat of harm are different. In cases in which rescues are necessitated by others' wrongdoing, and subsequent harms are unavoidable, those morally responsible, rather than innocent victims or bystanders, should bear the costs.[74] If those responsible are absent or unable to bear these costs, it is nonetheless not obvious that an egalitarian distribution of risks of harm between non-liable individuals is just by virtue of having equalised degrees of risk between potential risk-bearers.

I'll therefore outline a final consideration, which might offer a more compelling explanation for why Bystanders may be required to bear certain costs of the rescue operation.

5.3 Reducing Overall Harm

Bystanders may be required to bear significant risks as a side effect of an AHI in cases

[74] See McMahan, 'The Basis of Moral Liability,' 389-93; Kimberley Kessler Ferzan, 'Justifying Self-Defense,' *Law and Philosophy* 24 (2005), 733-39; Ferzan, 'Culpable Aggression: The Basis for Moral Liability to Defensive Killing,' *Ohio State Journal of Criminal Law* 9 (2012): 669-697. Chapter 8 makes this case with regard to compensation.

in which distributing risks in a particular way will lead to the overall reduction of wrongful harm to innocent people.[75] Prioritising force protection and imposing the risk of being killed as a side effect on Bystanders may be justified on the grounds that this will ultimately protect the most vulnerable by reducing the risk of wrongful harm to innocent people.

An egalitarian distribution for its own sake looks unappealing because, as McMahan puts it, 'it elevates the concern with outcomes, evaluated from an impersonal perspective, altogether above considerations of justice.'[76] Spreading the burden to achieve a more egalitarian distribution is therefore desirable primarily to the extent that it decreases the overall expected harm to innocent people. On this view, it is permissible to expose non-liable civilians to risks of harm insofar as this would significantly decrease the overall amount of harm to innocent individuals. That it decreases risks of harm to the most vulnerable may thus be one principal justification of any particular distribution of risks of harm.[77]

This principle may be taken to justify either an egalitarian or a heavily skewed distribution, depending on which type of distribution will result in the reduction of wrongful harms overall. Both prioritising the safety of intervening combatants and imposing risks of harm on innocent bystanders might thus be justified on the grounds that this ultimately protects victims of wrongful harm, such as the intended beneficiaries of the intervention. On this view, costs should therefore be dispersed as widely as possible, so that each individual bears as little cost as possible. In this respect, Pattison is right to emphasise the importance of enabling as many people as possible to still lead flourishing lives. In *Intervention*, all other things being equal, this might take the form of distributing risks equally between Interveners and Bystanders, but only insofar as this reduces the risk for each individual to the greatest extent possible.

We now turn to the final consideration to which one might appeal to support the view that Bystanders may harm Interveners in self-defence.

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[75] I leave open the question of whether Interveners should prioritise the protection of (a) those threatened with particularly grave harms, (b) the largest number of innocent people, or (c) those at the greatest risk of being harmed.

[76] McMahan, 'The Just Distribution of Harm,' 362, 377-8. See also *Killing in War*, 210-11.

[77] We might compare the basic idea to that reflected in Rawls's difference principle. (John Rawls, *Justice as Fairness: A Restatement* (HUP, 2001), 42-43.) Consider in particular his description of justice as fairness as people sharing each other's fate. See Rawls, *A Theory of Justice* (HUP, 1971), 102.

6. Agent-Relative Prerogatives

To say that Interveners have a lesser-evil justification for harming Bystanders as a side effect of rescuing the 100 other civilians is to say that it is permissible to impose higher costs on Bystanders than they are required to bear. Insofar as Bystanders are required to bear certain risks of harm, in addition to the considerations just outlined, this may be for the same reasons that ground Interveners' lesser-evil justification to begin with. That is, in some cases, the same impartial consideration which grounds agents' lesser-evil justification for harming innocent people may ground those innocent people's duty to bear the risk which agents have a lesser-evil justification to impose on them. This presumably underlies Rodin's assumption, cited above, that Bystanders can have a lesser-evil obligation to refrain from self-defence, given the 'broader goods at stake,' which render the Bystander's deaths a comparatively lesser evil.

However, there may be cases in which the permissibility of imposing costs on impartial lesser-evil grounds is compatible with the permissibility of refusing to bear these costs on agent-relative grounds. While agent-relative prerogatives do not permit killing, they do allow us to refrain from bearing certain costs for the sake of others. Thus, while Bystanders may not intentionally kill Interveners in self-defence, they may, on agent-relative grounds, refuse to bear certain costs for the sake of others' good.[78] Hence, it may be permissible to erect the bunker to avoid being concessively killed if this will 'merely' cause Interveners' deaths as a side effect, although it is impermissible to intentionally kill Interveners.

Compare this to McMahan's justification of his view that, in *Three-Option Trolley*, it is permissible for you to divert the trolley to the bystander, saving the five and sparing yourself. This, he states, is because '[w]e may sometimes do unto others what we are permitted not to do unto ourselves.'[79] This not only sounds suspiciously like an agent-relative permission. It also suggests that, if it is permissible to divert the trolley towards the bystander in *Three-Option Trolley* on agent-relative grounds, it must be permissible to kill Interveners as an unintended side effect on agent-relative - though not lesser-evil - grounds.

While I left open the question of whether Bystanders might have a liability-based justification for killing Interveners in self-defence, it is clear that Bystanders have no lesser-evil justification for killing Interveners in self-defence. Since self-defence against Interveners

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[78] For example, Larry Alexander, 'The Means Principle,' 262.
[79] McMahan, 'Self-Defense Against Justified Threateners,' 134.

would intentionally kill the same number of people who would thereby be saved, and prevent 100 innocent people from being rescued, Bystanders have no lesser-evil justification for killing Interveners.[80] However, even if Bystanders have neither a liability-based nor a lesser-evil justification for killing Interveners in self-defence, there may be cases in which they are not morally blameworthy for wronging Interveners by engaging in lethal self-defence.

Jonathan Quong, for example, has argued that it is permissible for Bystanders to kill Interveners in self-defence on agent-relative grounds.[81] In his words, 'the permission to act in self-defense is justified by appeal to the agent-relative value that each person's life has for them.'[82] While I am sceptical of Quong's assumption that agent-relative considerations can *justify* harms to innocent people, I think they may, in certain cases, *excuse* them. On my view, agent-relative prerogatives thus cannot render intentional killing permissible but, at most, render it excusable.[83]

The view that Bystanders's harmful act of self-defence might be excusable, rather than all-things-considered permissible, allows us to acknowledge (a) that the action is wrong, insofar as Interveners are not liable to be killed, (b) that Bystanders have no lesser-evil justification for killing Interveners, and (c) that Bystanders may nonetheless not be blameworthy for using defensive force under certain conditions, given that Bystanders retain their rights against being killed. We can thus reconcile the fact that Interveners have a lesser-evil justification for killing Bystanders with the fact that Bystanders have no duty to let themselves be killed by granting that, even if Bystanders are generally all-things-considered prohibited from killing Interveners in self-defence, there may be cases in which Bystanders are not morally blameworthy for wronging Interveners by using lethal defensive force against them. What these cases are, and whether Interveners are then, also on agent-relative grounds, permitted to engage in harmful self-defence are questions I will leave open.

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[80] See McMahan, 'Self-Defense Against Justified Threateners,' 109.

[81] Jonathan Quong, 'Agent-Relative Prerogatives to Do Harm,' *Criminal Law and Philosophy* 10 (2016): 815-829.

[82] Jonathan Quong, 'Killing in Self-Defense,' *Ethics* 119 (2009): 507–537, 516.

[83] On my view, self-regarding agent-relative prerogatives generally amount to excuses but not to justifications, whereas other-regarding agent-relative considerations can amount to justifications. Thus, your agent-relative prerogative does not provide a justification for killing an innocent person in self-defence simply because it is your life against hers; but your agent-relative prerogative might provide a justification for killing an innocent person in self-defence because your life is of special significance to a third party to whom you have special obligations (such as your child).

7. Conclusion

This chapter sought to illuminate the principles that determine whether it is permissible for non-liable individuals at threat of being killed as a side effect of a just intervention to employ lethal defensive force against just interveners. The challenge was to square the fact that just interveners have a lesser-evil justification for posing threats of unintended lethal harms to morally innocent civilians with the fact that these civilians retain their rights not to be killed - rights which it is, in certain circumstances, permissible to forcefully defend.

Rather than defending one generalisable principle to determine whether it is permissible or impermissible for Bystanders to kill Interveners in self-defence in any given case, this chapter offered a more open-ended view, in recognition of the fact that salient considerations may come together in different constellations in different cases. This mosaicked approach sought to look beyond clear-cut, knock-down answers to the question of whether it is, as a general matter, permissible for Bystanders to kill Interveners in self-defence. Thus, it suggested that self-defence against combatants who pose justified threats of unintended harm is one of the moral instances in which Oliver Wendell Holmes's point applies that, '[g]eneral propositions do not decide concrete cases.'[84] Instead, what it is permissible for non-liable civilians to do must depend on moral judgements more precise and varied than any wholesale assumption.

[84] Lochner v. New York, 198 U.S. 45 (1905).

6. Supererogatory Interventions

1. Introduction

Some philosophers have suggested that combatants carrying out a supererogatory humanitarian intervention may permissibly adopt a military strategy that minimises risks of harm to themselves at the cost of increasing risks of 'collateral' harm to intended beneficiaries of the intervention. For example, Jeff McMahan has suggested that it is because NATO had no obligation to intervene in Kosovo in 1999 that Kosovar Albanians had no valid complaint against NATO for killing more innocent people through the intervention than if NATO had adopted a different military strategy.[1] Gerhard Øverland similarly suggested that exposing to-be-liberated civilians to high risks of harm is permissible in cases in which intervening is supererogatory. As he put it, 'if no duty to intervene applied to the intervening forces, intervention at the highest risk level would not wrong the to-be-liberated civilians.'[2]

How we should assess the permissibility of collateral harms caused by supererogatory interventions is related to a puzzle about which there has been much debate recently. Philosophers have sought to explain how it can be wrong to perform a suboptimal rescue despite the fact that it is permissible not to rescue at all. This chapter seeks to reorient the discussion in one fundamental aspect. It argues that the permissibility of not performing a supererogatory rescue is wholly irrelevant to what duties and permissions agents have if they rescue nonetheless. Whether a military rescue operation is supererogatory therefore has no bearing on how it should be conducted.

I defend two main claims. First, the permission not to rescue, and hence to allow significant harm, does nothing to generate a permission to cause a lesser harm as a side effect of performing the supererogatory rescue. Second, in cases in which it is wrong to perform a suboptimal rescue despite the fact that rescuing is supererogatory, this is because agents who perform supererogatory rescues are constrained by the same duties that would apply if

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[1] Jeff McMahan, 'Humanitarian Intervention, Consent, Proportionality' in N. Ann Davis, Richard Keshen, and Jeff McMahan (eds), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (OUP, 2010), 66. Ultimately, he argues, it was combatants' professional obligations that required them to bear greater risks.

[2] Gerhard Øverland, 'High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?' in Paolo Tripodi and Jessica Wolfendale (eds), *New Wars and New Soldiers: Ethical Challenges in the Modern Military* (Ashgate, 2011), 69–86, 76.

rescuing were required.

This has two implications. First, it eliminates the supererogatory nature of a rescue as a potential justification for collateral harming. In military rescue operations, risks to non-liable civilians must therefore be justified for reasons other than that intervening was supererogatory. Second, it resolves a mystery that has animated recent debates about supererogatory rescues, namely why certain suboptimal acts of rescue are wrong although rescuing is supererogatory. Several scholars have sought to explain why it seems wrong, for example, to rescue a bird rather than a child from a burning house, although it would be permissible to save neither.[3] If a rescue's supererogatory nature has no bearing on the duties under which rescuers act, there is a straightforward explanation for why certain suboptimal rescues are wrong despite being supererogatory.

The proposed view is particularly attractive to non-utilitarians. The claim that agents are bound by the same duties irrespective of whether rescuing is supererogatory is compatible with, but does not rely on, a commitment to optimising outcomes. The view is therefore of particular appeal to those who share the intuition that certain suboptimal rescues are wrong, but seek to attribute this to a consideration other than a requirement to optimise outcomes.

The discussion proceeds as follows. Section 2 outlines the puzzle generated by supererogatory rescues. Section 3 challenges a prominent approach to addressing this puzzle, which focuses on comparing consequences of different courses of action. This neglects the fact that, in cases in which rescuing is supererogatory, the permissibility of allowing harm by failing to rescue does not generate a permission to cause harm as a side effect of preventing the harm one could permissibly allow. Section 4 provides an alternative explanation of why certain ways of rescuing are wrong despite being supererogatory, by defending the view that the supererogatory nature of a rescue has no bearing on the constraints governing rescuers' conduct. Section 5 addresses what look like two troubling implications of this view. First, certain rescuers may incur compensatory duties despite having acted in supererogatory fashion. Second, agents forced to perform supererogatory rescues are bound by the same duties as those who voluntarily chose to carry out a supererogatory rescue. Section 6 concludes.

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[3] For example, Shelly Kagan, *The Limits of Morality* (OUP, 1989); Jeff McMahan, 'Doing Good and Doing the Best' in Paul Woodruff (ed), *The Ethics of Giving: Philosophers' Perspectives on Philanthropy* (OUP, 2018); Theron Pummer, 'Whether and Where to Give,' *Philosophy & Public Affairs* 44 (1) (2016): 77-95.

Assumptions and Clarifications

My concern is not with supererogatory acts in general, but with a special subset of supererogatory rescues. My concern is with rescues that are ordinarily required, and supererogatory only because they would impose greater costs on an agent than she is required to bear. Where non-performance would normally result in blame, the high cost renders non-performance of these rescues non-blameworthy. I will not address the general paradox of supererogation, that is, the question how an action can be the morally best option available and yet not be required.[4]

'Costs' broadly include risks to human lives and wellbeing, financial and other resources. For the most part, I focus on risks of harm, but the principles outlined here may also apply, *mutatis mutandis*, to other types of cost.[5] Since my concern is not with what cost people can reasonably be made to bear, but with what follows if they bear more costs than they are required to bear, irrespective of how this is determined, I will put aside substantial disagreements about what costs rescuers can reasonably be expected to bear.[6]

Lastly, this chapter is not about what it is permissible for agents to *do* in the course of a supererogatory rescue. Rather, my concern is with what harms the supererogatory nature of a rescue is able to *justify*. To determine what, if any, justificatory work is done by the fact that rescuers act in supererogatory fashion, therefore, suppose that standing to benefit from being rescued does not weaken rescuees' rights not to be harmed.[7]

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[4] For discussion of the general paradox, see Horgan and Timmons, 'Untying a knot from the inside out: Reflections on the 'paradox' of supererogation,' *Social Philosophy and Policy* 27 (2010): 29-63; David Heyd, *Supererogation: Its Status in Ethical Theory* (CUP, 1982); Jonathan Dancy, 'Supererogation and Moral Realism,' in Jonathan Dancy (ed), *Human Agency* (Stanford University Press, 1988).

[5] Individual costs include losses in terms of well-being, goals, projects, and special relationships. For a more comprehensive list (which, however, omits risk), see Pummer, 'Whether and Whence to Give,' 80-1. For related discussions of demandingness, see for instance, Marcel van Ackeren, 'How Morality Becomes Demanding Cost vs. Difficulty and Restriction,' *International Journal of Philosophical Studies* 26 (2018): 315-334; Brian McElwee, 'Demandingness Objections in Ethics,' *Philosophical Quarterly* 67 (2017): 84-105.

[6] For discussion of how 'reasonable' costs might be determined, see Cécile Fabre, *Whose Body Is It Anyway* (OUP, 2006), 44-46, and Richard W. Miller, 'Beneficence, Duty and Distance,' *Philosophy & Public Affairs* 32 (2004): 357-383.

[7] For an account that assumes that standing to benefit from being rescued can diminish one's moral immunity, see McMahan, 'The Just Distribution of Harm Between Combatants and Non-combatants,' *Philosophy & Public Affairs* 38 (2010): 342-379. For critiques, see Adil Haque, *Law and Morality at War* (OUP, 2017); Lars Christie, 'Distributing Death in Humanitarian Interventions' in Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard (eds), *Who Should Die?: The Ethics of Killing in War* (OUP, 2018); Linda Eggert, 'Harming Beneficiaries of Armed Humanitarian Intervention,' *Ethical Theory and Moral Practice* 21 (2018): 1035–1050.

2. The Puzzle of Supererogatory Rescues

Call the idea at issue the *supererogatory rescue thesis* (SRT). According to the SRT, it is permissible for supererogatory rescuers to minimise risks of harm to themselves by increasing risks of harm to others, such as rescuees, on account of the fact that rescuing is supererogatory. The SRT rests on the idea that, if there is no duty to rescue, agents do not act wrongly by rescuing in a less-than-optimal way.

There is a second powerful intuition about supererogatory rescues. This is that, when we can do better at no significant extra cost, doing worse is morally wrong. Consider

Parrot:[8] You come upon a burning house. The risk of burning yourself is severe enough to render entering the house supererogatory. Having decided to go in nonetheless, you find a child and a parrot inside. Being able to save only one, you grab the bird and leave the building.

Most people think that, if you enter the building, saving the bird rather than the child is wrong. But this seems puzzling. 'How,' as Theron Pummer asks, 'can it be not wrong to stand by and do nothing but wrong to rather kindly incur a cost and do something better than doing nothing?'[9] The puzzle philosophers have consequently been trying to solve is that of how it could be wrong to do *some* good although it is permissible to do *no* good; and, relatedly, how it could be wrong to perform a suboptimal rescue, although it would be permissible not to rescue at all.[10]

This puzzle arises from two conflicting, but equally imperative ideas. On one hand, the axiom of transitivity tells us that, since it is permissible to do *no* good at all, it cannot be wrong to do *some* good. Call this the *transitivity thesis*. This is also the premise on which the SRT relies. On the other hand, a pro tanto requirement to optimise seems to tell us that, when doing better would come at no, or no significant, extra cost, doing worse is impermissible. Call this the *optimising requirement*. The discord between the transitivity thesis and the optimising requirement generates the puzzle according to which it seems impermissible to perform a suboptimal rescue although it is permissible not to rescue at all.

I will challenge, first, the transitivity thesis and then the optimising requirement. By

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[8] Based on Shelly Kagan, *The Limits of Morality* (OUP, 1989), 16.

[9] Theron Pummer, 'Whether and Where to Give,' 86.

[10] For example, Joe Horton, 'The All Or Nothing Problem,' *The Journal of Philosophy* 114 (2017): 94-104; Pummer, 'All or Nothing, But If Not All, Next Best or Nothing,' *Journal of Philosophy* 11 (2019): 278-291; McMahan, 'Doing Good and Doing the Best'; Thomas Sinclair, 'Are We Conditionally Obligated to be Effective Altruists?,' *Philosophy & Public Affairs* 46 (2018): 36-59. See also Derek Parfit, 'Future Generations: Further Problems,' *Philosophy & Public Affairs*, 11 (1982): 113–172.

applying the transitivity thesis in contexts of military rescue operations, I'll suggest, we overlook the fact that permissions to *allow* harm by failing to rescue do not generate permissions to *do* harm as a side effect of a supererogatory rescue. This eliminates supererogation as a potential justification for collateral harms, and suggests that the SRT is mistaken. I'll then argue that the wrongness of suboptimal rescues has nothing to do with a failure to optimise for optimisation's sake, but simply results from a failure to comply with ordinary duties of justice, which don't disappear if agents enter the realm of the supererogatory. The puzzle of suboptimal supererogatory rescues thus unravels.

3. Transitivity and Allowing Harm

In relying on the transitivity thesis, the SRT relies on a counterfactual account of how victims would have fared in the absence of rescue altogether. In the intervention case, the thought is that, since it is permissible not to intervene, and thereby fail to prevent a significant amount of harm, it must also be permissible to intervene in a way that exposes civilians to risks of harm which intervening combatants could bear themselves, insofar as this will still result in less harm to civilians than non-intervention would. Suppose interveners could permissibly do one of the following:

1) refrain from intervening, because the costs of fighting a war of other-defence exceed the costs they are required to bear;
2) intervene in a way that reduces risks to interveners by exposing innocent civilians to a significant degree of being harmed as a side effect;
3) intervene in a way that minimises risks of harm to civilians but requires interveners to incur greater risks to themselves.

According to the SRT, Option 2 is permissible because Option 1 is permissible. The transitivity thesis suggests that the permissibility of harming as a side effect arises, at least in part, from the permissibility of not rescuing at all. Some philosophers thus think that, if it is permissible to refrain from carrying out a costly armed humanitarian intervention (Option 1 in the above example), it must be permissible to intervene in a way that will expose civilians to significant risks of harm (Option 2), even if interveners could minimise risks to civilians by

bearing greater risks themselves (Option 3).[11]

This view rests on the assumption that permissible non-rescue would result in a significantly greater amount of overall harm to the same people whom one would harm as a side effect of a supererogatory intervention, and that the permissibility of failing to rescue, and thereby allowing harm, entails a permission to cause a smaller harm as a side effect of a supererogatory rescue.

Call this the *Doing Less Harm Thesis (DLH)*: If it is permissible to allow a significant amount of harm through non-rescue, it is permissible to cause some harm as a side effect of a rescue that results in less overall harm to the same people than one would have allowed.

The DLH, as I have specified it here, makes two critical assumptions. First, the permission to allow harm implies only a permission to cause harm as an unintended side effect, not a permission to harm intentionally. Second, the DLH takes into account the separateness of persons. While, in real-world cases, the people who would be harmed as a side effect of a high-risk intervention are not necessarily the same people who would be harmed in the event of non-intervention (for example, by becoming victims of atrocity crimes), I've granted that the people whom non-interveners would allow to be harmed in the event of permissible non-intervention are the same people who would be harmed as a side effect of a supererogatory intervention. Nonetheless, despite these accommodations, there are reasons to be sceptical of the DLH.

Why Permissions to Allow More Harm Do Not Imply Permissions to Cause Less Harm

The DLH essentially suggests that, since it is permissible to fail to prevent a significant harm, it must be permissible to cause a smaller harm as a side effect of rescuing in supererogatory fashion. Thus, if it is permissible not to intervene to suppress the perpetration of atrocity crimes, it must be permissible to cause a certain amount of collateral harm as a side effect of carrying out the intervention in supererogatory fashion, and thereby preventing significantly greater harms. However, the DLH implausibly implies that permissions to *allow* harm generate permissions to *cause* harm.

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[11] For example, Øverland, 'High-Fliers,' 76; McMahan, 'Humanitarian Intervention, Consent, Proportionality,' 66. A similar assumption is sometimes made in debates about exploitation. As Matt Zwolinski puts a related point, 'Can it be permissible to *neglect* workers in the developing world, but impermissible to *exploit* them, when exploitation is better for both parties?' (Zwolinski, 'Structural Exploitation,' *Social Philosophy and Policy* 29 (2012): 154-179, 167-8.) For discussion, see Mathias Risse and Gabriel Wollner, *On Trade Justice: A Philosophical Plea for a New Global Deal* (OUP, 2019), 72.

Generally speaking, duties not to cause harm are more stringent than duties not to allow harm. The considerations that govern the permissibility of allowing harm, moreover, are distinct from those that generate permissions to cause harm as a side effect. Permissions to allow harm generally result from limits to duties to rescue.[12] Permissions to cause harm, by contrast, even if as an unintended side effect, require positive justification, and are subject to distinct constraints.[13] Even in a purely abstract sense, there is therefore no reason to assume that the permissibility of allowing harm itself gives any indication about the permissibility of doing harm.

But the point isn't merely the established position that doing harm is, all other things being equal, more difficult to justify than allowing harm. The point is that, in cases in which it is permissible to cause some harm as a side effect of rescuing in supererogatory fashion, the permission to harm as a side effect has nothing to do with the permission to allow a greater harm by not rescuing at all. Rather, it is ordinary lesser-evil (that is, wide proportionality) considerations that permit causing unintended harms as a side effect of preventing a significantly greater harm under certain circumstances.[14] This matters because it eliminates supererogation as a relevant consideration to which agents can appeal to justify harming innocent people.

Even if it is permissible not to rescue at all, and to thereby allow a significant harm, it does not follow from *this* that it is permissible to cause harm as a side effect of the rescue. Consider Bernard Williams' example of Jim, who is given the option of killing one innocent person to save 19 others.[15] If he refuses, all 20 will be killed. Suppose that killing the one person would also result in Jim losing an arm, and that he is therefore not required to act to save the 19, because losing an arm exceeds the cost which he is required to bear in this case. It is thus permissible for him to walk on and let the 20 be killed. Assume, however, that Jim takes it upon himself to rescue the 19 by killing one and sacrificing his own arm.

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[12] For discussion, see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP, 2011), Chapter 6; Larry Alexander, 'The Means Principle,' in K. Ferzan and S.J. Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael Moore* (OUP, 2014); David Miller, 'The Nature and Limits of the Duty to Rescue,' *Journal of Moral Philosophy* 17 (2020): 320-341.

[13] See David Rodin, 'Justifying Harm.'

[14] McMahan distinguishes between narrow and wide proportionality in his *Killing in War* (OUP, 2009), 20-21. Wide proportionality concerns the permissibility of harming morally innocent people and is, as far as my discussion is concerned, synonymous with lesser-evil considerations.

[15] Bernard Williams and J.J.C. Smart, *Utilitarianism: For and Against* (CUP, 1973), 97–99. Jim would kill the one person intentionally, whereas my concern here is with the permissibility of harming as an unintended side effect. But this difference has no bearing on the argument made here.

If there is anything that permits Jim to kill the one person, it's a lesser-evil justification - not the fact that he could have permissibly walked on and allowed all 20 to be killed. Of course, he *could* have permissibly walked on and allowed all 20 to be killed. But what renders it permissible for Jim to kill the one person is how much greater the harm of letting 19 others be killed would be - not the fact that it would be *permissible* to allow the greater number of people to be killed by the threatener. That it would have been permissible to let the 20 be killed is true but irrelevant.

The same, I suggest, is true in the military rescue case. Harms caused as a side effect of supererogatory rescues are subject to ordinary wide proportionality considerations. That it would be permissible to fail to prevent a greater harm does not entail a permission to cause harm, not even as a side effect. The permission to cause harm as a side effect is instead grounded in a lesser-evil justification arising from the significant worseness of the harm prevented compared to the harm caused as a side effect.

This throws light on a deeper question raised by supererogatory military rescues - namely whether wide proportionality considerations are sensitive to the fact that one could permissibly fail to prevent the harm whose comparative severity justifies causing a smaller harm as a side effect. For example, suppose that the UK was not required to intervene in the Syrian civil war, and that it was thus permissible to allow almost 200,000 civilians to be killed by Syrian government forces.[16] But suppose that, in 2013, contrary to what actually happened, MPs decided that the UK should intervene to oust President Assad. In carrying out subsequent military operations, intervening forces would have had to calculate whether the risk these operations pose to innocent civilians would be proportionate in relation to the harm thereby prevented.[17] Imagine, for instance, that destroying a chemical weapons production facility could have caused hundreds of collateral civilian deaths, but might also have saved a thousand innocent lives. The question that might arise in these kinds of cases is whether the permissibility of unintentionally harming hundreds as a side effect should be weighed only against the number of lives this might save, or whether this calculation should itself be informed by the fact that it would have been permissible not to intervene at all, and let a far

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[16] Syrian Network For Human Rights, 'Civilian Death Toll,' available at http://sn4hr.org/blog/2018/09/24/civilian-death-toll/.

[17] For discussion, see for instance Thomas Hurka, 'Proportionality in the Morality of War,' *Philosophy & Public Affairs* 33 (2005): 34-66; McMahan, 'Proportionate Defence' in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP, 2017).

greater number of people be killed.

My argument suggests that the fact that it would have been permissible not to intervene at all is not a relevant consideration in determining whether unintended harms to innocent people are proportionate and hence permissible. Thus, intervening forces in our example should ask only whether killing hundreds of civilians is proportionate in relation to saving a thousand, not whether killing hundreds is proportionate in light of the fact that it would have been permissible not to intervene at all, and let a far greater number of people be killed. This is because the fact that it would be permissible to allow harm has no bearing on the permissibility of causing harm as a side effect of preventing the harm one could permissibly allow.

Permissions to cause harm as a side effect of preventing a significantly greater harm are constrained by wide proportionality considerations. These, as I argued above, are unaffected by whether it is permissible to allow harm. While proportionality calculations themselves are sensitive to the moral asymmetries between doing and allowing, and intended and unintended harms, in cases in which it is permissible not to rescue, this very fact is not a proportionality-determining consideration.[18] Permissions to cause harm as a side effect of preventing a significantly greater harm in supererogatory fashion, then, are not generated by the permission to allow the significantly greater harm.[19]

We've now seen that the moral basis for permissions to harm people as a side effect of a supererogatory rescue is distinct from the moral basis for permissions to allow harm by not rescuing at all. The fact that it is permissible not to rescue, therefore, has no bearing on whether it is permissible to harm as a side effect of rescuing in supererogatory fashion. This disqualifies the supererogatory nature of a rescue as a potential justification for harming. Causing a certain amount of harm as a side effect of a supererogatory rescue may well be permissible for a number of reasons. But this permission does not have its source in the

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[18] Put differently, the fact that it is permissible not to rescue is wholly independent of deontological constraints on what harms it is permissible to cause when certain harms would bring about more overall good.

[19] One way to think about this is in contrast to what Frances Kamm calls the Principle of Secondary Permissibility (PSP), according to which certain ordinarily impermissible acts may be rendered permissible by the availability of alternative acts that would permissibly cause more harm. (For instance, Kamm, *Intricate Ethics* (OUP, 2007), 170.) The main difference to the DLH is that the PSP permits otherwise impermissible killing as a means to prevent greater harm, whereas the DLH is concerned primarily with the permissibility of harming as a side effect of preventing greater harm. That said, nothing about the DLH's internal logic precludes the view that, if it is permissible to allow a great harm to a person, this renders it permissible to inflict a smaller amount of harm on that person as a means. I merely added the caveat that I take the DLH to permit only unintended harms as a side effect to allow me to work with the strongest possible version of the DLH.

permission not to rescue at all.

Let us take stock. Mainstream accounts of suboptimal supererogatory rescues assume that these cases are puzzling because, according to the axiom of transitivity, if doing nothing is permissible, doing more than nothing cannot be wrong. So far, I have argued that the transitivity thesis is insensitive to the difference between doing and allowing harm. It suggests that the permissibility of allowing harm by failing to rescue entails the permissibility of causing a lesser harm as a side effect of a supererogatory rescue. But this is mistaken. To justify harms caused as a side effect of the rescue, agents cannot appeal to the fact that rescuing was supererogatory.

The following section argues that the supererogatory nature of a rescue itself has no bearing on what rescuers ought to do. This unravels the mystery at the centre of recent debates seeking to explain why certain suboptimal acts of rescue are wrong although rescuing is supererogatory. If constraints governing rescuers' conduct remain unaffected by the rescue's supererogatory nature, the puzzle that seems to arise in cases of suboptimal supererogatory rescues disappears.

4. Gratuitousness and the Irrelevance of Supererogation

Most people believe that suboptimal supererogatory rescues are wrong when the cost of performing the optimal rescue is no higher than the cost of performing the suboptimal rescue. Consider

> *Arms:*[20] A stranger is at risk of losing both his arms. Preventing this is costly enough for Rescuer to render helping supererogatory, but he decides to take this cost upon himself. Although the cost of saving both the stranger's arms is the same as the cost of saving only one arm, Rescuer saves only the stranger's right arm.

Derek Parfit described saving only one arm as 'grossly perverse,' given that saving both arms would be no costlier than saving just one.[21] Consider also

> *Two Trolleys:*[22] Two runaway trolleys are hurtling down their respective tracks. There is one innocent stranger stuck on the first track, and a hundred innocent strangers are stuck on the second. Rescuer could stretch out her arm to stop either one of the trolleys, but this would destroy her arm. She can only stop one of the trolleys, and sacrificing her arm is, in any case, a large enough cost to

[20] Based on Derek Parfit, 'Future Generations: Further Problems,' 131.

[21] Parfit, 'Future Generations: Further Problems,' 131; see also McMahan, 'Doing Good and Doing the Best,' 82-3.

[22] Based on Theron Pummer, 'Whether and Where to Give,' 83.

> render doing so supererogatory. She sacrifices her arm to stop the first trolley, saving the one stranger, and letting the other hundred be run over by the other trolley.

Pummer argues that it would be wrong for Rescuer to sacrifice her arm for the one stranger rather than the hundred, even if she had no duty to sacrifice her arm for anyone, because deliberately refusing 'to do something much better *at no extra cost* . . . is a serious moral failing.'[23] This is a common intuition. If one can do better without incurring additional costs, doing worse seems morally suspect. In these cases, Rescuer's action seems wrong precisely because both options are equally costly.

To be clear, what matters is not that the cost of acting optimally is the *same* as that of acting suboptimally. What matters is that acting optimally is not *significantly* costlier.[24] Suppose that, in *Arms*, in order to save both of the stranger's arms, Rescuer would have to suffer a small cut in addition to the cost of saving just one arm. Presumably, it would still be wrong for Rescuer to save only one arm, even if saving both arms would be very slightly costlier.[25] Thus, even when the optimal rescue is trivially costlier than the suboptimal rescue, agents are morally required to do better rather than worse.

To explain why agents are required to do better rather than worse when this is sufficiently easy, most people appeal to some version of the optimising requirement - the intuition that, when one could do more good at no significant extra cost, all other things being equal, it would be wrong not to. But this is not the only possible explanation. A more compelling explanation, I suggest, is that supererogatory rescues are governed by the same principles that would apply if rescuing were morally required. Thus, no permissions to harm obtain *because* rescuing is supererogatory, and no duties not to harm obtain *despite* the fact that rescuing is supererogatory. Instead, the fact that a rescue is supererogatory has no bearing at all on the principles that govern what agents are permitted or required to do if they do rescue. Call this the Consistency View.

On the Consistency View, whichever duties we think ordinarily apply continue to apply when rescuing is supererogatory. For utilitarians, for example, the answer in either case is that suboptimal rescues are wrong when and because they fail to promote the good for no good reason. My contention is that this consistency between required and supererogatory rescues

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[23] Pummer, 'Whether and Where to Give,' 83, 87, emphasis added.

[24] How to distinguish between trivial and significant costs is a question I'll leave open.

[25] See Pummer, 'Whether and Where to Give,' 93.

indicates a broader truth - namely that supererogatory rescuers are, effectively by default, required to act just as they would if rescuing were not supererogatory.

For non-utilitarians, then, it is not that the difference between doing 'better' and doing 'worse' itself is duty-conferring. Instead of focusing on the gratuitous *worseness* of the suboptimal rescue, and taking this to confer a duty upon agents, I suggest that what matters is that the worseness is *gratuitous*. In cases in which the difference in cost between the optimal and suboptimal rescue is morally negligible, and agents bear the cost of a supererogatory rescue, the costs that rendered acting supererogatory no longer weaken those duties to perform the optimal rescue that would obtain in the absence of the 'supererogating' costs. These ordinary duties consequently resurface.[26]

In cases in which the difference in cost is insignificant, the cost that rendered acting supererogatory thus cannot weaken duties to act optimally when agents decide to bear the cost of acting suboptimally. Consider Joe Horton's example, in which

> two children are about to be crushed by a collapsing building. You have three options: (a) do nothing, (b) save one child by allowing your arms to be crushed, or (c) save both children by allowing your arms to be crushed.[27]

According to Horton, if you are willing to bear the cost of rescuing one child, this obligates you to save both children. Assuming that actions must be justifiable to those who will be harmed by them, Horton argues that you could not justify your failure to rescue the second child to her, given that you are willing to incur the cost that renders rescuing supererogatory. Your willingness to incur the cost of saving one child thus precludes any justification for letting the second child die.[28]

However, Horton's argument would presumably be no different, and appeal to the same contractualist commitments, if Rescuer could act without risking any harm to his arms, and would therefore be required to act. The challenge therefore remains to explain why the same principles apply even when rescuing is supererogatory.

Jeff McMahan has argued that the duty to save both children is generated by the fact that, once one has incurred the cost of saving one child, saving the second child would come

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[26] We might also say that, once one is relevantly positioned, duties to rescue arise from relational considerations about what we owe to those whom we are able to help at a reasonable cost, irrespective of how one ended up in a position to rescue. I return to this below.

[27] Horton, 'The All Or Nothing Problem,' 94.

[28] For discussion, see McMahan, 'Doing Good and Doing the Best,' 89; Pummer, 'All Or Nothing, But If Not All, Next Best or Nothing.'

at no additional cost, and is therefore required. What matters, he suggests, 'is that, in saving one arm, the agent has already incurred the cost that made both options supererogatory,' and that it is for this reason impermissible to save only one arm.[29] In *Parrot,* once Rescuer has entered the burning house, incurred a significant risk, and thus made the sacrifice that rendered entering the house supererogatory, the high cost of entering the house cannot justify Rescuer's failure to save the child. Rescuer's duty to perform the optimal rescue is thus explained by the lack of extra cost of performing the optimal rescue. 'The duty to save the second child,' McMahan says about Horton's case, 'arises only when and because the saving becomes costless.'[30] For the same reason, McMahan thinks, it is wrong to save the bird, only one harm, and only one child in the above cases - because one could rescue the child rather than the bird, the second arm, and the second child 'at no cost to anyone.'[31]

This seems to me a perfectly accurate description. But it does not yet explain why the costlessness of saving the second child, or the second arm, should be duty-conferring in this way. Although McMahan correctly points out *that* the similarity of costliness of the optimal and suboptimal rescue results in a duty to perform the optimal rescue, it does not specify why the lack of further costs renders it wrong to perform the suboptimal rescue in these cases. On the Consistency View, this is because, in supererogatory rescues, the same principles apply as in required acts of rescue.

The Consistency View is based on the assumption that, in cases in which the optimal rescue isn't significantly costlier than the suboptimal rescue, there are no costs that could effectively diminish ordinary duties to perform it - ordinary duties being those that obtain in the absence of costs that render acting supererogatory. In essence, the absence of significant extra costs of performing the optimal rescue results in the absence of constraints on those duties that would compel agents to do 'better' if the rescue were not supererogatory. If Rescuer could act without incurring any cost in *Parrot, Arms,* and *Two Trolleys*, she would presumably be required to save the child, both arms, and the hundred strangers. This same duty reemerges when the optimal rescue is not significantly costlier than the suboptimal rescue.

To be clear, it is not the lack of extra cost that generates a duty to perform the optimal

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[29] McMahan, 'Doing Good and Doing the Best,' 88.
[30] Ibid., 98.
[31] Ibid., 99.

rather than the suboptimal act, because duties to rescue are not generated by those contingent circumstances which render rescuing more or less costly. What duties we have is roughly a function of others' rights and how costly it is for us to comply with corresponding duties. But, while rights generate duties and determine their content, costliness merely constrains how far agents have to go out of their way to fulfil their duties. Duties to rescue neither have their source in, nor derive their normative force from, a lack of costliness. While costliness thus modulates duties to rescue, it neither creates nor extinguishes them. The fact that performing the optimal rescue is comparatively easy therefore matters only because it signifies the absence of considerations that could, were they to obtain, weaken rescuers' existing duty to act.

In this light, there is nothing mysterious about the fact that agents are sometimes required to perform the morally better of two acts, even though they were not required to perform either. We need only abandon the assumption that these acts stand in the type of scalar relationship which transitivity presumes. This, assumption incidentally, is also the reason why it is predominantly those who are committed to some form of the view that we should maximise the good who identify a puzzling contradiction in suboptimal supererogatory rescues. If the Consistency View is right that the same principles apply when rescuing is supererogatory, it is no surprise that those who are in any case committed to some version of the optimising requirement also argue that we are required to make our charitable giving as effective as possible, even if charitable giving is supererogatory.[32]

In the mainstream cases on which I have focused so far, the cost of performing the optimal rescue is not significantly higher than that of performing the suboptimal rescue. In these cases, on to the Consistency View, if a particular cost renders rescuing supererogatory, and the agent bears this cost nonetheless, she is consequently required to do what she would have had a duty to do in the absence of this cost.[33] However, in armed humanitarian interventions, matters are more complicated. Decreasing risks of harm to civilians may directly increase risks of harm to intervening combatants. The Consistency View implies that,

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[32] For example, Theron Pummer, 'Whether and Where to Give'; Joe Horton, 'The All Or Nothing Problem. For discussion, see Pummer, 'All or Nothing, But If Not All, Next Best or Nothing' and Sinclair, 'Are We Conditionally Obligated to be Effective Altruists?'

[33] Exceptions include cases in which bearing extra costs would make agents significantly worse off. See, for instance, Pummer, 'Whether and Where to Give,' 93. But merely having done one's share doesn't automatically get one off the hook. See Zofia Stemplowska, 'Doing More Than One's Fair Share,' *Critical Review of International Social and Political Philosophy* 19 (2016): 591-608.

in cases in which the cost of the optimal rescue *is* significantly higher than that of the suboptimal rescue, there is no duty to perform the optimal rescue. What, then, does this tell us about military rescue operations in which minimising risks of harm to civilians would increase risks of harm to intervening combatants?

The Irrelevance of Supererogation

Wars of armed humanitarian intervention (AHI) differ from the cases discussed so far in several respects. First, there is often a significant difference in cost to the intervening forces between an 'optimal' and 'suboptimal' intervention in terms of collateral harm caused, insofar as minimising risks of harm to civilians may significantly increase risks of harm to intervening combatants.[34] In addition, it is typically not combatants themselves who voluntarily decide how much risk to shoulder for the sake of rescuees. Rather, it is their states, superiors, and rules of engagement that determine what costs combatants must bear to minimise risks of harm to others. I will set related complications aside.

Most significantly, AHI are distinct from the cases discussed above in that the costs that render intervening supererogatory are the very costs that interveners would have to bear to minimise risks of harm to civilians. While, in the above cases, Rescuer has already borne the cost of the suboptimal rescue and could then, at little or no extra cost, perform the optimal rescue, AHI differ from these cases in that what is relevantly costly for combatants is not the act of putting themselves in a position where they can rescue in more or less harmful ways. Rather, it is the very rescue operation itself which might be prohibitively costly.

McMahan assumes that temporally disaggregating an act of rescue can tell us in which cases it is wrong for supererogatory rescuers to perform a suboptimal rescue. His discussion suggests that what matters is whether Rescuer can perform the optimal rescue at little or no cost to herself *after* having made a supererogatory sacrifice.[35] It is wrong to save the bird rather than the child once Rescuer has borne the cost of entering the burning house, insofar as it is then no costlier to save the child rather than the bird. By contrast, it is permissible to perform the suboptimal rescue in cases in which the decision about whether and whom to rescue precedes the supererogatory incurrence of cost. If the child and the bird find

[34] I'll continue to use the labels 'optimal' and 'suboptimal' to reflect the degree of risk of harm to which non-liable civilians are exposed.

[35] See McMahan, 'Doing Good and Doing the Best,' 91.

themselves in different parts of the house, and Rescuer must decide which part of the house she will enter to save either the child or the bird, it is permissible for her to choose to incur the supererogatory cost of entering the house where the parrot is to save the animal rather than the child.[36]

However, cases of AHI cannot straightforwardly be disaggregated in the same way, because it is not obvious what the relevant units of the action are, and what costs we should take to be relevant. For example, professional combatants make a significant sacrifice in joining the military, enduring gruelling training, and dedicating a considerable proportion of their lives to becoming professional rescuers who are, as a result, uniquely qualified to perform military rescue operations. In this respect, one might think that interventions are similar to the scenario in which Rescuer voluntarily chooses to make the sacrifice of entering the burning house and then finds that she can rescue in different ways. (Perhaps rescuing the child involves a slightly higher risk than saving the bird, but not nearly as much risk as entering the house in the first place.) On the other hand, one might think that there is no relevant cost to combatants until a military intervention is underway, insofar as combatants are only exposed to relevant risks once involved in hostilities. This would be distinct from both Kagan's original and McMahan's burning house scenarios.

Suppose that, unlike in Kagan's version of *Parrot*, it's not a preceding sacrifice that renders intervening supererogatory, but the constitutive risk of the military acts themselves which combatants would have to perform during an intervention to suppress atrocity crimes. That is, in AHI, the cost that renders intervening supererogatory just *is* the cost of the 'optimal' rescue, namely the cost interveners would need to incur themselves to reduce risks of harm to civilians. In these cases, the permissibility of minimising risks of harm at the cost of increasing risks to civilians, if it obtains, doesn't follow from the fact that intervening is supererogatory. Rather, as I suggested earlier, the same considerations that typically determine what costs agents have to bear for the sake of others will apply, such as wide proportionality considerations, as well as combatants' professional obligations.

Most people assume that, in cases in which rescuing is easy, there is a duty to do so; and that, in cases in which rescuing entails greater costs than agents are required to bear, it

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[36] See McMahan, 'Doing Good and Doing the Best,' 93. I am sceptical of this solution insofar as we can still blame Rescuer for wronging the victim in certain cases. As I suggest below, Rescuer can still make herself liable to punishment or pay compensation.

becomes supererogatory.[37] But this is not the whole story. Even when rescuing is required, it may be permissible to shift some costs to others. And, while agents may be *wronged* by having greater costs imposed on them than they have a duty to bear, this may, in limited circumstances, be all-things-considered permissible. It might, for example, be justified on lesser-evil grounds, and thus result in rights infringements rather than rights violations. In which circumstances this might be the case is a question I'll leave open here.[38] I'll merely note that certain circumstances may render it reasonable to bear, and impose, greater costs than it would be reasonable to bear or impose in other circumstances. The ability to prevent atrocity crimes, for example, might *make* it reasonable to bear higher costs than it would be reasonable to bear in non-emergency cases. Arguably, this is the case in humanitarian crises so extreme as to justify armed humanitarian intervention.

The suggestion I want to make is that an act of rescue does not become supererogatory until all the costs that can permissibly be shifted to others have been redistributed, and the remaining costs to agents are still above the threshold that renders rescuing supererogatory. Insofar as unavoidable costs can permissibly be distributed to others, agents can thus *make* costly acts of rescue obligatory by decreasing the cost that would otherwise render the act of rescue supererogatory. AHI are thus supererogatory only if excessive costs to interveners are unavoidable in the sense that they cannot permissibly be shifted to others. In these cases, however, the permission to cause collateral harm cannot be generated by the fact that rescuing is supererogatory, because rescuing is supererogatory only on account of the fact that the cost to oneself exceeds what can reasonably be required in the circumstances, but no further risks can permissibly be distributed to others. Permissions to cause collateral harm in supererogatory interventions therefore result from ordinary lesser-evil or wide proportionality calculations.

In short, whether an act of rescue is required or supererogatory is itself determined by

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[37] For a sample, see McMahan, 'Humanitarian Intervention,' 56-7; David Miller, 'The Responsibility to Protect Human Rights,' 41-44; Terry Nardin, 'The Moral Basis of Humanitarian Intervention,' 69; Fernando Tesón, 'Eight Principles for Humanitarian Intervention,' 97-8; Michael Walzer, *Just and Unjust Wars*, xiii; Noam Zohar, 'Can a War Be Morally 'Optional'?,' 236–39; Gerhard Øverland, 'High-Fliers,' 78. For a contrasting view, according to which high costs render AHI altogether impermissible, see Kieran Oberman, 'The Myth of the Optional War: Why States Are Required to Wage the Wars They Are Permitted to Wage,' *Philosophy & Public Affairs* 4 (2015): 255-286.

[38] In rescue cases, I take it that it may be permissible to force people to bear costs which they have a duty to bear anyway, and that, in these cases, they would not be wronged by having these costs imposed on them. For a defence of this view, see Victor Tadros, *The Ends of Harm*. I consider cases in which third parties impose greater costs than agents have a duty to bear below.

how much of the risk agents may permissibly shift away from themselves to begin with. The fact that intervening is supererogatory therefore cannot generate a permission to expose non-liable people to risks of harm which would not obtain otherwise. There may be other conditions that permit intervening combatants to cause unintended harm as a side effect of the rescue, such as lesser-evil considerations, and those that ordinarily limit the costs individuals must bear for the sake of others. But an intervention's supererogatory nature is not one of these conditions. Hence, the relation between supererogation and rescuers' permission to expose rescuees to risks of being harmed as a side effect is one of mere correlation, not one of causation. The point remains that an intervention's supererogatory nature provides no autonomous basis for permissions to harm.

Let us, once again, take stock. I first argued that the permission to allow harm by failing to rescue does not generate a permission to cause harm as a side effect of a supererogatory rescue. This was the first reason why combatants cannot justify collateral harms by appealing to the fact that carrying out a military rescue operation was supererogatory. I then argued that, in cases in which suboptimal rescues are wrong by virtue of being suboptimal, their wrongness has nothing to do with a failure to optimise for optimisation's sake, but simply results from a failure to comply with ordinary duties, which prevail if agents enter the realm of the supererogatory. In cases in which suboptimal rescues are not wrong, this is because agents cannot permissibly impose further costs on others to decrease costs to themselves.

As far as the permissibility of harming as a side effect of military rescue operations is concerned, supererogation is not justificatory, but conclusory. A humanitarian intervention's supererogatory nature has no bearing on the moral constraints under which intervening combatants act. To justify collateral harms, we therefore cannot appeal to the fact that it would have been permissible not to intervene at all.

5. Compensation and Coerced Rescues

Before I close, I will address two implications of the view that the supererogatory nature of a rescue has no direct bearing on the constraints that govern the permissibility of harming as a side effect of this rescue. The first is that agents may, in certain cases, incur compensatory obligations for harms caused as a side effect, even if rescuing was supererogatory. This is the case when victims of those harms are also wronged.

5.1 Compensation for Suboptimal Rescues

Consider what Joe Horton has described as the 'All or Nothing Problem.' This is the phenomenon that doing *some* good (performing a suboptimal rescue) seems prohibited when it is possible to do even *more* good (perform the optimal rescue), although it is permissible to do *no* good (or not to rescue) at all. The thought is that, as Horton's *Arms* case above illustrates, if (a) it is permissible to save neither child, and (b) wrong to save just one of the children when you could save both, it seems that (c) you should save neither child.[39] This problem thus raises the awkward possibility that it may be better not to rescue at all than to rescue in a suboptimal way. Surely, the thought is, this conclusion must be false.

However, rather than implying that it is better not to rescue at all than to perform a suboptimal rescue, the wrongness of failing to perform the optimal rescue entails compensatory obligations in cases in which this wrongs victims. To be clear, this does imply that, in cases in which agents permissibly choose not to perform a supererogatory rescue at all, they do not incur compensatory obligations; whereas, if they choose to perform a suboptimal supererogatory rescue, they may incur compensatory obligations, if the suboptimal rescue involves wronging a person. But, insofar as what's troubling about this is the implication that agents' unwillingness to perform the optimal rescue may cause them not to rescue at all, we'll have to ask why we care that people rescue in the first place. If our concern is solely with the prevention of harm, we'll always prefer a suboptimal rescue to no rescue at all. But if our concern is also with rescuees' rights, and moral status, the idea that agents may incur compensatory obligations for wrongfully failing to prevent a harm they could easily have prevented, but not incur compensatory obligations for permissibly failing to prevent even greater harm, may not strike us as inconceivable.

Consider McMahan's example:

> *Racist Rescuer*:[40] A white person and a black person are trapped inside a burning building. The risk involved in saving either person is the same as the risk of saving both. Given the high risk of getting injured, Rescuer is not required to enter the building. Rescuer is a racist who is willing to incur the great cost of the rescue to save the white person.

To resist the view that Racist Rescuer may not save the white person if she wrongly refuses to

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[39] See Horton, 'The All or Nothing Problem,' 94, 97-8.

[40] McMahan, 'Doing Good and Doing the Best,' 95.

also save the black person, McMahan proposes that she 'acts wrongly, but not impermissibly' in saving only the white person.[41] This seems right to me, but it is not the whole story. Unlike in cases in which it is all-things-considered permissible to infringe an innocent person's rights on lesser-evil grounds, and thereby wrong them, Racist Rescuer has no justification for failing to rescue the black person. The fact that it would have been permissible not to rescue either person is neither here nor there. It is independently true, but it does not render it any less morally wrong to let the black person die than it would have been if entering the house had been sufficiently easy to be obligatory. If Racist Rescuer is willing to incur the risk of rescuing one person, she wrongs the other by failing to rescue them. This is why she incurs rectificatory obligations, despite the fact that rescuing was supererogatory. She thus makes herself morally liable to compensation or punishment just as she would if the building had not been in flames.

The fact that Rescuer is a racist, and that she might perceive rescuing the black person as significantly costlier than saving the white person is morally irrelevant. This is because not all agent-relative reasons are valid simply by virtue of being agent-relative. The obvious question is where we should draw the line, which is an issue I cannot resolve here. But the fact that it is not always clear where to draw the line doesn't mean that it is always impossible to do so.

Consider, for instance

> *Piranha Pond:* Your child has fallen into a pond inhabited by hungry piranhas. There are ten other children struggling in the water nearby. You can save either your child or the ten strangers. You happen to be severely allergic to piranha bites which will cause you so much pain that jumping into the pond is supererogatory.

Grant that you are justified in saving your child. What distinguishes you from Racist Rescuer is the adequacy of your agent-relative reasons.[42] I take it that certain special relationships provide legitimate grounds for partiality, so long as they leave intact the moral status of those towards whom one is not partial. The same is not true for views that do not afford morally innocent individuals the same degree of moral consideration. Whilst legitimate partiality

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[41] McMahan, 'Doing Good and Doing the Best,' 100.

[42] Most people assume that not doing what one has a good agent-relative reason to do, such as prioritising certain people or values over others, can be exceedingly costly for agents. Pummer, Horton, and McMahan thus assume that performing the optimal act may entail additional costs in the form of sacrificing the agent's interest in performing the suboptimal act (McMahan, 'Doing Good and Doing the Best,' 83, 86; Pummer, 92; Horton, All Or Nothing, 98). My point here is that this is only true in some cases, as even agent-relative reasons have to meet some standard of adequacy.

acknowledges the individualised treatment of those towards whom we are partial, such as those with whom we share special relationships, illegitimate partiality, such that of Racist Rescuer, does not. Rescuing your child *because she is your child* does not violate the ten strangers' moral status in the same way in which Racist Rescuer wrongs the black person.

All this is to say that, if agents are, for agent-relative reasons, willing to go beyond what morality requires, it still matters why they are willing to do so. Insofar as bearing the costs of supererogatory actions is compatible with wronging others in the process, this explains why, if the black person survives but is injured, Racist Rescuer owes her compensation, whereas you don't owe compensation if you save your child rather than the ten strangers - even if both you and Racist Rescuer acted in supererogatory fashion for agent-relative reasons.

The fact that rescuing is supererogatory thus changes nothing about what rescuers are required - or, for that matter, on agent-relative grounds permitted - to do. Accordingly, agents may incur compensatory obligations for harms they cause or fail to prevent, when this wrongs innocent others, even if rescuing was supererogatory. Thus, rescuing in supererogatory fashion does not render agents immune from liability to compensate for violating rights in the process.

Until now, this discussion has been limited to agents who voluntarily bear costs they are not required to accept. The final implication I will address concerns agents who are forced to rescue.

5.2 Coerced Supererogatory Rescues

Imagine that Rescuer was forced into the burning house against her will. Is it any more permissible for her to rescue the bird, or to leave the building empty-handed, than it is for the supererogatory rescuer who entered the building of her own volition? I suggest that, while being forced to bear costs one has no duty to bear constitutes a distinct wrong, this does not entail any permissions to harm innocent others which would not obtain if one had borne the cost voluntarily.

On Cécile Fabre's account, whom it is permissible for interveners to harm during an AHI partly depends on what she describes as a 'cost-related gap between the right and the duty to intervene.' On this view, interveners have a duty to bear only those costs 'which it

would be permissible to inflict on them absent their consent.'[43] Thus, while interveners may consent to incur certain costs in supererogatory fashion, they need not incur costs that go beyond what can permissibly be imposed on them without their consent. While Fabre thus assumes that agents are required to bear only those costs that can permissibly be imposed on them without their consent, I suggested earlier that the reverse can sometimes be the case - that, although it is generally permissible to impose only those costs on people which they have a duty to bear, it may, in limited circumstances, be permissible to impose greater costs on agents than they are ordinarily required to bear, in which case their rights are justifiably infringed rather than violated. This, however, does not imply that agents are required to bear those costs *by virtue of the fact* that it is permissible for others to impose them.

Generally speaking, people are wronged by having burdens imposed on them which they have no duty to bear. After all, imposing costs is often justified precisely because people are required to bear them, and it is often impermissible to force people to perform even acts which they have a duty to perform. Suppose that Involuntary Rescuer has been catapulted into the burning house by Passive Rescuer. In this case, Involuntary Rescuer might suffer three distinct wrongs. First, she is wronged by having risks of injury imposed on her which she had a right not to bear.[44] These are the costs that rendered entering the building supererogatory. Second, insofar as it would be wrong for her not to rescue the child once inside the building, she is wronged by having the moral option of not rescuing taken away from her. This second wrong consists in the removal of the same feature which, under ordinary circumstances, renders supererogatory acts praiseworthy, namely their optionality.[45] Third, if Passive Rescuer catapulted Involuntary Rescuer into the burning house with the intention of placing her in a situation in which she would have no moral choice but to save the child, this may wrong Involuntary Rescuer insofar as she is being used as a means and exploited for her compliance with moral duties. There are thus at least three distinct ways in which forcing someone to perform a supererogatory rescue can wrong them.

Assume, then, that Involuntary Rescuer is wronged by being catapulted into the burning

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[43] See Fabre, *Cosmopolitan War*, 180.

[44] For discussion of why it is impermissible to force people to perform supererogatory acts, see Bashar Haydar, 'Forced Supererogation and Deontological Restrictions,' *The Journal of Value Inquiry* 36 (2002): 445-454, 453.

[45] Removing this optionality violates Involuntary Rescuer's autonomy interests. See, for instance, Michael Clark's view, according to which a distinguishing feature of supererogatory acts is that they involve 'an optional sacrifice, made from altruistic motives.' (For discussion, see Jonathan Dancy, 'Supererogation and Moral Realism,' 183; see also David Heyd, 'Moral Subjects, Freedom, and Idiosyncrasy' in Dancy (ed), *Human Agency,* 168.)

house. As I argued earlier, supererogatory rescuers may have a duty to perform the optimal act as a result of having borne the cost that rendered acting supererogatory. They do not incur this duty because they bore this cost voluntarily. If the optimal act is not significantly costlier than the suboptimal one - regardless of whether this is because Rescuer bore the cost that rendered rescuing supererogatory, because someone else did, or because it just disappeared - Rescuer must do whatever basic principles of justice in rescuing demand. How she ended up in that position is, for what she is required to do, irrelevant. Involuntary Rescuer has every reason to resent Passive Rescuer, and Passive Rescuer may well owe her compensation. Thus, those who wrongfully impose costs may incur rectificatory obligations, or make themselves liable to punishment; and involuntary supererogatory cost-bearers may acquire a claim to be compensated for the wrongs suffered. But none of this affects the duties under which Involuntary Rescuer is.

The fact that she has been wronged does not change anything about the fact that she has a duty to rescue the child rather than the bird, assuming that this is what she would be required to do if entering the house were not so costly as to be supererogatory.[46] This is because having been wronged by Passive Rescuer does not change anything about the grounds of the duty to save the child rather than the bird in this case, namely the difference in their moral status. Insofar as rescuees' rights not to be harmed are unrelated to, and unaffected by, the costs that rendered rescuing supererogatory, there is no reason to think that rescuers' duties to rescuees are altered, or weakened, when rescuers are wronged by being placed in a position in which they are able to rescue.[47] Thus, whichever principles we think apply ordinarily - that is, in the absence of the costs that render rescuing supererogatory, and in the absence of wrongs suffered by Involuntary Rescuer - continue to apply. This is not to suggest that forcing agents to perform actions they have no duty to perform is generally permissible. Far from it. The claim is that being wronged in this way does not make duties to rescue which one would incur if one had acted voluntarily disappear.[48]

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[46] McMahan has a similar intuition, but doesn't explain why. See 'Doing Good and Doing the Best,' 88.

[47] There is at least one exception to this. This is when the costs incurred by Rescuer in the process of performing the supererogatory act are exacerbated by the act of performing the optimal rather than the suboptimal act. This is consistent with, and an implication of, the broader principle according to which the difference in cost between the suboptimal and optimal rescue is decisive.

[48] I take this claim to be weaker than Scheffler's view, according to which one both has a prerogative to refrain from promoting the good but may nonetheless permissibly be forced by others to promote the good (see Samuel Scheffler, *The Rejection of Consequentialism* (OUP, 1982).

Accordingly, combatants who voluntarily joined the military, but involuntarily fight wars of AHI, are under the same duties as those who voluntarily fight wars of AHI. However, combatants who were forced to join the military and are fighting under duress pose a more serious challenge. In their case, one might be more inclined to think that they are excused for failing to minimise risks to civilians. But in such cases, in which it is permissible for coerced supererogatory rescuers to fail to minimise harms to others, this is because they had no duty to bear the risk of being harmed to begin with.

In some cases, however, the right not to *assume* certain duties is not identical with a right not to *bear* them. Rescuer is not required to enter the burning building, but - once inside, no matter how - she may be required to bear the costs that accompany duties to rescue that arise as a result of her capacity to do so. Thus, the same reason why agents may be required to conform with duties they did not voluntarily assume explains why coerced supererogatory rescuers are under similar constraints as voluntary supererogatory rescuers.[49]

Agents are required to perform the optimal rather than the suboptimal supererogatory act in cases in which performing the optimal act is not significantly costlier than the suboptimal act. If the reason why the optimal act is not significantly costlier than the suboptimal act is that Rescuer has been forced to bear the cost that made acting supererogatory, she has been wronged and is consequently owed compensation. But having been thus wronged changes nothing about what involuntary supererogatory rescuers are required to do once in a position to rescue, if the stakes are high enough - such as if innocent people's fundamental rights are at stake. Although forcing people to bear supererogatory burdens generally wrongs them, this does not automatically absolve them of duties incurred as a result of having involuntarily borne these costs. There may be plenty of other considerations that absolve them from these duties. But the mere fact that they did not have a duty to assume them isn't necessarily sufficient. Thus, even wronged supererogatory rescuers may be under the same obligations as voluntary supererogatory rescuers and required rescuers.

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[49] A similar idea is, incidentally, reflected in the law. In many cases, if one begins to rescue, one is then required to complete the rescue in non-negligent fashion, despite the fact that one had no duty to assume these duties, and rescue a person, to begin with. See, for instance, *Cross v. Wells Fargo Alarm Services*, 412 N.E.2d 472, 474 (Ill. 1980); *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976); Restatement (Second) of Torts § 323 (1965). Although the thought here is, in part, more consequentialist: it is that, if other potential rescuers see someone already aiding the victim, they are less likely to intervene and help themselves. (United States v. Lawter, 219 F.2d 559, 562 (5th Cir. 1955)). I am grateful to Michael Dorf for the examples.

6. Conclusion

Before I close, I will offer one final observation. This discussion has brought to light a distinct sense in which the principles governing the permissibility of harming *in bello* are impervious to whether an intervention is required or supererogatory *ad bellum*. There are, accordingly, two sets of distinction that describe an intervention's *ad bellum* status. Interventions are just or unjust, and, within just interventions, morally required or supererogatory. While the *ad bellum* moral nature of a war largely determines who is permitted to harm whom *in bello,* this chapter suggested that the *jus in bello* is also distinctly impervious to the deontic status of the intervention *ad bellum*, insofar as whether an AHI is required or supererogatory has no bearing on who is permitted to harm whom *in bello*. At the same time, the deontic status of the *jus ad bellum* is *not* impervious to what costs agents would have to bear *in bello*, insofar as the permissibility of carrying out an AHI is sensitive to, though perhaps not completely determined by, how risks of harm will likely be distributed *in bello*.[50]

To conclude, this chapter threw new light, and considerable doubt, on the idea that the supererogatory character of an act of rescue permits the infliction of unintended harm as a foreseeable side effect of the rescue. It argued that the supererogatory nature of a rescue itself has no bearing on rescuers' permissions to harm. Rather, the same duties that would obtain if rescuing were required also obtain when rescuing is supererogatory. Thus, whether NATO acted wrongly in Kosovo has nothing to do with whether saving threatened Kosovar Albanians was required or supererogatory. Rescuing in supererogatory fashion provides no autonomous basis for permissions to harm as a side effect, because ordinary constraints do not disappear when agents venture beyond the threshold of what is morally required. Once we look beyond questions about the promotion of the good for its own sake, we can see that questions of justice - distributive and compensatory - continue to rear their heads even in the realm of the supererogatory. Rescuers who go beyond the call of moral duty are subject to the same duties as those acting within the bounds of what morality requires. There is thus more to supererogatory rescues than individual freedom and heroism - considerations of justice prevail, alive and well.

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[50] See also James Pattison, *Humanitarian Intervention and the Responsibility to Protect* (OUP, 2010), 115-16.

7. Law and Morality in Humanitarian Intervention

1. Introduction

International law prohibits states' use of military force on the territory of other states, except with the authorisation of the territorial state or the UN Security Council, or in collective self-defence against armed attack.[1] Over the last fifteen years, the principle of the 'responsibility to protect' has complicated this picture. Unanimously adopted by the UN General Assembly in 2005, this principle demands that all states protect the populations under their jurisdiction from atrocity crimes, and that the international community assist states in this responsibility. The principle also asserts that, in cases in which a state 'manifestly fails' in its responsibility to protect its own population from genocide, war crimes, crimes against humanity, and ethnic cleansing, the international community has a responsibility to intervene - militarily, if necessary, as a last resort.[2]

That the road to hell is paved with good intentions applies not least to the use of military force for humanitarian purposes. NATO's bombing campaign during the intervention in Kosovo in 1999 killed 500-1,500 civilians.[3] And the 2011 intervention in Libya, having explicitly invoked the 'responsibility to protect', killed over a thousand civilians, in addition to leaving an entire geographical region in turmoil.[4] What's remarkable is that these interventions were carried out largely in compliance with the law of armed conflict. Yet, they inflicted harrowing suffering on those whom they sought to protect.[5] This raises the question - what,

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[1] UN Charter, Articles 2(4), 42, 51.

[2] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Council, 2001).

[3] Human Rights Watch, 'Civilian Deaths in the NATO Air Campaign - The Crisis in Kosovo' (archived November 2016), https://www.hrw.org/reports/2000/nato/Natbm200-01.htm; 'Civilian deaths "necessary price",' BBC News (31 May 1999), http://news.bbc.co.uk/1/hi/world/europe/357355.stm; Richard Norton-Taylor, 'How the Serb army escaped Nato,' *The Guardian* (9 March 2000), https://www.theguardian.com/world/2000/mar/09/balkans1.

[4] Human Rights Watch, 'Civilian Casualties in NATO's Air Campaign in Libya' (14 May 2012), https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya; C. J. Chivers and Eric Schmitt, 'In Strikes on Libya by NATO, an Unspoken Civilian Toll,' *The New York Times* (17 December 2011), https://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html; Dominic Tierney, 'The Legacy of Obama's 'Worst Mistake,'' *The Atlantic* (15 April 2016), https://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461/.

[5] For discussion, see Ivan Shearer, 'Rules of Conduct During Humanitarian Intervention,' in Andru E. Wall (ed), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, *International Law Studies* 78 (Newport, Rhode Island: Naval War College, 2002), 82.

if anything, should the law do about the contradiction inherent in the dropping of bombs to protect people?

Philosophical debates about the moral adequacy of the laws pertaining to the conduct of war have paid surprisingly little attention to questions about the legal regulation of just conduct in armed humanitarian intervention (AHI).[6] Legal scholarship on AHI, meanwhile, has focused almost exclusively on the fiercely contested legality of humanitarian intervention. As a result, the laws regulating combatants' conduct *during* AHI have undergone little scrutiny. For all our concern with controversies concerning the *jus ad bellum*, we - philosophers, legal scholars, just war theorists - have failed to confront critical questions about the *jus in bello*.

A major controversy about the 'responsibility to protect' is that, like all wars, military interventions are highly destructive, and therefore likely to do more harm than good. The main thesis of this chapter is that, if AHI are no less devastating than 'ordinary' wars in part because AHI are regulated no differently from traditional military campaigns, we must ask whether this regulation is adequate. The aim of this chapter, accordingly, is to examine whether the law indeed ought to regulate AHI no differently from any other type of armed conflict. More specifically, this chapter asks - ought the law grant all combatants the same permission to use lethal force, even in cases in which one side is acting on the 'responsibility to protect' and the other defending those who commit atrocity crimes?

For the purposes of this discussion, my aim is neither to provide a moral defence of the 'responsibility to protect' nor to take a stance on its contested legal status. I shall assume that intervening on humanitarian grounds is, under certain conditions, morally justified, without specifying the conditions under which this is the case. I make one further critical assumption. Even in the face of profoundly non-ideal circumstances, the law governing the use of force must meet a set of criteria to be morally defensible. Minimally, I submit, the law should seek to (a) reduce unjust harm, while (b) accounting for the epistemic constraints under which combatants operate, and (c) withstand deeply non-ideal considerations, such as likely non-compliance. Since (b) and (c) are widely accepted, I will treat these desiderata as requiring no special justification. Since (a) is controversial, the first half of the chapter is dedicated to its

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[6] Exceptions include James Pattison, 'The Ethics of 'Responsibility While Protecting': Brazil, the Responsibility to Protect, and the Restrictive Approach to Humanitarian Intervention,' in Kai Michael Kenkel and Philip Cunliffe (eds), *Brazil as a Rising Power: Intervention Norms and the Contestation of Global Order* (Routledge, 2016); Pattison, 'Humanitarian Intervention, the Responsibility to Protect and *jus in bello*,' *Global Responsibility to Protect* 1 (2009): 364-391.

defence.

The discussion proceeds as follows. Section 2 outlines these three desiderata, and argues that the law's failure to meet the first - that is, its failure to reduce unjust harm - requires justification. Section 3 examines two main approaches to providing such a justification - the revisionist view, which is based on non-ideal constraints, and the so-called humanitarian view, which is based on principled considerations - and argues that neither is fully satisfactory. Section 4 explores what a principle reducing unjust harms might look like. Section 5 then discusses why the law is nonetheless right to regulate AHI no differently from any other type of armed conflict. I argue that this is for a different reason than we might expect - namely, the international legal system's essential indeterminacy with regard to the legality of AHI. What this reveals is that the familiar tension between state sovereignty and the protection of individual human rights doesn't merely generate well-known controversies about the lawfulness of AHI, but actually precludes the very possibility of devising principles of just conduct *in bello* that are sensitive to questions of the *jus ad bellum*. In this light, Section 6 proposes an alternative way forward, and addresses a final objection to challenging the existing law at all. Section 7 concludes.

2. International Humanitarian Law and the Responsibility to Protect

I stipulated that the law should be able to do at least three things: (a) reduce unjust harm; (b) account for the epistemic constraints under which combatants operate; and (c) withstand profoundly non-ideal conditions, such as likely non-compliance.

The first criterion concerns the law's substance: the law should, overall, reduce unjust harms. Harms are unjust insofar as they fall on those who have moral rights not to be harmed. I will refer to this as the *justice criterion*. The justice criterion is controversial, because a popular view, which I'll discuss shortly, says that the law should seek to reduce harm in general, rather than harm that is unjust.

The second criterion is broadly concerned with the law's ability to be action-guiding. Legal rules must be followable under the conditions in which combatants operate in armed conflict. To be effective, for example, the law must be sensitive to the severe epistemic constraints under which individuals act. I will call this the *individual constraints criterion*.

The third criterion concerns the law's enforceability at the institutional level. The rule

of law depends on international institutions, such as international courts, to enforce the law impartially and consistently.[7] At the same time, the law must be able to withstand risks of non-compliance, abuse, and perverse incentives. Such eventualities shouldn't render the law altogether ineffective. This criterion is different from the first two in that it concerns not just the law itself, and those whose conduct it constrains, but the broader institutional context within which the law is administered. I will call this the *institutional constraints criterion*.

In short, the law should be sensitive to considerations of justice, individual, and institutional constraints. The justice criterion and the individual constraints criterion together comprise the law's twofold purpose of (a) reducing wrongful killing, while (b) accounting for the fact that combatants act under severe epistemic constraints. In addition, the individual constraints and the institutional constraints criteria together account for the fact that the law must fulfil its purpose in the face of profoundly non-ideal conditions: it must be (b) action-guiding even under the epistemically constrained conditions of armed conflict, and (c) enforceable within the international legal system, imperfect as the system may be. Put differently, the justice criterion and the individual constraints criterion are concerned with the law's constitutive properties; whereas the institutional constraints criterion is concerned with potential limits of the law's regulatory effects.

These three clusters of considerations are deliberately broad, and do not purport to be comprehensive. Their purpose is to strike a critical balance between providing a basis for moral assessment on one hand while being sensitive to how international law actually works on the other. That is, they seek to provide a basic framework for thinking about what the law *ought* to do within the bounds of what is *feasible*.

Why International Humanitarian Law Fails to Meet the Justice Criterion

In practice, the use of armed force in all international and non-international armed conflicts, including AHI, is governed by international humanitarian law (IHL). IHL's main aim

[7] For discussion, see Geert De Baere, Anna-Luise Chané, and Jan Wouters, 'International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities,' *New York University Journal of International Law and Politics* 48 (2016): 715-793.

is to protect persons not directly participating in hostilities.[8] A central principle is accordingly that of *distinction*.[9] The principle of distinction requires that the parties to an armed conflict at all times distinguish between civilians and civilian objects on one hand and combatants and military objectives on the other.[10] IHL protects all civilians from intentional attack on the basis of their status as non-combatants.[11]

In addition, IHL endorses the *legal equality of combatants*. The legal equality of combatants entails that the same permission to use lethal force applies to all parties to an armed conflict regardless of the justness or legality of their respective goals.[12] Irrespective of the legality of each party's war aims, so long as combatants distinguish themselves from civilians, IHL grants combatants the permission to 'participate directly in hostilities.'[13]

The legal equality of combatants is an upshot of the fact that the law governing the conduct of hostilities, the *jus in bello*, operates independently of the law governing the resort to military force, the *jus ad bellum*. This is sometimes referred to as the *ad bellum/in bello* dualism.[14] The *ad bellum/in bello* dualism captures the fact that the legal principles governing the permissibility of killing in war are impervious to questions about whether combatants' use of force is morally justified to begin with. That is, the law specifies principles of just conduct

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[8] The main instruments of IHL are the Geneva Conventions of 1949, which primarily protect combatants who are *hors de combat,* and the Additional Protocols of 1977, which strengthen the protection of civilian victims of international and non-international armed conflicts, and constrain the ways in which wars are fought. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), Preamble. For discussion of IHL's main principles, see M. Cherif Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities,' *Transnational Law & Contemporary Problems* 8 (1999): 199-200; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules* (CUP, 2005); Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War*, 3rd ed. (OUP, 2000).

[9] For discussion and defences of the conventional principle of distinction in general, see Seth Lazar, *Sparing Civilians* (OUP, 2016) and Adil Haque, *Law and Morality at War* (OUP, 2017).

[10] Combatants 'shall at all times distinguish between [civilians or] civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' (Protocol I, Article 48.)

[11] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law,* vol. i. *Rules* (CUP for the ICRC, 2005), 3.

[12] Nothing in my argument hangs on whether we interpret the legal equality of combatants as symmetrical legal permissions to fight or as symmetrical legal prohibitions on ways of fighting and symmetrical legal immunities from criminal prosecution for certain acts. For discussion, see Haque, *Law and Morality of War*, 23-34 for discussion. For justifications for using the language of permissions, see David Rodin, 'Morality and Law in War,' in H. Strachan & S. Scheipers (eds), *The Changing Character of War* (OUP, 2011), 446, 455. See also Jeremy Waldron, *Torture, Terror, Trade-offs* (OUP, 2010), 107, 109-11. Waldron has more recently endorsed Haque's view as the more accurate one (Waldron, 'Responses to Zedner, Haque and Mendus,' *Criminal Law and Philosophy* 8 (2014): 135-45, 137).

[13] Protocol I, 1125 UNTS 3, Articles 43 (2), 44; International Committee of the Red Cross, *Customary International Humanitarian Law*, vol I (CUP, 2009), II, 384.

[14] For discussion and defence, see Robert D. Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War,' *Yale Journal of International Law* 34 (2008): 48-112.

in bello with no regard to the *jus ad bellum*.

Since all armed conflicts are governed by IHL, combatants' conduct in AHI is regulated no differently from traditional military campaigns in which both sides are equally permitted to use lethal force.[15] This means that, even in military rescue operations, the law makes no distinction between combatants acting on the 'responsibility to protect' and those seeking to repel them.[16] Combatants seeking to repel intervening forces are no more legally constrained in targeting just combatants than vice versa.

However, in interventions necessitated by the 'responsibility to protect,' there is a prima facie moral difference between just intervening combatants acting on duties to rescue and unjust combatants seeking to forcefully repel interveners.[17] In addition, there is a sharp moral difference between innocent civilians and civilian perpetrators of atrocity crimes. While revisionism has been criticised for 'attuning the evils of war to the wrongs of the parties,' the 'responsibility to protect' necessarily arises in cases in which the evils of war are inextricably intertwined with the wrongs of the parties.[18] The 'responsibility to protect' thus provides at least *prima facie* reasons to distinguish belligerents on the basis of the justness of their respective war aims.

In this light, IHL's principles - its fundamental premises, distinctions, and assumptions - look fundamentally at odds with the moral commitments of the 'responsibility to protect.' After all, principles regulating just conduct *during* AHI pay no heed to the protection of individual rights, although the protection of individuals' rights is precisely what justifies the resort to force on distinctly humanitarian grounds. In other words, in prescribing the legal equality of combatants, the law regulating military operations aimed at protecting individual rights relies on principles that manifestly disregard individual rights.

As a result, in AHI based on the 'responsibility to protect,' the law fails to meet the justice criterion in the following ways. First, unjust defending combatants' permission to

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[15] See, for instance, Martin Shaw, *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq* (Polity, 2005).

[16] For broader discussion, see McMahan, 'Proportionality and Just Cause: A Comment on Kamm,' *Journal of Moral Philosophy* 11 (2014): 428–53; McMahan, 'War Crimes and Immoral Action in War,' in Antony Duff et al (eds), *The Constitution of Criminal Law* (OUP, 2013), 178; McMahan, 'Proportionality and Necessity in *Jus in Bello*,' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of the Ethics of War* (OUP, 2017), Section 3; McMahan, *Killing in War* (OUP, 2009), 107.

[17] I set broader questions about the extent to which the argument explored here bears on how we should think about the legal *jus in bello* more generally aside.

[18] Christopher Kutz argues that this is McMahanian revisionism's main mistake. See Kutz, 'Fearful Symmetry,' in *Just and Unjust Warriors,* 69-86, 75.

target just intervening combatants violates just combatants' moral rights. Second, this impedes just combatants' ability to carry out their duty to rescue, and increases risks of harm to civilians.[19] Threats posed by defending combatants require intervening combatants to increase their level of force protection. During NATO's Kosovo intervention, for example, this included bombing targets from high altitudes rather than deploying ground forces, which significantly increased risks of harm to non-liable civilians.[20] As a result, the legal equality of combatants effectively increases risks of 'collateral' harm to the very civilians to whom protection is owed.

While the conventional distinction between combatants and non-combatants may serve as a rough proxy for the distinction between morally liable and non-liable targets in some wars, this proxy's margin of error is significant in AHI justified by the 'responsibility to protect.' After all, in just AHI, the conventional combatant/non-combatant distinction gives no reliable indication of whom it is morally permissible to harm. It is a distinctive feature of AHI that it is morally worse for unjust defending combatants to kill just intervening combatants than it is for just combatants to kill liable civilians engaged in the perpetration of atrocity crimes. Hence, the difference between morally innocent and morally liable individuals irrespective of combatant status is significantly more substantial than the conventional proxy distinction between combatants and non-combatants.

In cases in which the 'responsibility to protect' necessitates military action, therefore, the conventional principle of distinction seems so morally inaccurate as to be ineffective as a reliable proxy for distinguishing morally liable and non-liable individuals. The standard assumption that it is generally morally worse for combatants to kill civilians than to kill other combatants accordingly provides no satisfactory justification for the conventional principle of distinction.[21] This confronts us with a challenge. To defend IHL's applicability in AHI, we must explain why, even in military rescue operations conducted to protect people from

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[19] For discussion of why it is morally impermissible for combatants engaged in the perpetration of atrocity crimes to use lethal force against just intervening combatants, and for combatants to defend perpetrators of atrocity crimes, see See McMahan, 'Individual Liability in War,' 288, 291; Simon Caney, *Justice Beyond Borders*, 194; Alex Leveringhaus, 'The Moral Status of Combatants during Military Humanitarian Intervention,' *Utilitas* 24 (2012): 237-258.

[20] For discussion, see Bruce Cronin, *Bugsplat: The Politics of Collateral Damage in Western Armed Conflicts* (OUP, 2018).

[21] This also applies to situations of armed conflict in which one party's goal is clearly just and the other's clearly unjust. I'll set these broader considerations aside, to focus on situations of AHI necessitated by the 'responsibility to protect' to preclude any uncertainty about the *jus ad bellum*.

atrocity crimes, the *jus in bello* should remain impervious to the *jus ad bellum*.

3. Two Cases for Disregarding the Justice Criterion

I'll consider two approaches to justifying the law's disregard for the justice criterion. The first assumes that the law cannot meet the justice criterion in deeply non-ideal circumstances, and reconciles itself to the view that non-ideal constraints preclude the legal enforcement of fundamental moral commitments. The second approach, by contrast, denies the validity of the justice criterion altogether. I will address both in turn.

Non-Ideal Constraints

Many philosophers view the law's divergence from morality as a non-ideal inevitability. On this view, even if we are committed to the moral inequality of combatants, we have at least three reasons to endorse their legal equality.

First, combatants generally act under severe epistemic constraints, which makes it practically impossible for them to distinguish between morally liable and non-liable individuals. In addition, most combatants are in any case convinced that they are fighting a just war. A prohibition on fighting unjust wars would therefore likely be ignored. Legally distinguishing between just and unjust combatants, and criminalising participation in an unjust war, would therefore be ineffective.[22]

Second, many combatants may not be blameworthy for mistakenly thinking that they are fighting a just war of self-defence.[23] They may also be morally excused for fighting under duress or acting on perceived associative duties. Enforcing a prohibition on attacking just combatants might therefore unfairly punish combatants who are not culpable for their participation in an unjust war.[24]

Third, criminalising participation in an unjust war might incentivise unjust combatants to increase their use of unjust violence. If unjust combatants expect that they will be punished for violating a prohibition on fighting unjust wars, they may be more likely to

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[22] McMahan, 'The Laws of War' in Samantha Besson & John Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010), 493-509; McMahan, 'The Morality of War and the Law of War,' 27-28; McMahan, *Killing in War,* 190-1.

[23] McMahan, *Killing in War*, 148-9; see also McMahan, 'Duty, Obedience, Desert, and Proportionality in War: A Response,' *Ethics* 122 (2011): 135-167, 138.

[24] For a critical discussion, see Victor Tadros, *To Do, To Die, To Reason Why* (OUP, 2020).

attempt to win at all cost and less willing to surrender. This would result in combatants employing more unjust violence than if they did not have to fear being punished for fighting in an unjust war.[25]

To the extent that arguments for the legal equality of combatants rest on contingent, non-ideal circumstances, this leaves open the possibility that, under different circumstances, a different set of laws might be more adequate. There are at least three reasons to think that this may be the case in AHI.

First, it is true that combatants generally act under severe epistemic constraints, and that many combatants are excused for mistakenly believing that the war they are ordered to fight is a just one. However, in many cases in which states manifestly fail in their own 'responsibility to protect,' government forces themselves are perpetrating, or complicit in, the perpetration of atrocity crimes against civilians. Consider the massacres committed by the Bashir regime and pro-government militias in Darfur, Gaddafi's forces in Libya, or the Assad regime in the Syrian civil war, to name but a few recent examples. That these combatants are not liable to harm because they mistakenly believe that a defensive war would be a just one seems far-fetched, although they may be morally excused for other reasons.

Second, combatants who are not morally blameworthy for posing unjust threats should not be punished for using defensive force. However, enforcing a prohibition on fighting unjust wars needn't result in the unjust punishment of morally excused unjust combatants. After all, one might hold that only high-ranking political and military decision-makers make themselves liable to punishment when combatants are not morally blameworthy for following orders to fight an unjust war. The risk of unfairly punishing morally excused unjust combatants is thus avoidable. Relatedly, the concern about perverse incentives rests on the assumption that combatants will equate winning their war with escaping punishment. But there is no reason to assume that those carrying out a just AHI should settle questions of the *jus post bellum* at all.

We'll revisit these considerations below. Whether prohibiting unjust wars of self-defence against just interventions on the basis of the 'responsibility to protect' would reduce or increase unjust violence is, in any event, a matter of speculation. What matters for the purposes of my argument is that, on views that presume the moral inequality of combatants,

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[25] For discussion, see Haque, *Law and Morality at War*.

it is primarily feasibility constraints and likely non-compliance which entail that the legal rules governing the permissibility of killing in war must be insensitive to whether combatants have a moral justification for using lethal force in the first place. Hence, the first desideratum - reducing *unjust* harms - remains valid; it's just outweighed in urgency by the non-ideal considerations captured by the second and third desiderata. The law's failure to meet the justice requirement is thus not justified as a matter of principle, but on the basis of non-ideal, contingent reasons, which may be highly context-sensitive.

The Humanitarian View

Alternatively, one might hold that the law's very purpose delegitimises the justice criterion, precluding a distinction between just and unjust combatants. According to the so-called 'humanitarian' view, the law has positive reasons to separate the *jus in bello* from the *jus ad bellum*. Reflected in Vattel's *Law of Nations* (1758), the St Petersburg Declaration (1868), and the fourth Hague Convention (1907), the humanitarian view takes IHL to embody a long-established and deep-rooted commitment to 'humanitarianism in war' which, above all, seeks to reduce harm and suffering.[26] On these grounds, Janina Dill and Henry Shue, for example, have sought to fortify IHL's moral foundations by arguing that the law does precisely what it should do.[27] On this view, the justice criterion is altogether invalid.

On the humanitarian view, the *ad bellum/in bello* dualism, and the concomitant legal equality of combatants, is justified by the fact that the law's primary purpose is to reduce violence in general, not killing that is morally wrong.[28] Dill and Shue accordingly maintain that the law must aim 'to limit all killing' and 'reduce unnecessary suffering in war to the greatest extent possible,' irrespective of the justness of resorting to military means in the first place.[29] On the humanitarian view, the *ad bellum/in bello* dualism thus isn't a regrettable feature of the law necessitated by non-ideal considerations, but a necessary precondition for the law to

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[26] See David Luban, 'Human Rights Thinking and the Laws of War,' in Jens David Ohlin (ed), *Theoretical Boundaries of Human Rights and Armed Conflict* (OUP, 2016), 52.

[27] For instance, Henry Shue, 'Do We Need a "Morality of War"?' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (OUP, 2008), 87-111; Henry Shue, 'Laws of War,' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010), 519-22; Janina Dill, 'Should International Law Ensure the Moral Acceptability of War,' *Leiden Journal of International Law* 26 (2013): 253-70.

[28] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*. Saint Petersburg, 29 November/11 December 1868, cited in Dill and Shue, 'Limiting the Killing in War,' in *Fighting Hurt*, 455.

[29] Janina Dill & Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption,' *Ethics & International Affairs* 26 (2012): 311-333, 311, 319; Adil Haque, *Law and Morality at War*, 20.

reduce harm irrespective of who causes it. Hence, the legal equality of combatants is morally justified on the grounds that the law should aim to reduce harms, irrespective of whether these are just or unjust. Indeed, Dill and Shue expressly deny 'that individual rights is what rules of warfare should be geared directly toward.'[30]

On the humanitarian view, the use of lethal force *in bello* is justified by military necessity. Whom it is permissible to kill in war, on this view, depends not on whether killing is morally *justified*, but on whether it is militarily *necessary*.[31] As Dill and Shue put it:

> Since the rules are intended to limit the conduct of both sides to a war, they have to avoid prescribing behaviour based on judgements about the justifiability of the resort to particular wars by particular parties. The normative framework must be completely agnostic concerning what force is being used for, morally or politically. As a result, the necessity to which it appeals can only extend to actions necessary to achieve a generic military victory.[32]

In other words, the law should base the permissibility of killing not on considerations of justice or individual rights, but on military necessity. Whether it is legally permissible to kill *in bello* thus depends on whether killing is necessary to gain some military advantage; not on whether this military advantage serves a just or an unjust war aim. This applies to both intentional attacks against enemy combatants and unintended, 'collateral' harms inflicted on innocent civilians. So, on the humanitarian view, the law ought to limit harm caused by all combatants, regardless of the justness of their party's respective war aims, and is therefore right to permit acts that are typically militarily necessary to achieve victory, irrespective of considerations of the *jus ad bellum*. The *ad bellum/in bello* dualism is thus a prerequisite for the law's ability to fulfil its main purpose of reducing harm irrespective of anything else. Hence, the justice criterion never enters the picture to begin with.

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[30] Dill and Shue, 'Limiting the Killing in War,' *Fighting Hurt,* 448, 454, 467.

[31] Their view shares a key assumption with Vattel's, according to whom unjustifiable acts of hostility are those 'which injure the enemy without necessity, or which do not tend to procure victory and bring about the end of the war.' (Vattel, *Law of Nations*, book III, §172). Relatedly, Francis Lieber, author of the first codification of rules for the conduct of land warfare - what's now known as the Lieber Code - described military necessity as 'those measures which are indispensable for securing the end of the war, and which are lawful according to the modern law and usages of war.' (US War Department, 'Instructions for the Government of Armies of the United States in the Field, General Orders No. 100,' April 24, 1863, http://www.civilwarhome.com/liebercode.htm.) This was in 1863. While the humanitarian view still regards this as the best view, I argue that the law ought to evolve with our understanding of the conditions under which the use of lethal force is morally permissible.

[32] Dill and Shue, 'Limiting the Killing in War,' 456. For discussion, see Haque, *Law and Morality at War*, 38-40.

Scepticism About the Humanitarian View

On the humanitarian view, it is simply not the law's purpose to reduce morally wrongful killing, and therefore not a problem that the law permits acts of killing which morality prohibits. However, the only reason why the law shouldn't seek to prohibit morally wrongful killing is that there are countervailing moral reasons which render the legal equality of combatants preferable, all things considered. That this is the case in AHI is far from obvious.

We have at least three reasons to be sceptical of the 'humanitarian' justification of the law's dissociation between the *jus in bello* and the *jus ad bellum*, not least in light of the 'responsibility to protect.' First, insofar as the humanitarian view defends the law on the grounds that permitting only force that is militarily necessary minimises harm, the humanitarian view rests on a dubious premise. In practice, militaries typically use as much force as is legally permissible to minimise risks to their own combatants.[33] As Tony Pfaff has pointed out, militaries generally aim to minimise risks to combatants within the constraints of the law - not to minimise risks to civilians to the greatest extent possible. In his words,

> it is always in the commander's interest to place as much force as is morally and legally permissible on any particular objective in order to preserve soldiers' lives. This means when commanders and their soldiers determine what is necessary, they are always asking themselves how much force is *allowable*, not how little is *possible*. . . . The most force allowable then becomes the necessary force since it is what is necessary to preserve soldiers' lives without violating the law or morality of war.[34]

Insofar as AHI are regulated, and consequently conducted, like traditional military campaigns, intervening combatants will employ the most force permissible, not the least force possible. It is therefore open to doubt whether IHL actually minimises harm to the greatest extent possible as an empirical matter.

Second, military necessity is a morally inadequate basis for the permissibility of harming. Dill and Shue insist that 'the military necessity of individuals' engagement in the fighting, not their moral status, should determine whether or not they are immune from attack.'[35] But treating military necessity as the ultimate criterion for the permissibility of the use of lethal force effectively takes unjust ends to justify lethal violence for no better reason

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[33] For example, Martin Shaw, *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq* (Polity, 2005).

[34] Tony Pfaff, *Peacekeeping and the Just War Tradition* (Strategic Studies Institute, U.S. Army War College, 2000), 2, emphasis added. While Pfaff's argument is primarily about the use of force in peace operations, James Pattison suggests that, like in peace operations, AHI call for the use of 'the least force' possible. See Pattison, *Humanitarian Intervention and the Responsibility To Protect: Who Should Intervene*, 106-7.

[35] Dill and Shue, 'Limiting the Killing in War,' *Fighting Hurt,* 448. See also 456.

than that a warring party regards its unjust end as an end. As David Rodin has argued, a system that 'creates a legal right for certain people to violate the moral rights of others, as a means to achieving a broader desirable end' thereby violates rights itself.[36] But a system that creates a legal right for people to violate the moral rights of others, as a means of achieving a broader, *unjust* end - the perpetration and enabling of atrocity crimes - is morally grotesque.[37]

Consider what this implies for the protection of civilians. As we saw above, the law constrains the unintended killing of innocent civilians only insofar as this would outweigh the anticipated military advantage. Specifically, the legal requirement of proportionality permits combatants to cause significant amounts of 'collateral' harm, so long as this does not outweigh the military advantage thereby gained. Article 51(5) of Additional Protocol I of the 1977 Geneva Conventions prohibits any 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage* anticipated.'[38] The law thus determines the permissibility of harms to innocent civilians purely in relation to the advancement of military goals.

In addition to subordinating innocent persons' rights not to be killed to the advancement of even unjust war aims, the law leaves significant room for interpretation of what harms count as 'excessive,' and what harms militaries deem 'proportionate' even in pursuit of just aims. Insofar as success in terms of the 'responsibility to protect' consists in protecting fundamental rights, sheer military advantage provides an inadequate baseline for proportionality calculations in this context. Typically, what harms it is proportionate to inflict does not reflect what the military advantage is for. Requiring interveners to weigh harms to the innocent against military advantage in the conventional sense thus disregards the fact that this military advantage should serve the distinct purpose of protecting innocent civilians.

James Pattison has, on similar grounds, argued that the humanitarian aim of AHI requires intervening forces to exhibit 'less aggressive conduct' than the standard legal

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[36] David Rodin, 'Morality and Law in War,' 455.

[37] See Gabriella Blum's discussion of the permissibility of breaking the laws of war on lesser-evil grounds: Blum, 'The Laws of War and the "Lesser Evil"', *Proceedings of the Annual Meeting* (American Society of International Law) 103, International Law As Law (2009): 274-277. See also McMahan, 'Proportionate Defence,' 144.

[38] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts' in Adam Roberts and Richard Guelff (eds), *Documents in the Laws of War* (OUP, 1982), 416. Emphasis added. For discussion of how the law differs from the moral requirement of wide proportionality, see McMahan, 'Proportionate Defense,' 139.

requirement of proportionality permits.[39] But killing innocent people wrongs them regardless of whether one does so in pursuit of a humanitarian or a different just goal. One might therefore question the assumption that principles governing just conduct in AHI ought to be more restrictive than in conventional wars of self-defence just because 'the intervener is using force for humanitarian purposes.'[40] Rather, I'll shortly suggest, we should question the *ad bellum/in bello* dualism altogether.

Finally, there is an aspect of IHL's paradoxical permissiveness in AHI which the humanitarian view cannot resolve. IHL permits unjust combatants to enable the very crimes, including genocide, torture, and ethnic cleansing, which other legal treaties and conventions prohibit. By granting all combatants the same permission to use lethal force, the law effectively permits perpetrators of atrocity crimes, and those defending them, to forcefully repel intervening combatants seeking to prevent these crimes. In AHI, IHL effectively permits unjust combatants to enable themselves and others to perpetrate the very crimes which are themselves illegal under international law. In this light, it seems distinctly incoherent for the law to deny any connection between the *jus ad bellum* and the *jus in bello*. It seems implausible not to prohibit perpetrators of atrocity crimes, and those seeking to protect them, from attacking combatants seeking to prevent or halt the crimes which international law itself prohibits.[41]

In sum, neither the revisionist nor the humanitarian approach offers a fully satisfactory justification of the law's failure to meet the justice criterion - that is, the *jus in bello*'s disregard for questions of the *jus ad bellum* - in light of the 'responsibility to protect.'

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[39] James Pattison, *Humanitarian Intervention and the Responsibility To Protect*, 104-9.

[40] Pattison, *Humanitarian Intervention and the Responsibility To Protect*, 100, original emphasis. Pattison, 'The Ethics of 'Responsibility While Protecting': Brazil, the Responsibility to Protect, and the Restrictive Approach to Humanitarian Intervention,' in Kai Michael Kenkel and Philip Cunliffe (eds), *Brazil as a Rising Power: Intervention Norms and the Contestation of Global Order* (Routledge, 2016), 104–26. See also Alex J. Bellamy, 'Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention,' *Journal of Military Ethics* 3 (2004): 216-232, 229; Eric A. Heinze, 'Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights,' *The International Journal of Human Rights* 8 (2004): 471-490; George Lucas, 'The Role of the "International Community" in Just War Tradition—Confronting the Challenges of Humanitarian Intervention and Preemptive War,' *Journal of Military Ethics* 2 (2003): 122-144.

[41] While genocide and war crimes have been codified in dedicated treaties of international law, this is not yet the case for crimes against humanity. However, similarly to the prohibition of genocide, the prohibition of crimes against humanity is considered a peremptory norm of international law, which applies to all states, and from which no derogation is permitted. (See Article 7 of the Rome Statute.)

4. The Principle of Proximate Protection

What would a principle meeting the justice criterion actually look like? To meet the justice criterion, the law would need to regulate the use of force in such a way as to effectively protect morally innocent persons. At the same time, the law must remain sensitive to the epistemic constraints under which individual combatants typically act, which render revisionism impracticable as a blueprint for legal reform. The law must also remain enforceable. The challenge thus is to reduce unjust harms while remaining sensitive to the non-ideal individual and institutional constraints.

To this purpose, I propose what I'll refer to as a principle of *proximate* protection. This approach seeks to strike a compromise between revisionism's moral appeal and IHL's practicability, by restricting attacks on just combatants carrying out the 'responsibility to protect.' My aim in what follows is not to advocate for legal reform on the basis of a principle of proximate protection. My aim is, first, to make what strikes me as the strongest possible case for a principle that meets the justice criterion; and, in the following section, to illuminate its main challenge.

To visualise the compromise achieved by a principle of proximate protection, consider the following distinction between four different ways of reducing harm in armed conflict, and four corresponding distinctions between legitimate and illegitimate targets. These four approaches fall on a spectrum. At one end of the spectrum is the view that the law should reduce the total amount of harm, irrespective of who is harmed, the justness of the warring parties' aims, or individual rights. Call this *aggregate harm reduction*.[42] The second view on the spectrum says that the law should minimise harm to civilians and reduce harms to combatants, by prohibiting attacks on civilians and limiting lawful attacks to militarily necessary attacks on combatants. Call this *status-based protection*.[43] The humanitarian view, as we saw earlier, appeals to both aims of aggregate harm reduction and status-based protection. Third on the spectrum is the view that the law should, as far as possible, protect morally innocent persons, and hence reduce unjust harms, by treating the justness of the warring parties' cause as a proxy for combatants' moral status. Call this *proximate protection*. This is the view which I will explore. Finally, there is the view that the law should, in all respects, track the 'deep morality' of war, and protect persons based on their individual moral status,

[42] For example, Dill and Shue, 'Limiting the Killing in War,' *Fighting Hurt*, 452, 454, 467, n30.
[43] For example, Haque, *Law and Morality at War*, 41.

undistracted by their status as combatants or civilians, or the justness of their party's cause. Call this *individualised protection*.[44]

Revisionists maintain that individualised protection is what the 'deep morality' of war requires. However, they also recognise that the epistemically constrained circumstances in which combatants operate render individualised protection practically impossible.[45] Revisionists therefore typically content themselves with the status-based protection intended by the conventional principle of distinction.[46]

But this is not the only option. Proximate protection might offer a more morally appealing alternative. A proxy-based approach presents a compromise between the humanitarian view's reliance on aggregate harm reduction and status-based protection on one hand and revisionist individualism on the other. While revisionism focuses on combatants' moral status as determined by their actions as individual moral agents, and the humanitarian view disregards questions of moral status altogether, the proxy-based approach operates with a set of broader distinctions to differentiate between typically morally liable and typically non-liable targets in AHI.

The principle of proximate protection (PPP) treats the justness of each party's goal as a general proxy for individuals' moral status, and seeks to limit unjust harm, as opposed to harm in general, by prohibiting attacks against combatants enforcing or discharging the 'responsibility to protect.' The main difference between revisionist individualism and proximate protection is that revisionism is fully individualised, whereas the PPP focuses on the justness of belligerents' respective war aims.[47]

The PPP rests on the assumption that a significant majority of just intervening combatants pose just threats and a significant majority of unjust combatants pose unjust

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[44] Though he doesn't go this far, Tadros comes closest to suggesting this. See *To Do, To Die*.

[45] For example, Jeff McMahan, 'The Morality of War and the Law of War,' in David Rodin & Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (OUP, 2008), 19-43.

[46] For an illustration, see McMahan's contrast between what he calls the 'Individual Liability Account' and the 'Group Membership Account' in McMahan, 'The Just Distribution of Harm.'

[47] Although they are not technically the same, justice-based harm reduction is sometimes run together with individualised harm reduction. In McMahan's account in *Killing in War*, for instance, the contours of justice-based harm reduction occasionally come into relief, as he notes that *most* just combatants are not liable to harm whereas most unjust combatants are. For accounts that defend a categorised approach to liability, which fall somewhere between individualised and justice-based harm reduction on the spectrum, see Bradley Jay Strawser, 'Walking the Tightrope of Just War,' *Analysis* 71 (2011): 533-44, at 540-2, and 'Revisionist Just War Theory and the Real World: A Cautiously Optimistic Proposal,' in Fritz Allhoff, Adam Henschke, & Nick Evans (eds), *Routledge Handbook of Ethics and War: Just War in the 21st Century* (Routledge, 2013), 76-90; Gerhard Øverland, 'Killing Soldiers,' *Ethics & International Affairs* 20 (2006): 455-475.

threats, and that their moral permissions to use lethal force differ accordingly. Unlike revisionist individualism, proximate protection is thus not entirely individualised but, to a certain degree, status-based. Since it is possible for intervening combatants to pose unjust threats, and for combatants defending the target party to pose just threats, the proxy-based approach is necessarily less precise than revisionist individualism. It would protect some just intervening combatants who may pose unjust threats, and it would not prohibit attacks against unjust combatants, some of whom may not be liable to be harmed.

However, a principle of proximate protection may nonetheless be substantially more morally accurate than the principle of legal equality, which indiscriminately permits the use of lethal force by unjust combatants in pursuit of manifestly unjust goals. After all, as I argued earlier, the problem with the conventional principle of distinction is one of unreliable proxies. In just AHI, the conventional principle of distinction is so morally inaccurate as to be ineffective as a reliable proxy for distinguishing morally liable and non-liable individuals. The standard assumption that it is generally morally worse for combatants to kill civilians than to kill other combatants therefore provides no satisfactory justification for the conventional principle of distinction in AHI.[48]

The suggestion, then, is that the PPP's distinction between the just and unjust side may be more morally accurate in distinguishing *morally* legitimate from illegitimate targets than the combatant/non-combatant distinction, despite the possibility that some just combatants may pose unjust threats and some unjust combatants pose just threats. Insofar as the margin of error on the proxy-based approach is significantly smaller than that of the law's conventional principle of distinction in AHI, the PPP would limit unjust harms more effectively than the conventional status-based approach by rendering the *jus in bello* sensitive to questions of the *jus ad bellum*. At least to this extent, a rule aimed at proximate protection stands a significantly better chance of meeting the justice criterion in AHI than the conventional principle of the legal equality of combatants.

Objections to proximate protection on the grounds that it would be unfair to treat all combatants carrying out a just AHI as effectively immune from attack and all combatants forcefully resisting the intervention as liable to attack would need to show that the alternative, the legal equality of combatants, would be more effective in protecting those who have moral

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[48] For discussion and defences of the conventional principle of distinction in general, see Seth Lazar, *Sparing Civilians*, and Adil Haque, *Law and Morality at War*.

rights not to be harmed. As I argued earlier, that this is the case is open to doubt. We'll return to this below.

First, let's take stock. Revisionism meets the justice criterion in theory, but is not feasible in practice. IHL renounces the justice criterion altogether. The PPP seeks to meet the justice criterion without compromising the other criteria. But more needs to be said to show how this works.

Rights and Epistemic Constraints

A main reason why many people think that the law should not aim to enforce combatants' moral obligations to protect individual rights at all is that combatants typically act under severe epistemic constraints. Given the messy reality of war, many combatants simply lack the information necessary to make accurate judgements about individual enemy combatants' moral liability to harm.[49] They are therefore in no position to distinguish liable from non-liable enemy combatants in the individualised way set out by revisionism.[50]

In addition, some philosophers have argued that it would be delusional to seek to prevent rights violations in war. Since wars are necessarily destructive, it would be silly to lament rights violations. 'Fundamental moral commitments,' as Henry Shue put it, 'cannot be fully honoured because military necessity minimally requires actions that violate the rules (moral and legal) for peaceful domestic life - it requires extensively "killing people and breaking things." This is what makes it war.'[51]

But the contrast between principles that govern military violence and principles that apply in peaceful domestic life is misleading. The problem, after all, isn't that, in war, combatants violate moral and legal rules that apply in domestic life. The problem is that combatants violate the moral rules that apply in war. The mere fact that wars involve killing and destruction is not a reason for the law to disregard the difference between justified and wrongful instances of killing and destruction, even amongst combatants, to the extent that it can do so.

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[49] For instance, McMahan *Killing in War*, 61, 148-9; also McMahan, 'Duty, Obedience, Desert, and Proportionality in War: A Response,' *Ethics* 122 (2011): 135-167, 138. Shue, 'Laws of War, Morality, and International Politics,' in *Fighting Hurt*, 473; 'Do We Need a 'Morality of War,' in *Fighting Hurt*, 414.

[50] Shue, 'Laws of War, Morality, and International Politics,' in *Fighting Hurt*, 476; Shue and Dill 'Limiting the Killing in War,' in *Fighting Hurt*, 459, 463; Shue, 'Laws of War,' in *Fighting Hurt*, 439-40.

[51] Shue, 'Laws of War, Morality and International Politics,' *Fighting Hurt,* 485.

While advocates of the humanitarian view have argued that the aim of legally regulating conduct in war cannot be guided by the aim of reducing rights violations because large-scale rights violations are inevitable, this is primarily a challenge to revisionist individualism - not a challenge to the proxy-based approach.[52] The PPP is under no illusion that wars, by force of circumstance, involve countless serious rights violations. But it suggests that the proxy-based approach can limit rights violations in AHI significantly more effectively than the conventional principle of distinction. The proxy-based approach thus doesn't deny that, 'even in an unjust war, there are rules worth following.'[53] It rather presumes that, even if the law cannot prevent all rights violations, it should still seek to prevent wrongful harms to the greatest extent possible. And it maintains that rules geared towards proxy-based harm reduction are significantly better suited to the task than IHL's conventional principle of distinction.[54]

In just AHI, unjust combatants' choice is between killing opposing intervening combatants and allowing intervening combatants to protect vulnerable civilians whose rescue unjust combatants have a negative duty not to prevent. The conventional principle of distinction therefore has little bearing on the extent to which unjust combatants will comply with their moral obligations. Indeed, IHL is primarily concerned with how combatants treat their enemies - not with how combatants treat their fellow civilian citizens.[55]

Since unjust combatants seeking to repel a just intervention are fighting on their own territory, all that the conventional principle of distinction tells them is that they are prohibited from intentionally killing their fellow civilian citizens. This, however, is either pointless, if members of the target party's armed forces themselves are committing, or complicit in, atrocity crimes against civilians, or unnecessary, if civilians' defence is part of unjust combatants' justification for waging a war against just interveners in the first place. Since the protection of the target party's civilians is precisely interveners' primary aim, the suggestion that unjust combatants should be permitted to target interveners to defend civilians is, in

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[52] Dill and Shue, 'Limiting the Killing in War,' *Fighting Hurt,* 467, n30, 452; Shue, 'Do We Need A Morality of War?,' 428.

[53] Haque, *Law and Morality at War*, 48-9.

[54] Insofar as the *moral* presumption is thus in favour of protecting individual rights rather than reducing aggregate harm, one might presume that the burden of proof falls on those who hold that, when it comes to the law, we should abandon rights protection in favour of harm reduction. For a more detailed defence of the assumption that the aim should not be to limit violence in general but to limit the violation of rights, see McMahan, 'The Just Distribution of Harm,' 354.

[55] For discussion, see Gabriella Blum, 'The Laws of War and the "Lesser Evil",' 227.

AHI, beside the point.[56] The question, then, is what the law should tell unjust combatants in AHI. And, really, what it should tell them is not to prevent the rescue of their fellow citizens whose fundamental rights are at stake. In cases in which an intervention is justified, unjust combatants should, as Gerhard Øverland put it, 'lay down their weapons and go home.'[57]

While the humanitarian view assumes that the law's main aim must be 'to restrain the destructive force of war, while recognising its inexorable necessities,' irrespective of considerations of the *jus ad bellum* or individual rights, the compromise which the principle of proximate protection offers is that the law should aim to reduce wrongful killing while recognising that epistemic limitations prevent combatants from making individualised liability calculations.[58] This is how the justice criterion coheres with the individual constraints criterion. Now consider institutional constraints.

Demandingness and Non-Compliance

In addition to epistemic constraints, the law must take into account further non-ideal considerations which IHL is better-equipped to address than revisionism. Devising laws requires us to take into account the possibility that people may fail to comply with them. In my earlier challenge to revisionist concessions to the legal equality of combatants, I indicated that a number of key concerns are weakened significantly if we let go of the premise that enforcing a prohibition on unjust wars necessarily entails punishing combatants for participating in unjust wars. So long as we don't presume that enforcing the law necessarily requires punishing individual combatants for participation in unjust wars, we needn't fear that combatants who don't make themselves liable to punishment would be unfairly punished. We also needn't assume that a prohibition on fighting unjust wars would create perverse incentives to use a greater degree of unjust force to win such wars. Troubling implications about perverse incentives and unfair punishment are thus avoidable.

Another concern is that many unjust combatants would likely fail to comply with a law

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[56] There may be cases in AHI in which unjust combatants defend fellow unjust combatants. But associative obligations to fellow unjust combatants are morally outweighed by duties not to kill just combatants preventing atrocity crimes. And those associative obligations would themselves need to be justified, likely based on the effective protection of civilians.

[57] Gerhard Øverland, 'High-Fliers: Who should bear the risk of humanitarian intervention?,' in Jessica Wolfendale and Paolo Tripodi (eds), *New Wars and New Solders: Military Ethics in the Contemporary World* (Ashgate, 2011), 69-86, 70.

[58] 1880 Oxford Manual, Preamble, cited in Shue, 'Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits,' *Leiden Journal of International Law* 26 (2013): 271-92, cited in *Fighting Hurt*, 467-493, 476.

prohibiting them to attack just intervening combatants. After all, the more demanding the law becomes, the less likely people will be to comply with it.[59] However, a greater deal of compliance doesn't automatically justify an unduly permissive law. In cases in which the law has good reason to be demanding, a greater degree of compliance doesn't justify toothlessness, especially when there are other ways to increase compliance - for example, through measures including sanctions, more aggressive enforcement, and public international shaming.[60]

The question is how we should weigh the likely effects of compliance with a deficient law against the likely effects of non-compliance with a more morally adequate law. On my view, we shouldn't dismiss the possibility that even partial compliance with restrictions on attacks against just interveners could bring about a more just distribution of harm. Likely non-compliance with a law aiming for proxy-based harm reduction is therefore not necessarily a knock-down argument against such a law. In cases in which innocent lives are at stake, widespread compliance with laws that permit the killing of innocent people is not obviously more morally desirable than partial compliance with more restrictive laws, so long as this results in fewer innocent people being wrongfully harmed.

Instances of non-compliance, moreover, wouldn't necessarily render the law altogether ineffective, because non-compliance still provides additional grounds on which to hold perpetrators accountable *post bellum*. Even if unjust combatants largely failed to comply with a prohibition on attacking just interveners, this would make little practical difference compared to how the current law demands that wars are conducted. That is, unjust combatants could permissibly attack just combatants and kill innocent civilians as a side effect. Non-compliance with a prohibition on attacks against just intervening combatants would thus look no different from compliance with the conventional principle of distinction.

Non-compliance, then, wouldn't damage the system's credibility as a whole, because making combatants act in a certain way *in bello* isn't the law's only function. The rules governing the use of force *in bello* may also have a critical impact on decisions about the resort

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[59] See Shue, 'Laws of War, Morality, and International Politics,' in *Fighting Hurt*, 484-6; Jeremy Waldron, 'Deep Morality and the Laws of War,' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (OUP, 2018).

[60] Shue, 'Laws of War, Morality, and International Politics,' in *Fighting Hurt*, 486.

to war, and on what measures will be available in the pursuit of justice *post bellum*.[61] While IHL gives governments no incentive not to order counterattacks against just interveners, a law prohibiting the use of military force against a legitimate intervention to prevent atrocity crimes might still do more than IHL to deter the target party's regime from ordering its military to wage an unjust war.

As some legal scholars have argued, it would be a mistake to measure the law's effectiveness solely by the degree to which it actually constrains states' conduct. The law also serves as a vital basis for criticising and justifying state conduct.[62] Even if a general prohibition on attacks against just intervening combatants would not deter atrocity-committing regimes from fighting unjust wars against just interveners in all cases, then, it may provide a critical basis for reckoning with wrongdoing, and facilitating the pursuit of post-intervention justice in the aftermath. That is, even if unjust combatants violated the prohibition on attacking just combatants *in bello*, such a law could still go a significant way towards facilitating the prosecution of military and civilian leaders who ordered their militaries to use lethal force against just interveners to hinder the prevention of atrocity crimes. In short, non-compliance with a more restrictive law would not automatically render it altogether ineffective.

5. Indeterminacy About the *Jus ad Bellum*

I have argued that the PPP would meet the justice criterion, without compromising the individual and institutional constraints criteria. And yet, our problem remains far from solved. In light of fierce controversies about the legal status of AHI, and in the absence of a legal basis on which to settle matters of the *jus ad bellum* with regard to the 'responsibility to protect,' the law lacks the means to distinguish between just and unjust combatants *in bello*, and their differing permissions to use lethal force.[63] This, however, is exactly what a proxy-based approach to harm reduction would require. Since the law itself does not give a clear

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[61] Dill and Shue's assumption is significantly narrower. They see IHL's purpose as 'limiting the harm done by all sides in all the wars that are in fact fought' (Dill and Shue, 'Limiting the Killing in War,' in *Fighting Hurt,* 459).

[62] Monica Hakimi, 'The Work of International Law,' *Harvard International Law Journal* 58 (2017): 1; Ian Hurd, *How To Do Things With International Law* (Princeton University Press, 2017).

[63] For this premise in a more general context, see McMahan, 'The Prevention of Unjust Wars,' in Yitzhak Benbaji and Naomi Sussman (eds), *Reading Walzer* (Routledge, 2014), 233-55. For discussion, see Adam Thomas Betz, 'Epistemic Authority, Sovereignty, and Selective Conscientious Objection: A Critical Revision of McMahan's "Jus Ad Bellum" Court,' *Social Theory and Practice* 44 (2018): 507-538.

indication of the circumstances in which conducting an AHI is justified, and when forcefully resisting it is not, it seems that the *jus in bello* cannot but remain impervious to the *jus ad bellum*. Rather than the considerations to which revisionist concessions or 'humanitarian' defences of the legal equality of combatants appeal, I'll now suggest, it is the law's own indeterminacy with regard to the legality of AHI which sustains the *ad bellum/in bello* dualism. This is why the law cannot meet the justice criterion in the face of the 'responsibility to protect.'

International law is essentially indeterminate with regard to the very legality of AHI. The 'responsibility to protect' is not itself a legally binding framework.[64] Whether the intentional legal system should accommodate justifications for breaching the laws pertaining to the initial use of force against another state in the context of AHI is hugely controversial. Some legal scholars assume that how we view the legality of AHI depends on how we interpret state practice, which is itself a subject of disagreement. Others assume that the legality of AHI is determined by whether customs can be taken to practically countermand treaties, which most, but not all, legal scholars deny.[65]

In practice, armed interventions that were widely seen as morally justified were neither wars of self-defence nor authorised by the UN Security Council. As such, they were technically illegal. Examples include India's intervention in East Pakistan in 1971 in response to large-scale human rights violations, Vietnam's intervention in Cambodia in 1978 to remove Pol Pot, Tanzania's intervention in Uganda in 1979 to oust Idi Amin, and, more recently, NATO's intervention in Kosovo in 1999. While each of these interventions sought to suppress extreme human rights violations, they are seen by many to have violated

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64 But it has roots in existing international law, in the form of the Genocide Convention, the Geneva Conventions, and their Additional Protocols. Crimes against humanity are spelled out in the Rome Statute, and don't have their own designated convention or treaty; but specific elements (such as torture and slavery) have their own conventions. So states have legal obligations through other treaties and conventions to prevent the crimes which the 'responsibility to protect' also seeks to prevent.

65 For example, some people have argued that UN Article 2(4) can be interpreted to support the use of force for humanitarian purposes. For example, Fernando Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (Transnational, 1997). See also Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo,' *International and Comparative Law Quarterly* 49 (2000): 926-34. For critical discussion, see Michael Byers and Simon Chesterman, 'Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law,' in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP, 2003). According to the Australian Red Cross, the principle of the 'responsibility to protect' 'does allow for the use of force under Chapter VII of the UN Charter for the protection of populations vulnerable to, or suffering from genocide, crimes against humanity, war crimes and ethnic cleansing.' See Red Cross Australia, *International Humanitarian Law and the Responsibility to Protect: A Handbook* (2001).

international law.[66]

At the same time, the UN's response to these interventions was effectively to acquiesce in them. For example, although the UN had not authorised NATO's intervention in Kosovo, it later rejected a resolution to condemn it, and instead 'retroactively endorsed' it in the form of a number of resolutions towards the end of the conflict.[67] Insofar as the UN deliberately refrained from condemning military interventions, some scholars therefore argue, these interventions are not clearly illegal.[68] Without commenting in detail on the intricacies of the uncertain legal status of AHI, it is accurate to say that the legality of AHI is still essentially indeterminate in international law.[69]

There are several reasons why we might want to change this. First, clear legal grounds for AHI may prove essential to guiding states' behaviour. Greater clarity might pressure states to fulfil their responsibility to protect in both relevant senses: by forcing states to protect their own citizens' human rights, to avoid external intervention, and by moving the 'international community' to intervene as a last resort. After all, it was partly uncertainty about what was required that led the Clinton administration to go to absurd lengths to avoid even using the term 'genocide' in the spring of 1994, for fear that this would require decisive action as 800,000 Rwandans were hacked to death within a few weeks.

Second, a clear legal basis for AHI might reduce the risk of abuse. Clarity about the conditions under which the law prohibits, permits, or requires intervention on humanitarian grounds may prevent states from appealing to allegedly humanitarian reasons to justify

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[66] The position that these interventions were illegal is based on standard interpretations of Articles 2(4) and 2(7) of the UN Charter. See, for example, Nigel Rodley, 'Humanitarian Intervention,' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford Handbooks in Law, 2015). For discussion, see Allen Buchanan, 'From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform,' *Ethics* 111 (2001): 673-705, and Buchanan, 'Reforming the International Law of Humanitarian Intervention,' in J. L. Hozgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, 130.

[67] For discussion, see J. L. Holzgrefe, 'The Humanitarian Intervention Debate' in Hozgrefe and Keohane (eds), *Humanitarian Intervention;* N. Lewis, 'The Rationale: A Word Bolsters Case for Allied Intervention,' *New York Times*, 4 April 1999; C. Greenwood, 'Yes, But Is the War Legal?' *Observer*, 28 March 1999. See also Independent International Commission on Kosovo, *Kosovo Report* (OUP 2000), available at http://www.kosovocommission.org; R. Wedgwood, 'NATO's Campaign in Yugoslavia,' *American Journal of International Law* 93 (1999), 828; A. Cassese, '*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' *European Journal of International Law* 10 (1999), 23-30.

[68] See Thomas M. Franck, 'Interpretation and Change in the Law of Humanitarian Intervention,' in Holzgrefe and Keohane (eds), *Humanitarian Intervention*. Others maintain that this did not amount to the positive authorisation required by the Charter. See Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP, 2001), 213.

[69] Ian Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World,' *Ethics & International Affairs* 25 (2011): 293-313.

opportunistic, non-humanitarian interventions - as was, arguably, the case with the 2003 US invasion in Iraq.

Finally, and most relevantly, clarity about the legality of AHI would provide the basis for principles geared towards more effectively protecting those who retain their moral rights not to be harmed, including just combatants whose principal aim is to protect vulnerable civilians.

However, there are also reasons for preserving the law's indeterminacy. The first is that greater clarity might actually increase the risk of abuse. A law that allows states to intervene without the authorisation of the UN Security Council, one might fear, is simply too dangerous. The worry is that the mere possibility of legal AHI may increase the risk of states abusing such a provision, to engage in unjust interventions for non-humanitarian reasons. Paving the way towards legal AHI might thus loosen currently perceived constraints against wars of aggression. For this reason alone, one might think, the law's fundamental indeterminacy with regard to the legality of AHI is a good thing.

A second concern is that codifying the principles governing the *jus ad bellum* of AHI might backfire. Jane Stromseth, for example, has argued that the law's indeterminacy might be an advantage. As she put it, uncertainty offers 'fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making.'[70] On this view, striving for clarity about the ambiguous legal status of AHI might be counterproductive, insofar as such an enterprise might bring with it obstructive rigidity where flexibility is of the essence. In addition, given the nature of international negotiations, codification would be exceedingly difficult to achieve, and the rules on which states would be able to agree would likely be so vague as to be impractical. The very enterprise of codifying the *jus ad bellum* on humanitarian grounds could therefore backfire.

In addition, it is one of the idiosyncrasies of international law that it is continuously and case-specifically constructed.[71] In some cases, it is only in invoking the law that states construct its very meaning. In this sense, it is states' use of international law which generates it in the first place. Insofar as using the law may, counterintuitively, precede lawfulness in international legal practice, it may be a mistake to assume that the law should tell us what it

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[70] Jane Stromseth, 'Rethinking Humanitarian Intervention: The Case for Incremental Change,' in Holzgrefe and Keohane (eds), *Humanitarian Intervention.*

[71] Hurd, *How To Do Things With International Law,* 68.

requires in any given case to begin with.[72]

Besides, states lack incentives to resolve deep-rooted ambiguities in the international legal system. The non-ideal reality is that a small number of dominant states, notably, the permanent five members of the Security Council, enjoy a disproportionate degree of power over the creation, application, and enforcement of international law. That this handful of states should establish what it is permissible to do in light of seemingly contradictory values of state sovereignty and the protection of fundamental rights is, to put it mildly, open to doubt.[73]

Where does this leave us? To limit morally unjust killing, the law needs a basis on which to distinguish just from unjust killing. However, the very enterprise of clarifying the legality of AHI might itself cause more problems than it solves. Not only is the law fundamentally indeterminate with regard to the *jus ad bellum* of AHI, but it's not at all obvious that we should seek to change this.

Even so, maintaining the status quo comes at a real moral cost. Not only could a more definitive sense of the *jus ad bellum* prevent wrongful failures to rescue, but it could also pave the way towards regulating just conduct in AHI in such a way as to more effectively protect the innocent. And preserving a high degree of ambiguity about the legality of AHI might not be our only option. Arguably, a more appropriate response to the risk of abuse of a legal provision for AHI would be to vigorously enforce rules against unjust wars of aggression.[74]

Whether the occurrence of unjust interventions would increase or decrease if the law became more definitive about the legality of AHI is a matter of speculation. Our current, indeterminate system has seen everything from morally unjust interventions, such as the 2003 invasion in Iraq; arguably morally just interventions, at least in terms of the *jus ad bellum*, such as the 1999 intervention in Kosovo; and unjust non-interventions, such as the failure to intervene in Rwanda in 1994. In light of the risk of failure in the face of duties to rescue, and undue legal permissions to commit morally wrongful acts of killing, the case for preserving the law's indeterminacy concerning the *jus ad bellum* would be more compelling if there were

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[72] Hurd, *How To Do Things With International Law*.

[73] For discussion, see Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty,' *The International Journal of Human Rights* 6 (2002): 81-102; Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council,' *Global Governance* 8 (2002): 35-51. See also Buchanan, 'Reforming the International Law of Humanitarian Intervention,' 162.

[74] For example, Simon Caney, *Justice Beyond Borders* (OUP, 2005).

less to gain from clearer principles regarding the legality of AHI *ad bellum*.

6. Human Rights in Humanitarian Intervention

Let's take a step back. The Geneva Conventions and their Additional Protocols embody momentous advances in the international community's efforts to limit the harmful effects of armed conflict. At the same time, the international legal system for the prosecution of atrocity crimes is still highly porous and underdeveloped. What we still lack are robust, independent, and legitimate international institutions to enforce the criminalisation of atrocity crimes and humanitarian obligations to suppress them.[75]

To regulate AHI to more effectively protect the innocent, the international legal system would need to do two things it currently doesn't do. In addition to protecting individual rights *during* such interventions, it would need to prohibit unjust wars of self-defence against just interventions. In the absence of globally just institutions and international enforcement mechanisms, this is, of course, utopian. Still, effective international enforcement mechanisms for the prohibition of unjust wars, against interventions necessitated by the 'responsibility to protect,' would fill a gaping hole in the system.[76]

While states' legal right to wage a war in self-defence currently exists alongside their 'responsibility to protect,' especially egregious failures to comply with the latter should entail loss of the former. After all, the principle of the 'responsibility to protect' grew out of an explicit desire to reconcile the traditional principle of state sovereignty with the moral imperative to respond to heinous international crimes - specifically, genocide, war crimes, crimes against humanity, and ethnic cleansing. If failing in this responsibility compromises state sovereignty, then it should also limit states' legal permission to launch a war of self-defence against just interveners. In other words, the assumption that state sovereignty is contingent on the protection of fundamental rights not only provides grounds for AHI in certain cases, but arguably also means that target states' legal permission to use lethal force

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[75] See, for instance, Fabre's proposal for an international compensation fund (in her *Cosmopolitan Peace*, 152-170); Ronald Dworkin's discussion of international legitimacy in Dworkin, 'A New Philosophy for International Law,' *Philosophy & Public Affairs* 41 (2013): 2-30; and Jeff McMahan's discussion of a *jus ad bellum* court in McMahan, 'The Prevention of Unjust Wars.'

[76] See David Scheffer, *All the Missing Souls* ((Princeton University Press, 2012).), Ch.14. Scheffer proposes the overarching term 'atrocity law,' to comprise relevant parts of each of the established fields of law, to capture the crimes prosecuted by the ICC as well as preceding courts, including the ICTY, the ICTR, the Special Court for Sierra Leone, and the Cambodia or Khmer Rouge Tribunal (Extraordinary Chambers in the Courts of Cambodia) (Scheffer, *All the Missing Souls*, 424.)

ought to be constrained.

In the short term, progress might take the form of developments in customary international law, both with regard to greater determinacy about the *jus ad bellum* and a more rights-focused *jus in bello* in contexts of the 'responsibility to protect.' One way of more effectively protecting individual rights during AHI might be by affording international human rights law (IHRL) a further reach and a stronger grip in situations of armed conflict.[77] This proposal elaborates an aspect of the institutional constraints criterion - coherence with the broader international legal system. More effective international enforcement mechanisms for the prohibition of unjust wars, and for rights-based just conduct to the extent that this is possible, would be coherent with the very values already at the core of recent developments in the international legal system.

The relationship between IHL and IHRL is notoriously nebulous.[78] Both bodies of law have separate origins and evolved in separate ways. While IHL was codified in the second half of the 19th century, with origins that date back much further, IHRL didn't emerge in its current form until after the Second World War.[79] While the 1948 Universal Declaration of Human Rights first set out international human rights in a non-binding General Assembly resolution, it wasn't until 1966-67 that universal human rights treaties emerged as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The origins of IHRL are thus completely independent of and considerably more recent than those of IHL.

IHL and IHRL are also implemented by different agents and institutions, and are generally understood to apply in different contexts. Technically, IHRL applies at all times, in peacetime and during armed conflict. But it doesn't govern the conduct of hostilities.[80] In

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[77] For the view that IHRL should prevail at least in some instances even in armed conflict, see Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (OUP, 2008): 395-471. For more general discussion, see Louis Henkin et al. (eds), *Human Rights,* 2nd ed. (Foundation Press, 2009), 413-15.

[78] For discussion, see Janina Dill, 'Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities,' in Ziv Bohrer, Janina Dill, and Helen Duffy (eds), *Law Applicable to Armed Conflict* (CUP, 2020).

[79] Although similar fundamental ideas became prominent during the Enlightenment, and profoundly shaped the US Declaration of Independence in 1776, as well as the French Declaration of the Rights of Man and of the Citizen in 1789.

[80] It does, however, govern the use of force in law enforcement. For example, it prohibits the arbitrary deprivation of life, and is based on central assumptions about the morality of defensive harming, including considerations of necessity, proportionality, and just cause. (For instance, International Covenant on Civil and Political Rights, Article 6(1).)

times of war, the standard assumption is that IHRL is effectively trumped by IHL as the more applicable body of law. This is because, while IHRL generally aims to protect individuals from abuse by the state, IHL aims to protect civilians specifically from the effects of hostilities.

But this doesn't mean that IHRL can't plausibly play a critical role especially in AHI. The standard assumption is that IHRL applies in peacetime, while IHL applies in times of war, including in AHI. It is therefore also standardly assumed that, in cases in which there is uncertainty about which body of law should prevail in armed conflict, IHL should effectively trump IHRL. But that this should be the case in AHI is hardly self-evident. In cases in which AHI is justified precisely because a state failed in its duty to protect human rights, the assumption that IHRL should stop applying, and be overridden by IHL, which is insensitive to individual rights, seems out of place. After all, the very reason why an intervention is justified in any given case is that the target party failed in its obligation to protect its people's human rights. To declare IHRL, for all intents and purposes, irrelevant even in military operations carried out to suppress grave human rights violations therefore seems unduly deferential to IHL.

The view that IHRL shouldn't fall out of the picture in armed conflict is coherent with existing human rights norms and recent developments in international law more broadly. While international law traditionally concerned relations among sovereign states, rather than relations between states and individuals, international law is now recognised as constraining not merely how states interact with other states but also how they interact with individuals, including their own citizens.[81] Both the Universal Declaration of Human Rights and the Genocide Convention were early building blocks of a growing framework of human rights law that made 'how a state treats individual human beings . . . a matter of international concern.'[82] The 'responsibility to protect' continues this trend, by enforcing the view that protecting human rights is everybody's business.[83]

The Creaky Wheels of International Law

One might fear that any challenge to the existing law of armed conflict threatens to

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[81] For the traditional view concerning the 'law of nations,' see Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398, 422 (1964)

[82] Bradley, supra, at 832 (quoting Restatement (Third), pt. VII, Introductory Note, at 144–145), cited in Federal Republic of Germany v. Philipp.

[83] A notion emphasised by Gareth Evans, co-chair of the ICISS commission, on numerous occasions.

undermine its all-too-easily jeopardised influence. For example, Jeremy Waldron has cautioned that criticising existing laws without offering an adequate alternative carries the danger of weakening these laws.[84] But even actual reform wouldn't necessarily be destabilising - neither with regard to the regulation of armed conflict nor with regard to the functioning of the international legal system as a whole. Consider how the 1977 Protocols came about. At the time, the growing number of wars of national liberation and civil wars after decolonisation and during the Cold War created a need for distinct laws to apply in those specific types of conflict. Given the worry that revising the 1949 Geneva Conventions might compromise some of their important advances, additional Protocols were adopted. Similarly, new texts in the form of Protocols additional to the Geneva Conventions might be considered for the legal regulation of AHI, to set out the rules that apply specifically in cases in which military force is used to enforce states' 'responsibility to protect.'[85]

Humanitarian interventions, certain types of asymmetric wars, and the war against terrorism have revealed that, as humanity has moved from the mass mobilisation of national armies to advanced precision-guided weapons technology and remote warfare, IHL is, in critical aspects, too blunt a tool to effectively guide just conduct in different contexts. Not only is the idea that there may be an enforceable 'responsibility' to protect individual rights a relatively recent phenomenon.[86] But the way in which armed conflicts are fought has also developed far beyond what the existing laws were originally designed to regulate. As the character of war has evolved and diversified, the legal enforcement of just conduct should advance accordingly.

The majority of armed violence now occurs within, rather than between, states. Insofar as the occurrence of intra-state violence far exceeds that of inter-state violence, the existing requirement of UN Security Council authorisation does little to support the protection of

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[84] See Jeremy Waldron, 'Deep Morality and the Laws of War,' in Seth Lazar and Helen Frowe, *The Oxford Handbook of Ethics of War* (OUP, 2015).

[85] One might also appeal to the notion of the 'responsibility while protecting.' See Oliver Stuenkel, 'Responsibility while Protecting,' in Alex J. Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP, 2016).

[86] States have, for a long time, abused the 'humanitarian' justification as a pretext for furthering their national interests abroad. See, for instance, Aidan Hehir, *Humanitarian Intervention* (Palgrave Macmillan, 2009); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP, 2002). But the doctrine of the 'responsibility to protect' was only adopted by the UN in 2005.

fundamental human rights. If anything, it rather hinders it.[87] By falling back on a centuries-old understanding of what warfare is like, without regard to considerations of justice or the requirements imposed by individual rights, the law does primarily those a service who commit, and allow, grave moral wrongs.

Given how much there is to gain from a more robust, consistent, and just international system, some risk, as Victor Tadros has suggested in a more general context, may therefore be worth taking.[88] The long-term goal of eradicating atrocity crimes, and impunity for their commission, may make it worth bearing some short-term costs of disrupting the performance of international institutions. It's hardly as though existing institutions like the UN were functioning flawlessly. And, as others have pointed out, many existing laws and customs are simply not fit for the purpose of holding individual perpetrators, including civilian leaders, accountable for atrocity crimes.[89]

International law, especially as it relates to the prevention, suppression, and prosecution of atrocity crimes, is still in the making. Even the very set of crimes for which people can be held accountable is constantly evolving. For example, after WWI, there was no way to try the Kaiser, because there wasn't yet a crime of aggression. It was only because the Kellogg Briand Pact of 1928 made the crime of aggression illegal that it was possible to try the Nazis for this crime after WWII.[90] And the term 'genocide' was only coined in 1943-44, after Polish-American lawyer Raphael Lemkin recognised the need for a word to capture the human destruction of the Holocaust, and worked to make it an international crime.[91] International justice, this is to say, is an unsystematic, inconsistent, sporadic, non-linear, arduous ongoing process. Working towards more globally just institutions to enforce the prohibition on unjust wars, both of aggression and defence against just intervention, therefore needn't be seen as destabilising, but rather as part of an inherently messy process to ultimately strengthen the international legal system's moral foundations.

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[87] It is tempting to agree with Allen Buchanan that the time has come to abandon, or significantly change, a rule of AHI which was one created 'for quite a different world.' See Buchanan, 'Reforming the Law of Humanitarian Intervention,' 131.

[88] See Victor Tadros, *To Do, To Die*.

[89] See David Scheffer, *All the Missing Souls*, 426.

[90] For discussion, see Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

[91] For an account of Lemkin's monumental efforts, see Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002), 47-60.

7. Conclusion

Arguing for greater protection of human rights in situations of armed conflict, even in the context of the 'responsibility to protect,' might sound like foolish fantasy. But it would be reckless to ignore the scope for debate which this chapter sought to illuminate: about what the law must permit on feasibility grounds on one hand, and what it ought to prohibit on moral grounds on the other. After all, states are capable of agreeing that not anything goes. Indeed, before the first Geneva Convention in 1864, the Additional Protocols over a hundred years later, the signing of the Genocide Convention and the UDHR a day later in 1948, and the signing of the Rome Statute in 1998, the enshrining of fundamental moral commitments in these international agreements may have seemed no less utopian than striving for a greater degree of human rights protection in cases in which protecting human rights is the very cause for military action.

This discussion revealed that the perpetual tension between state sovereignty and the protection of individual human rights doesn't merely generate familiar controversies about the legality of military intervention in the absence of UN Security Council authorisation.[92] It also carries little-acknowledged, far-reaching implications for the very possibility of codifying principles of just conduct during AHI in the first place. This chapter took issue with the fact that the law regulates armed humanitarian intervention no differently from traditional military campaigns, in which the permissibility of using lethal force is determined by military necessity rather than considerations of justice. In the absence of rules of just conduct which are sensitive to the *jus ad bellum*, and just mechanisms to enforce the prohibition on unjust wars, this chapter argued, the law falls short of its potential to effectively protect innocent persons. As a result, we are stuck with the *ad bellum/in bello* dualism, which ultimately means that AHI are regulated like conventional wars. Even military operations justified on the grounds of the 'responsibility to protect' are consequently no less destructive than traditional military campaigns whose primary aim isn't to protect the vulnerable. To close, what I hope to have shown is that the regulation of just conduct in AHI - the *jus in bello* - goes to the very core of why the practice of AHI carries an enormous risk of doing more harm than good, and that we should therefore confront this issue head-on.

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[92] For example, Kofi Annan, 'Speech to the General Assembly,' SG/SM/7136GA/9569: Secretary-G, 20 September 1999, 2.

8. Compensating Beneficiaries

1. Introduction

Many military actions that carry significant risks of harm to innocent people are not only legally permissible under international humanitarian law, but are also often morally justified on lesser-evil grounds.[1] Since debates about the *jus post bellum* typically focus on rectificatory duties incurred by unjust parties, little is usually said about what, if any, rectificatory duties arise from *just* belligerents' actions. The aim of this chapter is to illuminate one of these less prominent grounds for rectificatory obligations in the aftermath of an intervention - harms caused by just interveners as a side effect of all-things-considered permissible military actions.

This chapter argues that harms and damage caused as unintended side effects of just armed humanitarian interventions (AHI) can give rise to claims to compensation *post bellum*, even when the military acts that caused them were justified on lesser-evil grounds. My aim is to defend this view against the objection that people cannot acquire claims to compensation for an intervention to which they owe their survival. The position I wish to defend, then, is that compensation may be owed to victims of 'collateral harm,' even if these victims manifestly benefited from the intervention.

Harms permissibly inflicted on innocent people on lesser-evil grounds pose a special challenge to conventional theories of compensation for three reasons. First, in the absence of an AHI victims of collateral harms may have become victims of atrocity crimes. In saving their lives, the AHI may therefore have overall benefited, rather than harmed, them. Second, the collateral harms in question are side effects of morally justified acts performed to prevent more significant harm. The harms to be compensated thus resulted not from morally prohibited acts, but from acts which were all-things-considered permissible. Third, insofar as claims to compensation are determined in relation to a state of affairs in which the harmful act was not performed, this is a scenario in which no military rescue operation was carried out. This, however, may constitute a fundamentally unjust state of affairs in which atrocity crimes are not prevented.

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[1] For example Cécile Fabre, *Cosmopolitan War* (OUP, 2012), 192.

In response to each challenge, I defend three main claims. First, the fact that victims of collateral harms may be better off as a result of the AHI than they would have been in its absence is morally irrelevant. Their benefit therefore poses no obstacle to compensatory obligations. Second, while the fact that the harmful military acts were justified on lesser-evil grounds *is* morally relevant, this also poses no obstacle to compensatory obligations. Rather than implying that no compensation is owed, it implies that it is not necessarily interveners themselves on whom compensatory burdens fall. Third, in cases in which innocent people are harmed by agents acting all-things-considered permissibly to prevent grave injustice, ordinary counterfactual reasoning is inadequate. To determine claims to compensation in this context, we should appeal not to counterfactuals which rely on empirical speculations about what *would* have happened had a harmful act not been performed, but rather to what I call *deontic* counterfactuals, based on what agents *ought* to have done.

By recognising that (1) having benefited is compatible with being owed compensation, (2) compensatory burdens needn't fall on those who caused all-things-considered permissible harms, and (3) identifying the relevant counterfactual is a prescriptive, rather than a descriptive, matter, we can see why compensatory obligations arise from collateral harms of an AHI, even if the AHI was justified and victims owe their survival to it. Our theory of post-intervention justice should therefore accommodate obligations to compensate innocent victims for rights transgressions, even if these were all-things-considered permissible, and even if victims owed their survival to the harmful acts in question.

The discussion proceeds as follows. Section 2 describes the view that harmful side effects of just AHI do not generate compensatory obligations if victims of these harms owe their survival to the intervention. Section 3 suggests that the moral purpose of compensation includes the addressing of rights transgressions irrespective of whether they resulted in harm; and argues that the fact that victims would have been worse off in the absence of an intervention is wholly irrelevant for whether compensatory obligations arise. Section 4 argues that, in cases in which the harms in question were permissibly inflicted on innocent people on lesser-evil grounds, conventional theories of compensation are inadequate. This is because, in cases in which lesser-evil justifications for harming obtain, the counterfactual state of affairs in which the harmful act is not performed itself constitutes an unjust state of affairs. Section 5 subsequently argues that, to determine claims to compensation in cases such as AHI, in

which the *status quo ante* itself was unjust, we need a different understanding of counterfactual reasoning. I therefore make a case for what I call *deontic* counterfactuals, which describe what agents *ought* to have done, rather than merely what would have happened in the absence of the harmful act in question. Section 6 explains why compensatory obligations for harms permissibly caused on lesser-evil grounds do not necessarily fall on those who caused these harms. Section 7 finally addresses non-compensable harms that resulted from all-things-considered permissible military acts.

Assumptions and Clarifications

By way of reminder, I say 'concessive' harms to refer to harms justified on lesser-evil grounds. Lesser-evil justifications for harming rest on the anticipated moral value of the outcome that will result *despite* the harms caused to innocent people - hence *concessive* harms. When I say 'concessive harms,' I thus mean harms justifiably inflicted on innocent people on lesser-evil grounds.

Second, some types of harm, such as harm to property, are more readily compensable than others, such as death or grievous bodily injury. As mentioned previously, I assume that non-compensable harms are generally harder to justify than compensable harms.[2] But my argument doesn't hang on whether compensation is the most appropriate rectificatory measure. My primary concern is with the *grounds* of rectificatory obligations, and I discuss compensation mostly for purposes of illustration.

Lastly, for the purpose of this discussion, I will make two assumptions. First, I assume that the harms at issue are side effects of military operations justified on lesser-evil grounds, although it is questionable whether collateral harms are morally justifiable on lesser-evil grounds in many real-world cases. Second, I will stipulate that victims of collateral harm would have been significantly worse off in the absence of an intervention, although, in real-world cases, many actual victims of collateral harms may have been better off in the absence of an intervention. I make these assumptions because, in cases in which inflicting harms on morally innocent people is impermissible, and victims are made worse off than they otherwise would have been, there is little doubt about the grounds of compensatory obligations. However, my aim here is to explore the more ambitious position that victims of collateral

[2] I discuss this in a working paper ('The Compensability Condition for Wide Proportionality in War,' available upon request).

harms acquire claims to compensation, despite the facts that the harmful acts in question were all-things-considered permissible, and victims would have been even worse off in the absence of an intervention.

2. The Benefit Objection to Compensation for Collateral Harm

The claim that harms and damage caused as unintended side effects of just AHI can give rise to claims to compensation *post bellum*, even if victims would have been significantly worse off in the absence of the intervention, may seem counterintuitive. If combatants (a) had a moral justification for carrying out a military act that harms innocent people as a side effect, *and* if (b) those people would almost certainly have been worse off in the absence of the harmful act in question, why should these victims be compensated for the harms they suffered?

I'll set aside the claim that, if harms are justified, no compensation is due on moral grounds.[3] Since I make the case elsewhere that certain justified rights infringements can give rise to compensatory obligations, I will not discuss the view that no claims to compensation arise for collateral harms if these were justified on lesser-evil grounds.[4] Instead, I'll focus on what I call the *benefit objection*. The benefit objection denies that people can be owed compensation for harms suffered as a side effect of an intervention that manifestly benefited them. Accordingly, victims have no claim to be compensated for the harmful side effects of an AHI if they are significantly better off as a result of the intervention than they would have been otherwise.

The benefit objection is similar in nature to commonly articulated objections to compensation for historical injustice. For example, it is sometimes suggested that the descendants of slaves cannot be owed compensation for the evils of slavery insofar as their very existence is a result of it. As Stephen Kershnar puts it, 'the descendants of slaves were not harmed by slavery since they owe their existence to slavery,' and are, for that reason, not entitled to be compensated for this specific injustice.[5] The general thought is that a person

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[3] For an example of this view, see John Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights,' *Law and Philosophy* 23 (2004): 325-346, 337.

[4] 'Compensation for Rights Infringements,' working paper available upon request.

[5] Stephen Kershnar, 'The Inheritance-Based Claim to Reparations,' *Legal Theory* 8 (2002): 243-67, 243. See also Kershnar, 'Are the Descendants of Slaves Owed Compensation for Slavery?' *Journal of Applied Philosophy* 16 (1999): 95-101.

cannot be owed compensation for some act or event when she would not be alive without it. As Janna Thomson put it, it 'doesn't seem to make sense for a person to claim that she has been wronged by a historical injustice if she would not have existed at all if the injustice had not been done.'[6]

Similarly, one might hold, it wouldn't make sense for a person to claim that she has been wronged by the collateral harms of a military intervention if she would not have survived at all if this intervention had not been carried out.[7] Similar to the claim that, insofar as people owe their existence to an injustice, they cannot be said to have been wronged, or harmed, the benefit objection suggests that victims of the target party don't acquire claims to be compensated for the collateral harms caused by an AHI, insofar as they owe their survival to it. In short, if civilians of the target party would have become victims of atrocity crimes in the absence of an AHI, they cannot acquire claims to be compensated for harms suffered as a side effect of their rescue. According to the benefit objection, then, harms caused as a side effect of an AHI do not generate compensatory obligations, insofar as victims owe their survival to the very same military acts that caused those harmful side effects.

The Conventional View of Compensation

If people owe their survival to a just intervention, how can they acquire claims to compensation for harmful side effects of acts that saved their lives? The implicit assumption underlying the benefit objection is that, insofar as people owe their lives to an intervention, they have not been made overall worse off. Therefore, there is nothing to compensate.

The benefit objection rests on the common view that the purpose of compensation is to restore victims of harm to a position equivalent to that in which they were before they suffered the harm. The purpose of compensation, on this view, is to restore victims of harm to the same level of wellbeing at which they would have been, or to return them to a status that is relevantly equivalent to the position in which they would have been, had they not

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[6] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity, 2002), 104.

[7] There is a clear difference in that the AHI which I have in mind are justified (that is, they fulfil all relevant requirements of the *jus ad bellum*), whereas slavery and colonialism constitute massive wrongs. This difference, however, has no bearing on the particular claim I advance here.

suffered the harm in question.[8] Common conceptions of compensation thus rely on a counterfactual assumption in which the harm was not suffered. For example, as Robert Nozick put it:

> Something fully compensates a person for a loss if and only if it makes him no worse off *than he otherwise would have been*; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it *if Y had not done A*.[9]

The basic assumption is thus that, by considering a counterfactual in which the harm did not occur, we can establish the degree to which a victim has been harmed and is consequently owed compensation. I'll refer to this as the *conventional view* of compensation.

On the conventional view, the aim of compensatory justice is to make victims no worse off than they would have been had a harmful act or event not occurred.[10] The degree to which a person has been harmed, on this view, is a function of the difference between (a) her overall level of wellbeing as a result of the harmful act or event to be compensated and (b) her overall level of wellbeing in a counterfactual state of affairs in which that act or event did not occur.[11]

The benefit objection rests on this conventional view of compensation. It assumes that compensatory duties are contingent on victims having suffered a net loss, suggesting that no compensation for collateral harms is owed if victims are not worse off overall as a result of the intervention than they would have been if the intervention had not occurred. Accordingly, people whose lives were saved by an AHI are not owed compensation for harms caused as a side effect, because the intervention did not make them overall worse off than they would have been otherwise. What matters, in short, is that victims did not suffer a net loss.

However, we have several reasons to be sceptical of the benefit objection, given its reliance on the conventional view of compensation.

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[8] See Loren Lomasky, *Persons, Rights, and the Moral Community* (OUP, 1987); Robert E. Goodin 'Theories of Compensation,' *Oxford Journal of Legal Studies* 9 (1) (1989): 56–75; Victor Tadros, 'What Might Have Been' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP, 2014); Roberts, 'The Counterfactual Conception of Compensation,' *Metaphilosophy* 37 (3-4) (2006): 414-428.

[9] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), 57, emphasis added. George Sher designates this the 'official' view. George Sher, *Approximate Justice: Studies in Non-Ideal Theory* (Rowman and Littlefield, 1997), 29.

[10] For more general discussion, see Daniel Butt, *Rectifying International Injustice* (OUP, 2008), Chapter 4; also see Roberts, 'The Counterfactual Conception of Compensation.'

[11] This same assumption, incidentally, is why some adherents of the non-identity problem adopt the position that those who owe their existence to the circumstances of slavery cannot also have been harmed by it, given that it is better to exist than not to exist. But this is hardly the point. For discussion, see, for instance, David Benatar, 'Why It Is Better Never to Come into Existence,' *American Philosophical Quarterly* 34 (1997): 345-55.

3. Rights-Based Compensation

The benefit objection assumes that compensation is owed only if victims are overall worse off as a result of the harm to be compensated than they would have been if the harmful act had not occurred. This view assumes that the grounds of compensation are limited to a net loss in victims' overall wellbeing. But this is not the only relevant consideration. Claims to compensation can also arise from rights transgressions in the absence of harm. If a victim's rights have been transgressed, this may generate a claim to be compensated, irrespective of how the rights transgression affected victims' overall level of wellbeing. We can thus distinguish two distinct grounds for compensation - welfare-based compensation and rights-based compensation - which coincide in cases of harmful rights transgression.

The benefit objection suggests that people cannot be said to have been harmed by an intervention if they also owe their lives to it. As some philosophers have pointed out, however, many harms and benefits simply aren't aggregative in the way in which they would need to be to yield a totality of wellbeing as the binary standard by which to determine whether or not a person has been harmed.[12] For example, insofar as people's wellbeing comprises multiple dimensions, the same act can harm a person on one dimension while benefiting her on another.[13] It is thus possible that losing a leg in an airstrike constitutes a harm, even if the victim would, in the absence of an intervention, have been killed in an ethnic cleansing campaign. Thus, for a person to have been harmed, she need not have suffered a decrease in her *overall* level of wellbeing compared to a counterfactual state of affairs.

Setting aside conceptual questions about what it means to be harmed, a more fundamental concern is that the conventional view's understanding of the moral grounds and purpose of compensation itself is overly narrow. The welfare-based view that compensatory obligations arise only if a person is worse off overall as a result of a harmful act than she

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[12] In addition, as Tadros illustrates, harms and benefits are not one-dimensional over time. See Tadros, 'What Might Have Been.'

[13] Fabre, *Justice in a Changing World* (Polity, 2007), 143.

would have been if the harmful act hadn't been performed is unduly simplistic.[14] Arguably, what's at stake when questions about compensation arise isn't merely victims' level of wellbeing but victims' moral rights, which may have been transgressed. People can be *wronged* by having their rights transgressed even if this doesn't *harm* them.[15] For example, imagine that a doctor performs a life-saving blood transfusion against a patient's will. Although the doctor doesn't necessarily act impermissibly by carrying out the transfusion against the patient's will, she may wrong the victim, even if the victim is not harmed, and if the victim is in fact benefited by having his life saved as a result of having his rights transgressed.

The point is that rights transgressions can generate rectificatory obligations even if victims are not harmed, and potentially even if they are benefited.[16] Whether rectificatory obligations arise thus depends not on whether a victim has been harmed, but rather on whether her rights have been transgressed. Harms are consequently relevant insofar as they result from a rights transgression. Having been made overall worse off is not a necessary condition for claims to compensation to arise.

This conception of compensatory justice as fundamentally rights-based also explains why claims to compensation arise in causal overdetermination cases. These are cases in which the harm a person is wrongfully made to suffer is less than the harm she would otherwise have suffered, and in which she is nonetheless owed compensation for this lesser harm precisely because she had a right not to suffer it.[17] Consider Jules Coleman's example, in which

> I am scheduled to take a plane from New Haven to Washington. Five blocks from the airport, the taxi hits another car. My leg is broken; I'm taken to the hospital; I miss my flight. The plane I would have taken crashes. There are no survivors. Had I caught the plane, I would have died. Only the taxi driver's recklessness keeps me alive.[18]

Causal overdetermination cases, in which victims are overall better off as a result of suffering some harm than they would have been if the harm in question had not been caused illustrate that victims can acquire claims to be compensated for harms even if they are overall better

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[14] For example, Butt, *Rectifying International Injustice,* 104, 109-11; Feinberg, 'Wrongful life and the counterfactual element in harming' in *Freedom and Fulfillment: Philosophical Essays* (Princeton, 1992), 11; Tadros, 'What Might Have Been'; Roberts, 'The Counterfactual Conception of Compensation.'

[15] For discussion, see for instance Frances Kamm, *Intricate Ethics* (OUP, 2007), 240; David Rodin, 'Justifying Harm,' *Ethics* 122 (2011): 74–110, 87.

[16] Many rights transgressions not only generate rectificatory liability, but also liability to defensive harm. For discussion, see Rodin, 'Justifying Harm,' 84, 87, 98.

[17] For a description of causal overdetermination cases, see Feinberg, 'Wrongful life and the counterfactual element in harming,' 8. For discussion, see Tadros, 'What Might Have Been.'

[18] Jules Coleman, *Risks and Wrongs* (CUP, 1992), 323.

off as a result of suffering the harm than they would have been had the harmful act not been performed.[19] Clearly, I am owed compensation for my broken leg, even though I am better off having been injured in the car crash than I would have been otherwise.

The fact that the driver's saving my life doesn't affect his compensatory duties, some people have argued, shows that we need a more complex conception of counterfactual compensation.[20] Complex counterfactual accounts do not limit themselves to comparing the harmful outcome of an act to the state of affairs that would have obtained if this harmful act had not been performed. Instead, they seek to accommodate the view that compensation can be owed for harming a person even if one thereby preempts a greater harm which they would otherwise have suffered.[21]

To see why this is necessary, consider what the conventional view of compensation would tell us in Coleman's case. If, as Rodney Roberts points out, the taxi driver gives me one dollar as compensation for my broken leg, it seems that, according to the conventional view of compensation, I am more than fully compensated, given that I am significantly better off with one dollar and a broken leg than I would have been had the driver safely delivered me to the airport.[22] The conventional view thus compares a broken leg to dying in a plane crash.

By treating the aim of compensatory justice as that of making victims no worse off than they would have been in the absence of a harmful act, the conventional view implausibly reduces compensatory justice to a simple comparison between what did happen (I got injured in the car crash) and what otherwise would have happened (I would have died in a plane crash). But it is morally irrelevant for whether the driver owes me compensation for his reckless driving that I am, through sheer luck, better off as a result of his recklessness than I would have been had I made it onto the plane. What matters is that the driver has wronged me by failing to afford me some reasonable standard of care, and that *this* is what grounds his compensatory obligation.

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[19] Feinberg, 'Wrongful life and the counterfactual element in harming,' 8. The same, I assume, applies to justified rights infringements. If innocent people's rights are unjustifiably transgressed, they acquire claims to compensation, regardless of how much better off they would be, compared to how they would have fared in the absence of an intervention. This is straightforwardly because compensation can be owed for wrongs, not merely for harms conceived of in some comparative way.

[20] See Feinberg, who suggests that we need a 'doubly counterfactual' consideration, 'Wrongful life and the counterfactual element in harming,' 11; Butt, *Rectifying International Injustice*, 108-11; Tadros, 'What Might Have Been.'

[21] See Tadros, 'What Might Have Been.'

[22] Roberts, 'The Counterfactual Conception of Compensation,' 418.

Whether victims can be thought to have been harmed if they are made overall better off is therefore beside the point. Whether people acquire claims to compensation depends not on whether they would otherwise have been better off, but primarily on whether they were made to suffer harms which they had a right not to suffer. For non-liable victims of collateral harms caused by an AHI, this is clearly the case, irrespective of the fact that they might not have survived a humanitarian crisis otherwise. Owing one's survival to an AHI thus doesn't automatically preclude claims to be compensated for harms suffered as a side effect, because the purview of compensatory justice extends beyond simple counterfactuals.

But there is a deeper issue. Ordinary counterfactual reasoning, simple or complex, is inadequate at assessing claims to compensation when the *status quo ante* itself is characterised by injustice.

4. The Problem of Unjust Counterfactuals

The conventional view assumes that claims to compensation are determined in relation to victims' level of wellbeing in a counterfactual in which they did not suffer the harm for which they are to be compensated. In AHI, the conventional view thus compares survivors' level of wellbeing as a result of an intervention with their level of wellbeing in the absence of an intervention. However, how victims of the target party would have fared in the absence of an intervention is not an appropriate counterfactual, insofar as this describes a state of affairs that is fundamentally unjust - that is, one in which atrocity crimes are not prevented.

Standard counterfactual reasoning is inadequate at assessing claims to compensation when the harms in question are justified on lesser-evil grounds to prevent some greater injustice. In cases in which harms are caused to innocent people as a side effect of preventing greater harm, ordinary counterfactual reasoning is unsuited to determining whether compensation is owed for these concessive harms. Cases in which the *status quo ante* is unjust, and the harm to be compensated a side effect of an act whose performance is all-things-considered permissible given lesser-evil considerations, are therefore more complicated than those typically addressed by conventional views of compensation.

Conventional views, as we saw above, generally take the aim of compensatory justice to be that of reversing some deviation from a particular *status quo ante*. On these views, the purpose of compensation is to bring people back to where they were before they suffered the

harm for which they are to be compensated.[23] The measure of compensation, accordingly, is the difference between victims' baseline situation of wellbeing prior to the harm for which they are to be compensated and their position as a result of having been harmed.[24]

To restore the *status quo ante*, accounts of compensatory justice typically adopt a three-step process. First, they presume a *status quo ante* in which the moral protagonists are in some state of 'moral equilibrium'; that is, the moral universe is in balance and no rectificatory obligations obtain yet. Then an agent causes a wrongful harm - settlers colonise, oppress, and enslave; the taxi driver drives recklessly - which upsets the moral equilibrium. Third, as a consequence, rectificatory obligations arise, to set the moral equilibrium right. Thus, compensation serves to return victims to a position equivalent to that in which they were before suffering the harm.

But matters are more complicated in AHI. AHI occur in profoundly non-ideal circumstances, in which the *status quo ante* itself is unjust, and interveners cause concessive harms in acting to mitigate that injustice and to prevent further injustice. Insofar as the *status quo* preceding the intervention is itself unjust, concessive harms caused during an AHI do not themselves represent a deviation from a just *status quo*. Standard counterfactual reasoning is therefore inadequate at assessing claims to compensation for concessive harms.

The standard counterfactual conception of compensation, as Roberts puts it, effectively 'paints a utopian picture of rectificatory compensation' in conjuring up a scenario in which unjust acts and events did not occur.[25] But since concessive harms are justified on lesser-evil grounds, a world in which the 'unjust events' do not occur would be a world in which no atrocity crimes are committed and no military rescue operations are necessary to begin with - at the present moment, a utopian picture indeed. When it comes to compensation for harms suffered as a side effect of an intervention that saved victims' lives, the ordinary counterfactual of 'what if the harmful action hadn't been performed' is therefore out of place and normatively uninformative. Since AHI are carried out to prevent greater injustice, the aim of compensating victims for harms suffered as a side effect cannot be to 'restore' victims to

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[23] In Robert Goodin's words: 'The aim is to bring him up to some baseline of wellbeing. That baseline to be used for reckoning the adequacy of compensation will typically be identified by reference to some *status quo ante*, i.e., some position that the individual himself actually enjoyed at some previous time.' (Goodin, 'Theories of Compensation,' 59.)

[24] See Goodin, 'Theories of Compensation,' 59, n.20.

[25] Roberts, 'The Counterfactual Conception of Compensation,' 416.

the position in which they would have been if the intervention had not been carried out.

Concessive harms caused during AHI thus occur within a moral context that is practically the reverse of that standardly assumed by mainstream accounts of compensatory justice. While standard accounts presume a for all intents and purposes legitimate *status quo ante*, and assume that the moral equilibrium is then offset by an unjust harm which is to be set right through compensation, AHI are precipitated by an unjust *status quo ante* in which the moral equilibrium is already out of order. Since AHI are precipitated by others' wrongdoing, harm is effectively overdetermined.

Compensation for concessive harms can therefore not be a means to restoring the broader moral equilibrium. Concessive harms are, after all, permissibly caused as a side effect of AHI whose very purpose it is to mitigate the skewness of the equilibrium which was upset to begin with. AHI thus differ from typical contexts of compensation not only in that the harms in question are inflicted all-things-considered permissibly, namely as side effects of acts justified on lesser-evil grounds, but also in that the *status quo ante* is itself unjust.

In sum, the counterfactual of non-intervention is fundamentally unjust, because it reflects a state of affairs in which atrocity crimes are not prevented. This state of affairs which would have obtained in the absence of a just intervention, and in which victims would have been significantly worse off, is therefore not an appropriate counterfactual. To ground compensatory obligations for harms caused as a side effect of just AHI, the following section suggests, we therefore need a different approach.

5. Empirical and Deontic Counterfactuals

I propose a twofold approach. This (a) determines relevant counterfactuals in relation to moral duties rather than empirical speculations, and (b) grounds compensatory obligations for concessive harms in previous failures to prevent wrongful harms, which ultimately result in lesser-evil justifications for harming innocent people.

5.1 Deontic Counterfactuals

We can distinguish between two different approaches to identifying counterfactuals, which I'll refer to as *empirical* and *deontic*. Mainstream approaches are broadly empirical. They seek to determine what would likely have been the case, and how a victim would likely have

fared, had a particular act of injustice not occurred. Empirical counterfactuals are thus based on speculations about the state of affairs that would have obtained had a harm not been caused. The purpose of this type of conjecture, as we saw earlier, is to bring about a state of affairs that is as similar as possible to that which would have obtained had a particular harmful act or event not occurred.

Deontic counterfactuals, on the other hand, take as their main point of reference agents' moral duties. The primary question, on this approach, is not what would likely have been the case if injustice had not been done, but what duties agents failed to discharge, as a result of which victims are now worse off. Thus, rather than seeking to determine what would have been the case if a harmful act had not occurred, deontic counterfactuals focus on what agents ought, or ought not, to have done.[26] On a deontic conception of counterfactuals, it is clear, for example, why Coleman's taxi driver owes me compensation although his recklessness by chance also saved my life. Insofar as he failed in a duty to drive conscientiously, he owes me compensation for his recklessness, irrespective of the fact that that ultimately happened to make me better off.

One key advantage of deontic counterfactualism is that it can account for cases in which there is a range of just counterfactuals. In some cases, as Daniel Butt puts it in the context of claims relating to colonialism, 'there is more than one just counterfactual to an act of injustice than the simple non-performance of the act in question. Instead, the act might be performed in a different, just way.'[27] Accordingly, when we consider colonial injustice, the appropriate question is not necessarily whether current generations would be better off if there had been no interaction at all between colonial powers and their colonies, but whether current generations would be better off if the relations between colonial powers and their colonies had been consensual and non-exploitative.[28] Designating just interaction rather than non-interaction the relevant counterfactual to unjust interaction requires an appeal to deontic rather than empirical counterfactuals. It asks us to consider what agents ought to have done, rather than speculating about what circumstances would have obtained if a particular feature of a situation had been different. If agents had violated a negative duty, then the relevant counterfactual might well have been non-performance of the act in question. However, as

[26] I assume that this applies to both negative duties not to harm and positive duties to aid and rescue.
[27] Butt, *Rectifying International Injustice*, 110.
[28] Ibid., 111.

Butt's discussion illustrates, since there is nothing wrong with mere interaction, but rather with *unjust* interaction, the relevant counterfactual isn't *non*-interaction but *just* interaction.

Another advantage of the deontic counterfactual approach is that it can deal with both wrongful instances of *doing* harm and wrongful instances of *allowing* harm. Standard accounts of compensation ordinarily identify the morally relevant counterfactual as a state of affairs in which an act of injustice did not occur. However, if the relevant injustice results not from a harm one caused but from a harm one wrongfully failed to prevent, then standard, empirical counterfactual approaches don't have much to tell us. This is because, as we saw earlier, empirical counterfactualism seeks to identify the harmful effects of a wrongful act by comparing what actually happened to a possible world in which the harmful act did not occur. As Kershnar puts it, 'we determine the conditions in the relevant possible world by assuming that the conditions in it are identical with those in the actual world up until the time of the injury, and then envisioning the most probable outcome if the injuring act had not occurred.'[29] But, if the 'injury' results not from positive agency, but from a wrongful failure to prevent a harm, then 'envisioning the most probable outcome if the injuring act had not occurred' will not be possible unless we appeal to the deontic counterfactual - that is, a state of affairs in which agents conformed with their duty to prevent wrongful harm.[30]

There are, then, three main reasons in favour of supplementing, if not altogether renouncing, empirical counterfactuals in favour of deontic counterfactuals.[31] First, empirical counterfactuals are highly speculative and plagued by considerable uncertainty. As a result, in cases in which it is unclear what would have happened if some injustice had not occurred, victims of wrongful harms might not be able to be compensated. This would fail to fulfil basic requirements of rectificatory justice.[32] Second, as we saw above, many empirical counterfactuals are morally irrelevant insofar as they diverge from what agents ought to have done. A distinct advantage of deontic counterfactuals is that they bring into alignment the wrongful harms victims suffered with agents' failures to discharge their duties. This also

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[29] Kershnar, 'Are the descendants of slaves owed compensation for slavery?' 97-9.

[30] For discussion of how to identify relevant counterfactuals in the context of war, see Gregory Kavka, 'Was the Gulf War a Just War?,' *Journal of Social Philosophy* 22 (1991): 20-29; David Mellow, 'Counterfactuals and the Proportionality Criterion,' *Ethics & International Affairs* (2006): 439 - 454.

[31] For a more comprehensive critique of empirical counterfactuals, see Roberts, 'The Counterfactual Conception of Compensation.'

[32] See Roberts, 'The Counterfactual Conception of Compensation,' 416. While 'ought' implies 'can,' insofar as we're setting the parameters for what can be done based on what counterfactual approach we use, we might be sceptical of an approach that makes compensation impossible in the face of a more viable alternative.

coheres with the case for rights-based compensation outlined above. Third, deontic counterfactuals can handle both instances of doing and instances of allowing harm. Thus, by dispensing with nebulous speculations about what would have been the case, and focusing on what agents *ought* to have done, deontic counterfactuals are both more morally accurate and relevant than their empirical counterparts, and consequently cohere better with complex real-world situations in which it is often impossible to say what would have happened if one particular injustice had not occurred.

However, this is revealing only to the extent that agents did fail in some moral duty - for instance, if interveners failed to distribute risks of harm fairly between themselves and civilians of the target party. But, in cases in which agents *permissibly* cause harms to innocent people on lesser-evil grounds, deontic counterfactuals, by themselves, cannot explain what grounds compensatory obligations.

5.2 Genealogies of Rectificatory Duties

To justify compensatory obligations for concessive harms in light of the limits of counterfactual reasoning, we must look at what is effectively the moral 'origin story' of the relevant lesser-evil justification. What we need is effectively a backward-looking account of how the lesser-evil justification that permits causing harms to innocent people came about. This means looking to the duties agents may have failed to discharge, as a result of which causing harms to innocent people on lesser-evil grounds, to prevent wrongful harms, becomes permissible.

Insofar as past failures to prevent threats of wrongful harm may culminate in the threat of harm whose prevention lends normative force to the justification to harm innocent people as a side effect, AHI are precipitated by the failure to protect people's fundamental rights. In these cases, there may therefore exist a direct moral relationship between *ex post* duties to compensate for harms caused to innocent people as a side effect of just AHI and states' *ex ante* duty to protect people's fundamental rights, both within and beyond their own borders.

Consider, for instance, the assumption underlying the 'responsibility to protect,' according to which the duty to protect fundamental human rights is universal, implying a duty to take up the slack when others fail in their obligations. If this is right, states may incur certain rectificatory duties for failing to prevent the humanitarian crisis that justified military

intervention to begin with. The basic thought is that compensatory obligations for concessive harms can arise from failures to prevent, mitigate, or address wrongful threats of harm to innocent people at various stages leading up to an AHI. For example, these might be states' failures to take measures to prevent severe human rights violations in the target party, which can take a variety of different forms; the failure to intervene when doing so was morally required; and, where applicable, the failure to distribute risks adequately *in bello*, where an intervention was carried out but risks of harm were distributed unjustly.[33]

Contrary to what the conventional view of compensation suggests, matters are therefore not as simple as observing that victims would be worse off if the intervention had not occurred. Whether victims of the target party are better off *post bellum* than they would have been in the absence of the intervention is not the only, and certainly not the most relevant question when it comes to assessing claims to compensation. More relevant questions are, first, whether victims would have been better off if the international community, potentially including interveners, had prevented the target party's government from perpetrating or condoning atrocity crimes; and, second, insofar as risks of harm could have been distributed more justly *in bello*, whether victims of the target party would be better off *post bellum* if interveners had distributed risks of harm differently *in bello*.

This backward-looking approach, incidentally, also shows why compensatory obligations for concessive harms can ultimately fall on the international community in general, rather than being limited to interveners. At least insofar as interveners acted all-things-considered permissibly in causing certain harms as a side effect of their military acts, and other states failed to discharge duties to prevent unjust harms, they may incur some of the costs of compensation *post bellum*. We will return to this below.

In sum, by adopting a deontic rather than an empirical conception of counterfactuals, and by conceiving of duties to prevent atrocity crimes as partly rectificatory, we can explain why compensatory obligations for concessive harms arise even in cases in which victims of those harms owe their survival to the acts that caused these harms. The fact that victims of concessive harms would have been worse off in the absence of an intervention is wholly

[33] In fact, insofar as a distinct wrong is committed at each point in time at which an agent fails to rectify an injustice, we might think that the costs agents might be required to bear to prevent unjust harms increase with every instance of failing to do precisely that. For discussion, see Daniel Butt, 'Inheriting Rights to Reparation: Compensatory Justice and the Passage of Time,' *Ethical Perspectives* 20 (2013): 245-269; Bernard R. Boxill, 'A Lockean Argument for Black Reparations,' *Journal of Ethics* 7 (2003): 63-91; George Sher, 'Transgenerational Compensation,' *Philosophy & Public Affairs* 33 (2005): 181-200.

irrelevant for whether they can acquire claims to be compensated. The fact that victims of collateral harms are overall better off as a result of an intervention consequently falls out of the picture. Indeed, this discussion has shown that this consideration should never have entered the picture in the first place.

Let's take stock. I have argued that the benefit objection poses no obstacle to victims' claims to be compensated for collateral harms. Victims may acquire claims to be compensated for collateral harms, even if they owe their survival to the AHI, because the fact that they would have been worse off in the absence of the intervention is morally irrelevant. Compensatory obligations can arise for harms and damage caused to innocent people as a side effect of a just AHI which manifestly benefited victims. Critically, however, there may be cases in which resulting compensatory obligations do not fall on those who permissibly caused concessive harms.

6. Who Should Compensate for Concessive Harms?

I have already indicated that duties to compensate for harms and damage justifiably caused by interveners during an AHI do not necessarily fall on the intervening party, but may fall on the international community in general. The fact that interveners had a lesser-evil justification for harming thus doesn't preclude compensatory obligations in general, but rather entails that it is not interveners themselves on whom resulting compensatory burdens fall.

When agents have a lesser-evil justification for harming as a side effect of preventing a greater wrongful harm, costs of compensation for resulting concessive harms should fall primarily on those responsible for bringing about the threat of that greater wrongful harm. Duties to compensate victims of concessive harms should therefore, in the first instance, fall on those responsible for the threat that generated the lesser-evil justification which permitted transgressing innocent victims' rights to begin with. Morally speaking, those in the target party responsible for threats of atrocity crimes whose prevention generates lesser-evil justifications for harming innocent people bear the primary moral duty to compensate victims - not interveners who caused concessive harms in fighting to halt atrocity crimes, or civilian beneficiaries of the intervention.

In cases in which primary duty-bearers cannot be made to bear the costs of compensation, Saba Bazargan-Forward has suggested that compensatory obligations should

fall on those who committed and benefited from the harmful rights infringements.[34] In his words, 'those who authorize or commit the infringements and who also benefit from those harms will bear that compensatory duty if the unjust aggressor cannot or will not discharge it.'[35] His assumption is that, in cases in which primary duty-bearers aren't available, 'the duty would fall on the party who both committed the rights violation and benefited from doing so.'[36]

But AHI raise special challenges in determining who should bear the costs of compensation for concessive harms. While Bazargan-Forward has in mind cases of national self-defence, in which a just defending state both commits rights infringements and benefits from them, standard arguments for imposing the costs of compensation on rights-infringing beneficiaries don't apply in AHI. For this reason, if those responsible for the unjust harms that necessitated the intervention cannot be made to bear the costs, and if interveners acted all-things-considered permissibly, costs of compensation for harms and damage justifiably caused by interveners during an AHI may fall on the international community in general.[37]

There are two main reasons why standard arguments for imposing compensatory obligations are not applicable to rights-infringing beneficiaries in AHI. First, the moral constellations in AHI are distinct from those of just wars of national self-defence. It is generally the target party's own government that bears the primary responsibility for failing to protect its vulnerable populations from atrocity crimes. In addition, those who commit the harmful rights infringements in question are just interveners, who primarily intend to benefit victims of the target party. This, however, is complicated both by the fact that interveners are the beneficiaries of force protection, which might itself be a cause for rights infringements, and by the possibility that some of the rights interveners infringe belong to intended beneficiaries. Lastly, the primary intended beneficiaries of the intervention are threatened civilians of the target party. In AHI, those who commit rights infringements are thus not necessarily identical with those who benefit from them. Standard arguments for imposing costs of compensation on rights-infringing beneficiaries therefore don't straightforwardly

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[34] In some of these cases, as Bazargan-Forward points out, primary duty-bearers incur duties to compensate those who picked up the slack. See Bazargan-Forward, 'Compensation and Proportionality in War' in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP, 2017), 183, 186-7.

[35] Bazargan-Forward, 'Compensation and Proportionality in War,' 187.

[36] Bazargan-Forward, 'Compensation and Proportionality in War,' 183. He mentions both infringements and violations in this context, but the distinction has no bearing on the views discussed here.

[37] See, for instance, Cécile Fabre, *Cosmopolitan Peace* (OUP, 2016), 152-170.

translate into contexts of AHI.

Second, given Bazargan-Forward's assumption that those who infringe rights, or authorise others to do so, also benefit from these infringements, it's ambiguous which of these considerations is decisive for the incurrence of compensatory obligations in cases, such as AHI, in which these considerations come apart.[38] In a trolley case, in which a significant number of innocent people are trapped on one set of the tracks and one innocent individual is trapped on another set of tracks, and a bystander flips the switch, causing the trolley to injure the one innocent individual to save the greater number, Bazargan-Forward suggests that it is primarily the beneficiaries who owe the innocent victim compensation, rather than the bystander. This is because, as he puts it, '[t]heir status as beneficiaries who authorized the rights infringement suffices to impose upon them duties of compensation toward [the innocent victim].'[39] On this view, beneficiaries can incur compensatory duties for authorising others to commit rights infringements in their (beneficiaries') defence.[40]

Ordinarily, it would be appropriate to focus on those who benefit from rights infringements as potential compensatory duty-bearers.[41] But, as discussed in Chapter 4, the intended beneficiaries of AHI are victims of wrongdoing. Their benefit consists in not suffering harms which they have a right not to suffer. Having, in this sense, 'benefited' from an intervention therefore doesn't provide a valid basis for compensatory obligations. Since the benefit of not suffering wrongful harms is not morally salient, beneficiaries of the prevention of wrongful harms are not appropriate compensatory duty-bearers.

In the aftermath of just AHI, then, compensatory burdens primarily fall neither on morally innocent beneficiaries nor on just interveners. Insofar as beneficiaries are victims of wrongdoing, duties to compensate for harms justifiably inflicted in preventing threats of harm they had a right not to suffer should fall on them only if no other, more morally appropriate duty-bearers can be identified. And, unless interveners committed wrongs *in bello* for which they must be held accountable *post bellum*, it is not necessarily the case that duties to compensate for harms and damage caused as a justified side effect of their military acts must

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38 Bazargan-Forward, 'Compensation and Proportionality in War,' 183.

39 Ibid., 175.

40 Ibid., 186.

41 See Daniel Butt, 'On Benefiting from Injustice,' *Canadian Journal of Philosophy* 37 (2007): 129–52; Christian Barry and Robert Goodin, 'Benefiting from the Wrongdoing of Others,' *Journal of Applied Philosophy* 31 (2014): 363–76; Gerhard Øverland and Bashar Haydar, 'The Normative Implications of Benefiting from Injustice,' *Journal of Applied Philosophy* 31 (2014): 349–62.

fall on them. Rather, as others have suggested, since the intervening party bore the cost of intervening itself, non-intervening parties can incur duties to bear the costs of post-intervention reconstruction.[42] For this reason, we might look to the international community as a whole.

For example, Cécile Fabre has proposed that the international community should contribute to a universal compensation fund for victims of atrocity crimes.[43] Thus, even states that lacked an obligation to carry out an intervention *ad bellum* may incur duties to assist with the demands of the *jus post bellum* in the aftermath.[44] This, we might think, should include costs of compensation for concessive harms caused by just interveners during an AHI.

Members of the international community might also incur remedial obligations as a result of having failed to prevent wrongful harms *ex ante*. As indicated earlier, failures to prevent wrongful harms, which precipitated the crisis necessitating the AHI, may ground *post bellum* duties to address concessive harms caused *in bello*, insofar as these would not have occurred if the intervention had not been necessary to stop grave injustice, which there was a duty to prevent in the first place. The 'greater evil,' whose prevention permits interveners to cause concessive harms on lesser-evil grounds is thus the very reason why the international community incurs compensatory obligations, insofar as there was a general duty to prevent the threats that constitute the 'greater evil' to begin with.

Another view would be that, if primary duty-bearers had intervened, they would not have been permitted to shift as many risks of harm to civilians, and that they should therefore pay compensation because their failure to intervene meant that civilians were permissibly exposed to greater risks of harm by actual interveners. But, as I argued in Chapter 5, it would be unfair to require individual combatants of a morally or causally responsible intervening party to bear greater risks than combatants of a non-responsible intervening party. Similarly, interveners from a non-responsible party that is picking up the slack are not, on these grounds, permitted to shift more risks to civilians *in bello*. What it does mean, however, is that the intervening party incurs fewer compensatory obligations, and that wrongful non-

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[42] Seth Lazar, 'Scepticism About Jus Post Bellum' in In Larry May & Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP, 2012), 204-222; Frowe, *The Ethics of War and Peace* (Routledge, 2011), 244.

[43] See Fabre, *Cosmopolitan Peace*, 152-170.

[44] See also Frowe, *The Ethics of War and Peace* (Routledge, 2011), 246. Capacity to compensate is likely decisive in determining what a fair distribution of compensatory burdens would look like. For discussion, see for instance, Simon Caney, 'Climate change and the duties of the advantaged,' *Critical Review of International Social and Political Philosophy* 13 (2010): 203-228.

interveners must bear a greater share of the compensatory burden *post bellum*. Thus, responsibility for failing to prevent the injustice whose halting necessitated intervention can ground post-intervention rectificatory duties to compensate for harms caused in the process of other parties halting the injustice through intervention.

The final section considers a challenge raised by harms that cannot be compensated.

7. Non-Compensable Concessive Harms

While there are clear moral and legal paths to rectification for harms that are compensable and a result of wrongdoing, this final section addresses cases in which neither feature obtains - that is, cases in which harms are non-compensable but were the result of all-things-considered permissible military acts. Consider, for instance, cases in which morally innocent civilians are killed as an unintended side effect of fighting to halt atrocity criems. My aim is to offer a starting point for how non-compensable concessive harms might find a place in our theory of post-intervention justice.[45]

The challenge is to accommodate harms which (a) cannot be compensated in the strict sense, given the intrinsic value of what was lost, (b) were justified on lesser-evil grounds, but (c) nonetheless demand moral attention given that innocent victims' fundamental rights were transgressed. To this purpose, I propose that we consider an expression of a special type of regret. To distinguish this type of expression from apologies, I'll refer to this as *recognition*. Apologies generally comprise two elements - an expression of regret, and a recognition of wrongdoing. Thus, it's typically assumed that 'for an utterance to count as an apology . . . it must contain an admission or acknowledgement of wrongdoing.'[46]

Victim recognitions differ from apologies in that they do not presuppose wrongdoing or aim to evoke forgiveness. Recognitions thus aren't meant to express that wrongs were committed by agents, but that innocent people's substantive rights not to be harmed were, albeit justifiably, transgressed.[47] The subject of victim recognitions thus isn't the main act that caused harms as a side effect, which was all-things-considered permissible, but the fact that its

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[45] How we draw the line between compensable and non-compensable harms is irrelevant, so long as we grant that such a distinction exists. For discussion of the distinction, see Rodin, 'Justifying Harm,' Goodin, 'Theories of Compensation.'

[46] Roberts, *Injustice and Rectification,* 16. See also Kathleen Gill, 'The Moral Functions of an Apology,' *The Philosophical Forum* XXXI (1) (2000): 11-27.

[47] In light of the discussion in Chapter 5, recognitions acknowledge that victims have been wronged, without implying that interveners acted wrongfully.

victims were made to suffer a harm which they had a right not to suffer.

We might compare what's being acknowledged to what Bernard Williams described as 'agent-regret.'[48] While Williams emphasised the aptness of agent-regret for involuntary acts, such as completely accidentally, and without fault, running over an innocent person, we might apply a similar kind of reasoning to the harmful side effects of acts *justified* on lesser-evil grounds. What's relevant about agent-regret is that agents feel regret for something to which they might be causally connected but for which they are not blameworthy. But, while Williams argued for the aptness of experiencing agent-regret, my point has nothing to do with the sentiment itself, but rather with what its source or origin implies for rectificatory justice, broadly conceived. Thus, while Williams defended agent-regret as deserving of a place in our theory of moral rationality, my suggestion is that it might also resurface in sophisticated theories of rectificatory justice.

For example, in some cases, it might be appropriate to publicly recognise those who were concessively killed - perhaps in the form of public statements, memorials, or other types of declarations, which may also publicly blame those responsible for the threats of harm whose prevention necessitated intervention to begin with. While Roberts states that 'all justice can require in the way of an apology is an acknowledgement of wrongdoing,' the thought here is that justice might also require an acknowledgement of harms permissibly inflicted, insofar as those who suffered them were morally innocent, even if those who caused them are not blameworthy.[49]

But this is only a starting point - and an exploratory one at that. The main idea, in short, is that acts of public recognition would not purport to replace what can't be replaced, but would serve to give expression to the moral remainders that persist when transgressions of innocent people's fundamental rights are permissibly committed, but ultimately and necessarily left uncompensated. Arguably, these remainders deserve a place in the same 'conscience of humanity' to which the Rome Statute appeals in setting out the very atrocity crimes which AHI seek to prevent.

8. Conclusion

In conclusion, compensatory obligations are not owed only to victims of all-things-

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[48] See Bernard Williams, 'Moral Luck,' in *Moral Luck* (CUP, 1981), 20-40, 29.

[49] Roberts, *Injustice and Rectification,* 17.

considered impermissible harms but may, in certain circumstances, also be owed to victims of harms justified on lesser-evil grounds. Compensation may be owed for the harmful side effects of an AHI, even when these harms were permissibly caused on lesser-evil grounds and even if survivors would, in all likelihood, have been worse off in the absence of the intervention. The possibility that victims of collateral harms would have been significantly worse off in the absence of an intervention poses no obstacle to compensatory obligations. The fact that causing collateral harms may have been all-things-considered permissible merely implies that compensatory burdens do not necessarily fall on just interveners, but may need to be distributed otherwise, for instance to those who failed in previous duties to prevent wrongful harms.

What ultimately matters is how prepared we are to defend the significance of individual rights in the face of other, typically consequentialist considerations. This chapter suggested that, in addition to addressing the wrongs of rights violations, a theory of post-intervention justice should seek to accommodate duties to mitigate harms and suffering justifiably caused to innocent people on lesser-evil grounds.

Bringing about a just post-war state of affairs and creating the conditions for sustainable peace thus requires a whole lot more than accounting for rights violations. While enforcing human rights protection may, in certain cases, justify a peremptory and resolute response to atrocity crimes, this comes with weighty obligations to redress the harms and wrongs which even justified AHI may entail. This is why compensatory obligations are not owed merely to victims of wrongful rights violations but can also be owed to victims of all-things-considered permissible harms who manifestly benefited from the intervention.

CONCLUSION

Ten years ago, Jeff McMahan observed that traditional just war theory lacks the tools necessary for determining the just distribution of risk of harm in humanitarian interventions.[1] By looking beyond paradigmatic just war theory and the existing laws of armed conflict, this thesis threw light on some of the considerations that bear on what it would mean to distribute risks justly in cases in which these risks result from the prevention of a greater injustice; intended beneficiaries are already victims of wrongdoing; and none of the potential risk bearers are liable to harm.

We began our enquiry with a conundrum faced by potential interveners - the choice between standing by as atrocity crimes are being committed, or, in trying to prevent them, risk killing innocent people and causing significant destruction. Against this baseline situation, I then examined the considerations to which interveners may, and may not, appeal to justify exposing non-liable civilians to risks of harm. The first two chapters focused on the nature of other-defence. Chapter 2 suggested that duties to rescue others from wrongful threats of harm might take the form of duties to harm in their defence. It explained under what conditions rescuers are required to act on liability-based and lesser-evil justifications for harming, and which considerations might absolve them from a duty to do so. Chapter 3 then offered an in-depth examination of how victims' and third parties' permissions to harm in victims' defence interact, and differ, in light of the requirement to minimise harm.

The middle chapters concerned the principles that govern the just distribution of risks of harm between non-liable individuals. Chapter 4 argued that, contrary to what some philosophers have suggested, standing to benefit from being rescued does not provide a sound moral basis for the permissibility of exposing intended beneficiaries to greater risks of collateral harm. Chapter 5 then considered the permissibility of self-defence by innocent civilians who are exposed to threats of collateral harm. Proposing a case-specific approach, it refined the principles that determine under which conditions these persons may use defensive force against just intervening combatants to avoid being killed as a side effect. Chapter 6

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[1] McMahan, 'The Just Distribution of Harm Between Combatants and Non-Combatants,' *Philosophy & Public Affairs* 38 (2010): 342-79, 379.

argued that, contrary to common assumptions, the supererogatory nature of some interventions does not weaken the constraint against harming as a side effect.

The final two chapters then considered questions of criminalisation and compensation. Chapter 7 probed the moral justifiability of applying the current law of war in AHI. It argued that, although key principles enshrined in international humanitarian law effectively undermine, rather than advance, the law's own humanitarian goals, this is inevitable so long as the broader legal system remains indeterminate with regard to the legality of AHI, and we lack effective international enforcement mechanisms for the prohibition of unjust wars. Chapter 8 then traversed some less frequently visited areas of rectificatory justice. It argued that duties of compensation may arise as a result of harmful military acts that were all-things-considered permissible, even if they manifestly benefited survivors.

Each chapter sought to make a distinct contribution to the philosophical literature pertaining to some of the more obscure, less prominent questions of justice that arise during and after AHI. The analysis revealed that justifications for harming innocent people during an AHI are significantly more limited than we might have assumed in light of the alternative of non-intervention. What we saw is that many considerations to which philosophers and militaries have appealed to justify harms to non-liable people - intending to benefit them (Chapter 4), the lesser evil (Chapter 5), acting in supererogatory fashion (Chapter 6), conforming with international humanitarian law (Chapter 7), and actually benefiting civilians (Chapter 8) - have little justificatory force when these deliberations take place within a broader rectificatory project to prevent and mitigate wrongful threats to innocent people's fundamental rights. The considerations to which interveners can appeal to justify causing 'collateral' harms in particular are constrained in critical ways, but the pool of potential cost-bearers extends far beyond those directly involved in AHI.

Remaining Challenges and Open Questions

The thesis would have been numerous times the length if it could have given space to everything. More challenges have emerged from our analysis, and deserve substantial further philosophical discussion, than I can mention here. One concerns the nature of lesser-evil justifications. The moral conundrum faced by potential interveners, I argued, is a choice between *allowing* atrocity crimes to be committed by others and *doing* harm as a side effect of

fighting to prevent these crimes. This raises a deeper question about the paradox of deontology which our discussion left unresolved. This is how different modes of agency interact with the deontic nature of acts; specifically, how the moral asymmetry between doing and allowing harm interacts with the moral difference between just and unjust harms. All other things being equal, do we have stronger duties to prevent innocent people from being wrongfully harmed by others, or to prevent significant wrongful harms when this will, albeit justifiably, harm innocent people as a side effect? Even taking into account agent-relative constraints and the possibility of a 'consequentialism of rights,' our discussion illustrated that lesser-evil justifications are significantly more complex than typically acknowledged. A related question I left unresolved concerns the extent to which agent-relative prerogatives may bear on proportionality calculations. These questions must wait for another day.

A second question that remains open is what a more comprehensive theory of distributive justice with regard to risks of harm might demand in AHI, in terms of both substantive and procedural considerations. Concerning substantive questions, for example, I did not discuss possibilities of protecting victims beyond preventing attacks by wrongdoers. I did not discuss the possibility of partially occupying territory to create safe areas and states' obligations to open their borders to refugees, to reduce risks of harm in certain areas. A more comprehensive theory, moreover, might have presented an account of what a just authority on fairly distributing the burdens of addressing wrongdoing *post bellum* would look like. Relatedly, while my discussion focused on issues that arise in relation to what some have described as the 'responsibility while protecting,' an additional question is how progress with regard to complying with duties of justice *while* protecting might facilitate the responsibility to rebuild and restructure *post bellum*.

Finally, an issue that would have required one more full-length chapter than the thesis could accommodate is that of post-bellum duties that fall on wrongful *non*-interveners. While I addressed certain rectificatory duties generated by interveners' harmful actions, an additional, full-length chapter would have been required to provide an account explaining what, if any, rectificatory duties are generated by wrongful omissions. Although negative duties not to harm are generally more stringent than positive duties to prevent harms caused by others, violations of positive duties to rescue and not to 'allow' harms may also generate rectificatory obligations. In this light, had space allowed for an additional, full-length chapter,

the thesis would have included a discussion of rectificatory duties for wrongful failures to intervene, and to compensate those that might have picked up the slack.

If the space had been available, a number of additional discussions would have crept into the thesis. They are now the subjects of working papers: One examines the permissibility of harming in other-defence against victims' express wishes; another explains why justified rights infringements generate compensatory obligations; and the third defends compensability as a consideration in wide proportionality calculations. All are available upon request.

The Bigger Picture

This thesis began the task of developing principles for a central but often overlooked challenge in the normative theory of AHI - that of determining what justice demands after all *jus ad bellum* conditions have been met. While my aim was to offer a nuanced reflection of philosophical interest, the thesis' concern was ultimately with real problems faced by real people. While rampant international apathy in the face of egregious wrongdoing has exacerbated humanitarian crises in many parts of the world, the mess caused by the interventions in Iraq and Libya in particular has shattered much of the confidence the 'responsibility to protect' once inspired. This thesis suggested that, for all the work political theorists, legal scholars, and philosophers have done to specify the conditions under which carrying out a military intervention might be permissible, the way in which such operations are conducted is no less critical.

At present, appeals to state sovereignty and self-determination, which are little more than covers for persecution, massacres, and other rights violations; an absurdly biased UN Security Council; and a still nascent international legal system make it conceivably easy to evade the demands imposed by fundamental human rights. Those who continue to suffer the consequences include Assad's victims in Syria, the persecuted and displaced Rohingya in Myanmar, and those living through the ongoing hells in Yemen, the DRC, Darfur, and Xinjiang, to name but a few examples - but the list continues.

While human rights protection appears out of vogue, there are two considerations not to be dismissed. The first is that the world has already seen instances of intervention whose justness was highly questionable, in which other aims, such as combating terrorism, were

decisive, but in which human rights were invoked to defend the use of military force.[2] A clearer vision of what justly conducted interventions demand - and a considerably more comprehensive one than I could provide here - will therefore be indispensable in light of potential abuses of the 'humanitarian' justification.

The second - and this is the one cause for hope - is that the principles underlying contemporary just war thinking have caused ripples beyond academic scholarship. Increased concern for the protection of individual rights has not only found expression in the 'responsibility to protect,' but has also significantly shaped international political discourse, military practice, and weapons technology. In fact, both the *jus in bello* and the *jus post bellum* increasingly focus on individual rights. Individual combatants and their superiors are increasingly the ones who bear specified obligations as the primary moral agents *in bello*, and these obligations have provided the moral and legal grounds for holding individuals accountable for grievous violations of individuals' rights and accordingly classified international crimes *post bellum*.

This is also reflected in the very institutionalisation of individual accountability for the perpetration of atrocity crimes, which the thesis did not address. Until fairly recently, trying individuals for such crimes was a remarkably impromptu matter. The International Military Tribunal at Nuremberg, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone were all ad-hoc creations which did not come into being until after atrocities had been committed. The International Criminal Court, at work since 2002, is the first permanent international judicial body capable of trying individuals for war crimes, crimes against humanity, and genocide. All this is to finally acknowledge that we have already come some way in imbuing the madness of having to respond to atrocity crimes with some method.

In the preface to *Morality*, Bernard Williams warned that '[w]riting about moral philosophy should be a hazardous business' - both because one reveals 'the limitations and inadequacies of one's own perceptions' more plainly than in other areas of philosophy, and because one runs the risk of 'misleading people about matters of importance.'[3] While a DPhil thesis is unlikely to mislead anyone about anything, I take solace in the fact that any limitations and inadequacies exposed herein exist in the service of matters of importance, and

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[2] J.L. Hozgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP, 2003).
[3] Bernard Williams, *Morality: An Introduction to Ethics* (Canto, 1993), xvii.

occurred in the hope of better understanding what it takes to protect the fundamental rights of all who share our unjust world.

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