

## **Distributive Justice in Transitions**

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## Corrective Justice versus Social Justice in the Aftermath of War

Pablo Kalmanovitz\*

### 3.1. Introduction

The right to receive reparations or compensation for harms suffered during war has progressively consolidated as part of the standard repertoire of transitional justice mechanisms. In tandem with this progression, the duty to repair for serious violations of human rights and International Humanitarian Law has gained increasing recognition and force in international law.<sup>1</sup> In an important recent step in this development, the UN General Assembly adopted and proclaimed at the end of 2005 a set of basic principles and guidelines on the “right to a remedy and reparation”, among which were a state obligation to “provide reparation to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law or serious violations of international humanitarian law” (§15).<sup>2</sup> Given that the state can be presumed in general to be responsible for the protection of its citizens’ human rights, the scope of the attribution of omission, and hence of the duty to repair, is in principle very wide. Moreover, the principles and guidelines include a broad right to compensation, which provides for “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”, including in particular lost opportunities

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<sup>1</sup> See generally Dinah Shelton, 1999, *Remedies in International Human Rights Law*, Oxford: Oxford University Press; Steven R. Ratner and Jason S. Abrams, 2001, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. Oxford: Oxford University Press; Pablo De Greiff, 2006, *The Handbook of Reparations*, New York: Oxford University Press.

<sup>2</sup> UN General Assembly Resolution 60/147 of December 2005.

and losses of earning potential (§20). Even though these principles and guidelines are not strictly binding on states, they are indicative of the growing expectations of international and domestic NGOs, of victim organizations, and of civil society in general, that wide programs of reparations or compensation be funded and implemented by the state in the aftermath of armed conflicts.

In this chapter I would like to probe into the justification of rights and duties associated with compensation programs and assess critically standard transitional justice and human rights discourse. I want to examine in particular the normative force of the right to be repaired for harms suffered during war from the standpoint of a liberal conception of corrective justice. This conception, to be developed below in sections 3.2. and 3.3., is part of a broader theory of justice that aims to protect human autonomy and its material bases. The claim I will defend is that if we adhere to this liberal understanding of justice, then in the aftermath of a massively destructive war we should give priority to rights and obligations of *social* justice over those of corrective justice. Paradoxical as it sounds, I want to argue that the more widespread and extensive the destruction caused by a war, the weaker the rights to receive reparations. In the limiting case of a war that affects directly a large majority of the population (for example, Mozambique), rights and obligations of social justice should trump all rights of corrective justice.

Before moving on to my main argument, I would like to raise two preliminary doubts about the normative force of the right to reparation in the aftermath of war, with the aim of giving some intuitive motivation to my theoretical approach. Generally speaking, duties to repair look into the past with the aim to restore, as far as possible, the *status quo ante*. But in war cases, if the *status quo ante bellum* led to a war, why should we want to restore it? Should we not rather avoid the *status quo ante bellum* and invest resources in a more forward-looking way, so that we create conditions that are more likely to sustain peace and future justice? Cases of war fought in order to redistribute resources – for example, land, oil, diamonds – make this plain. In Nicaragua, for example, the Sandinista revolution in the early 1980s expropriated Somoza and his allies, whose assets amounted to 25% of the

country's industrial capacity and 20% of the farmland.<sup>3</sup> Strict observance of the right to reparation would require the devolution of these assets to their original owners. It would be very hard to argue that devolution would be just, or even prudent, since arguably the unequal distribution of wealth contributed to social unrest and ultimately to the war in Nicaragua. If the distribution of goods in a country is highly unequal, corrective rights and obligations seem to lose much of their intuitive appeal, particularly if a skewed distribution can be plausibly seen as a factor contributing to social unrest and violence.

The proper definition of the baseline of corrective justice raises the second doubt. If we are mandated to restore the status quo *ante bellum*, how far back do we need to go?<sup>4</sup> Often, countries that have suffered from war have had a long history of violence and conflict, and it may be impossible to identify uncontroversially a time in history where corrective rights and obligations should be grounded. Illustrations abound, but to name just a few: in post-1990 Eastern Europe, should there be reparations for losses suffered during the First World War, or for anti-Semite expropriations in the *inter bellum* period, or for the losses suffered during the Second World War, or for the massive expropriations at the end of the War (1945-1950), or for later Communist nationalizations (1950-1970)?<sup>5</sup> In East Timor, should reparations be made to those who held property during Portuguese colonial rule and lost it during the Indonesian occupation, or to those who got property during Indonesian occupation and lost it during the wanton and massive destruction of 1999?<sup>6</sup> If reparations had been on the agenda at

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<sup>3</sup> Valpy Fitzgerald and Arturo Grigsby, 2001, "Nicaragua: The Political Economy of Social Reform and Armed Conflict", in *War and Underdevelopment*, Frances Stewart and E. V. K. Fitzgerald (eds.), Oxford: Oxford University Press: 124.

<sup>4</sup> For a thorough treatment of this question, which leads to conclusions similar to my own, see Tyler Cowen, 2006, "How Far Back Should We Go? Why Restitution Should Be Small", in *Retribution and Reparation in the Transition to Democracy*, Jon Elster (ed.), New York: Cambridge University Press.

<sup>5</sup> On the immense complexity of corrective justice in Eastern Europe see generally Istvan S. Pogany, 1997, *Righting Wrongs in Eastern Europe*, Manchester: Manchester University Press. See also chapter four in this volume by Monika Nalepa.

<sup>6</sup> Daniel Fitzpatrick, 2002, *Land Claims in East Timor*, Canberra: Asia Pacific Press.

the end of the Contras War in Nicaragua, in 1990, should it have aimed at conditions during the Somoza period, repairing losses endured during the Sandinista revolution (1979), or should it have aimed at conditions during early Sandinista rule, repairing for losses during the Contras War (1984-1990)? In each of these cases, there is no obvious, uncontroversial focal point on which to anchor reparation claims. Moreover, suggesting any date as a baseline may be divisive politically and potentially conflictive: in each case, questions of legitimacy were at the heart of the complex history of violence, and the selection of a baseline would imply by necessity favoring some claims of reparation over others on controversial grounds.

The argument in this chapter may be added to these two skeptical considerations to make the case for a re-conception of the right to reparation after war. In addition, my argument will offer positive reasons for giving priority to social justice over corrective justice in the aftermath of massively destructive wars. The argument proceeds as follows. Section 3.2. defines more precisely the concepts of corrective and social justice, and section 3.3. sketches summarily the liberal conception of corrective justice that will serve as the basis of my critique of current transitional justice discourse. Section 3.4. makes the critique explicit and discusses some illustrations and limits. Section 3.5. addresses the objection that giving priority to social justice undermines the accountability of wrongdoers after war, and section 3.6. concludes.

### **3.2. Corrective Justice and Social Justice**

The basic principle of *corrective justice* (henceforth CJ) holds that an individual who has been harmed by another's act or omission has a right to be repaired or to receive compensation for the losses thereby incurred.<sup>7</sup> If possible, reparation should provide the harmed individual

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<sup>7</sup> According to standard usage, the term 'reparation' is reserved to cases in which it is possible to completely make up for the loss, for example returning a stolen good or giving an identical version of a destroyed good, and the term 'compensation' is reserved to describe monetary payments made instead of the lost good, for example when the good cannot possibly be replaced or when the harm is immaterial. My argument makes no use of this distinction so I will use the two terms interchangeably.

with a “full and perfect equivalent” of the thing lost.<sup>8</sup> The standard construction of the right to be repaired assigns the corresponding duty to the agent of the harm on grounds of individual responsibility.<sup>9</sup> But in cases of serious violations of human rights and international humanitarian law, the state has been made liable on grounds of responsibility for omission, and has acted as subsidiary compensator when the actual agent of harm was not identified or was unable to compensate.<sup>10</sup> Whatever the source of compensation, one of the core aims of CJ is to *bring people back to where they were* before the harm suffered, not just to make them better off.<sup>11</sup>

A doctrine of CJ must articulate defensible grounds for rights to be repaired and duties to repair. In the following section we will examine one appealing doctrine, but first I would like to make some conceptual remarks relative to corrective rights and duties. First, CJ is *individualistic* in the sense that its rights and obligations arise from interpersonal transactions and individually suffered wrongs or losses. As is often put, CJ creates “agent-relative reasons for action”, that is, reasons that apply only to particular agents in virtue of their particular harmful acts or omissions; causing harm creates a duty to repair in the responsible agent and suffering harm creates a right to be repaired.<sup>12</sup> Second, CJ is *backward-looking* in the sense that it addresses and seeks to remedy wrongful acts or omissions that occurred in the past. In consequence, any pursuit of CJ must necessarily involve *some* investigation of past wrongful acts, perhaps not under the strictures of tort law but at least in the form of a more loosely defined truth-elucidation commission with the power to make compensation awards. Third, CJ necessarily involves a *transfer of assets* to a wronged party. Purely symbolic

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<sup>8</sup> The phrase comes from the U.S. Supreme Court landmark case *Monongahela Navigation v. U.S.*, 148 U.S. 312 (1893), cited in Robert Goodin, 1991, “Theories of Compensation”, in *Liability and Responsibility: Essays in Law and Morals*, R. G. Frey and Christopher W. Morris (eds.), Cambridge: Cambridge University Press: 262.

<sup>9</sup> See generally Jules L. Coleman, 2002, *Risks and Wrongs*, Oxford: Oxford University Press.

<sup>10</sup> Ratner and Abrams, *supra* n. 1.

<sup>11</sup> Goodin, *supra* n. 8: 276-77.

<sup>12</sup> Coleman, *supra* n. 9: 311-15.

reparations, for example public apologies or acts of atonement, commemorative days, or the creation of museums, are not part of corrective justice as here understood. Finally, note that CJ is *different from retributive justice*. The aim of CJ is not to punish the agent who caused harm by forcing him to pay reparations (as in punitive damages) but mainly to bring back the sufferer of harm to the position he was before the harm. It may be argued that it is equally important for corrective justice that the agent responsible for the harm be the source of the reparation, regardless of whether he is blameful or not, but, for reasons that will be clear in section 3.5., my analysis will focus largely on the right of victims of harm.

I shall understand *social justice* (henceforth SJ) as a set of principles that allow us to identify certain distributions of goods and opportunities in society as preferable to or more justified than others. The concept of SJ on which I rely is broadly Rawlsian, but I will simplify much and concentrate on two principles, neglecting a great deal of the subtlety and theoretical complexity of Rawls and Rawlsian commentators. The first principle is that all citizens must have access to certain basic goods that are necessary for their subsistence and free agency, and that securing such access is always an urgent task of government. In Rawls's theory these basic goods appear as "primary social goods", and are characterized as goods that "every rational man is presumed to want" because they are means for advancing one's ends, "whatever these ends may be". The bundle of Rawlsian primary social goods consists in certain basic political and civil rights and liberties, together with the guarantees of the rule of law, sufficient income and wealth, and security in the holding of private property.<sup>13</sup> The free use of these goods allows each member of society to bring his own self-chosen plans to fruition, given reasonably favorable circumstances. The specific contents of the bundle of basic goods may vary across societies according to historical circumstances, but it includes minimally provi-

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<sup>13</sup> See John Rawls, 1999, *A Theory of Justice*, Rev. ed. Cambridge: Belknap Press of Harvard University Press: xiv–xvi, 53–56, 242; John Rawls, 2001, *Justice as Fairness: A Restatement*, Cambridge: Harvard University Press: 168–77.



sion of basic health, sufficient nutrition and education, and basic material goods.<sup>14</sup>

The second principle of social justice I will refer to is that of equal opportunity. According to this principle, equal access to primary social goods, to wealth and positions of influence in society, should be secured for all, so that “in all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed”.<sup>15</sup> This principle reinforces the egalitarian vocation of SJ.

In contrast to corrective justice, SJ thus conceived is not individualistic but *institutional*, in the sense that it creates not agent-relative but general reasons for action, central among which is that of upholding and supporting just social institutions with enough power to generate society-wide incentives and to direct and transfer resources justly. Secondly, SJ is not backward-looking but *present- and forward-looking*. Its driving concerns are current and future access to primary goods, not past endowments or rectification of historical wrongs. Finally, SJ is driven by the maximization of the access to primary goods, to which all people are assumed to be *equally entitled*. Unlike CJ, which prescribes material transfers in proportion to an *ex ante* loss or harm, SJ is egalitarian and in principle independent of considerations of merit or desert.<sup>16</sup>

Now, clearly CJ and SJ will often pull in opposite directions. While CJ is meant to protect rich and poor alike, for SJ the unequal

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<sup>14</sup> Rawls, 1999, *supra* n. 13: 244-45; Rawls, 2001, *supra* n. 13: 172. Amartya Sen and Martha Nussbaum’s capability approach can provide a helpful alternative framework for articulating principles of social and corrective justice, and to assess their force in the aftermath of armed conflict. In their approach, the task of government is not to provide or secure some primary goods but rather to enable and sustain certain basic capabilities for functioning among the members of society. The definition of these modes of functioning is partly up for each society to decide, partly a natural matter. This is not the approach I will follow here, but for commentary and applications to cases of transitional justice see David A. Crocker, 2008, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy*, New York: Cambridge University Press.

<sup>15</sup> Rawls, 1999, *supra* n. 13: 63.

<sup>16</sup> *Id.*, 88-89.

enjoyment of primary goods is a *prima facie* reason to redistribute. This tension between CJ and SJ is not irreconcilable, but it suggests the distinction of four social groups in the aftermath of war. Let us say that someone has SJ-priority when his enjoyment of primary goods is below a certain minimum threshold, and that he is CJ-entitled when he has suffered a harm that validates a reparation claim.<sup>17</sup> We then have four possible groups, which may be represented in the following table:

	<i>SJ-priority</i>	<i>No SJ-priority</i>
<i>CJ-entitled</i>	Poor victims (I)	Well-off victims (II)
<i>Not CJ-entitled</i>	Poor (III)	Well-off (IV)

**Table 1:** Types of justice entitlements.

Given the often massive and widespread harmful impact of wars, one may expect to have in their aftermath a significant number of people in groups (I) and (II). Wars also often cause widespread poverty, so even those who were not harmed directly may be poor. Moreover, wars often take place in already poor countries, and hence one may expect having a significant number of people who were poor also before the war (group III).

With the aid of this four-fold classification, I can now articulate more precisely my central claim. I will argue in section 3.4. that, in cases of massively destructive wars, groups (I) and (III) should have priority in the post-war allocation of resources, and that the only valid grounds for giving priority to (I) over (III) should be present- or forward-looking. This claim follows naturally from what may be called a Rawlsian construction of the relationship between CJ and SJ, to which I now turn.

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<sup>17</sup> The terms “minimum threshold” is left deliberately vague to allow for variations among different cases. As noted above, however, basic health and nutrition and basic education should be included in the minimum. For Rawls’s take on the minimum threshold, see *id.*, 244-45.

### **3.3. Liberalism and Corrective Justice**

I can only give a rough sketch of the theoretical construction of CJ and SJ that I will use for my argument. I hope to say enough to give a sense of its plausibility and appeal, but for a full defense the sources cited should be consulted. The construction has two main steps: one is based on the value of individual autonomy and the other on the definition of a sphere of legitimate expectations. This two-fold construction interlocks the rights and obligations of CJ with broader principles of SJ.

We stipulated above that CJ seeks not merely to make people better off but also to put them in the very same situation they were before suffering the harm. So why should people have a right to return to how they were before suffering some particular harm? A powerful answer is that the interest in protecting individual autonomy justifies the right. Harms of the kind for which we think reparations are due are unwelcome and disruptive, if not always altogether unexpected, and their reparation aims to restore, as far as possible, the original course of the harmed agent's life. Restoring that original course of life, in turn, is a way of securing and sustaining the plans and projects that were upset by the harm. In the interest of protecting the plans and projects which arise in the exercise of individual autonomy, it is desirable to make the agent of harm, or some other suitable agent, liable to pay for reestablishing these projects as completely, fast, and surely as possible. Robert Goodin unpacks this justification into three steps:

1. People reasonably rely upon a settled state of affairs persisting (or, anyway, not being interrupted in the ways against which compensation protects them) when framing their life plans.
2. That people should be able to plan their lives is morally desirable.
3. Compensation, if sufficiently swift, full, and certain, would restore the conditions that people were relying

upon when framing their plans, and so allow them to carry on with their plans with minimal interruption.<sup>18</sup>

CJ, then, aims to secure the background conditions against which the exercise of individual autonomy takes place. If people are to go on as they intended before suffering the harm, then they should be compensated as completely as possible for that harm. Moreover, delays in the payment of compensation can create damaging interruptions to ongoing projects and should therefore be avoided. Certainty in the payment of compensation amounts to increased security in the completion of one's plans, which is intrinsically valuable. On this view of CJ, then, "what is sacrosanct is not the preexisting distribution but rather preexisting expectations and the plans and projects that people have built around them".<sup>19</sup> The right to compensation protects our legitimate expectation that our projects will come to fruition if we are reasonably cautious and invested in them.

This conception of CJ leaves open two crucial questions: which plans, projects, or expectations are worth preserving, and from which kinds of harm should these expectations be protected? To answer them, we need an account of the proper sphere of individual freedom, and of the sort of harmful disruptions that merit corrective action. Some disruptions may be seen as intrinsic to the activity in which they arise, and for this reason make no third-party liable to compensate – someone who loses in sports has no claim to compensation; moreover, some expectations should not be upheld – a thief may expect someone riding public transportation to leave his belongings unattended at some point, but this is merely a probabilistic, not a legitimate expectation. I want to suggest, in a Rawlsian vein, that CJ serves to preserve the integrity of the rights and procedures defined by the just background institutions of society, within which the exercise of autonomy takes place. These rights and procedures importantly include the preservation of life,

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<sup>18</sup> Robert Goodin, 1991, "Compensation and Redistribution", in *Compensatory Justice*, John William Chapman (ed.), *Nomos 33*. New York: New York University Press: 152.

<sup>19</sup> *Id.*, 157.

health, and bodily integrity, and the protection of property rights and of entitlements derived from valid contracts.

Rawls himself said very little explicitly about CJ, or “compensatory justice” as he called it.<sup>20</sup> However, we can get to CJ through the role of the legal system in his theory of justice. According to Rawls, the background institutions of society are created and defined in the law. When legal rules are just and fairly applied, which is to say that the institutions they create are just, they “constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled”.<sup>21</sup> We may conceive of CJ as having the task of identifying which rightful objections to unfulfilled expectations can give rise to a duty in others to pay reparations. Legitimate expectations in turn are defined by the system of rights, liberties, and procedures that are defined and adjudicated by background legal institutions, and which include in particular entitlements to primary goods, security in private property, and conditions of equal opportunity. A scheme of compensation is meant to uphold and secure effectively the enjoyment of these goods and opportunities, so that if their enjoyment is harmfully impaired, compensation is due.

Thus seen, the connection between CJ and SJ becomes fairly straightforward: CJ is a necessary component of the procedural setup of SJ.<sup>22</sup> Duties to compensate are triggered by illegitimate “moves” (that is, harms) in the practice of social cooperation, as defined by the general principles of justice and as implemented by their guardian institutions, procedures, and organs, the legal system being central among them. Compensation serves the two-fold purpose of eliminating, as far as possible, the losses incurred by faulty moves, and of motivating people to take responsibility and observe rules and procedures in the future. While justice aims generally to secure basic rights, liber-

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<sup>20</sup> Rawls, 1999, *supra* n. 13: 309. Compare Rawls’s remarks on punishment in 1999, *supra* n. 13: 210-13.

<sup>21</sup> *Id.*, 207.

<sup>22</sup> I am in fact simplifying much. For a thorough treatment of this connection, to which I am indebted, see Stephen R. Perry, 2000, “On the Relationship Between Corrective and Distributive Justice”, in *Oxford Essays in Jurisprudence: Fourth Series*, Jeremy Horder (ed.), Oxford: Oxford University Press.

ties, and resources for as large an exercise of freedom as would be compatible with everyone else's exercise, CJ is meant to protect the boundaries of this exercise in each particular agent. SJ and CJ are then *complementary* in the sense that both support, at different levels, the exercise of people's autonomy. While the general principles of justice apply to the basic institutions of society and define, among other things, the liberties and goods that should be generally secured and protected, CJ governs directly the interaction among individuals and aims to secure the enjoyment of liberties and goods via the stipulation of remedial action for harmful transactions.<sup>23</sup>

### 3.4. The Circumstances of War

The liberal account of the relationship between CJ and SJ operates under some implicit empirical assumptions. CJ can protect the value of individual autonomy by restoring the *status quo ante* only if most things, the harm aside, run on an orderly, predictable, and regular course. Indeed, the exercise of individual freedom and autonomy, which forms the basis of CJ, presupposes a sufficiently large degree of predictability and stability in the world. There is stability and predictability when the basic legal and political institutions of society effectively govern transactions and also, more broadly, the system of social cooperation and economic production. Among other things, the sources of stability and predictability are a well-functioning legal system, which runs in keeping with the principles of the rule of law, well-functioning and predictable governmental institutions, and well-regulated and functional markets.

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<sup>23</sup> A key Rawlsian concept here is that of an "institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions". Rawls says that, "[i]f this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made", John Rawls, 1993, *Political Liberalism*, New York: Columbia University Press: 268-69. This is the reason why CJ may operate independently of SJ, and apply equally to the rich and the poor. The egalitarian work of redistributing resources is not CJ's but SJ's task.

Now, these background conditions for the proper exercise of autonomy are often missing in war and its aftermath. There is, of course, variation in the way wars impact social life and the background conditions for the exercise of freedom and autonomy in particular. But it is often the case that wars upset these background conditions to a sufficient degree that we may reasonably doubt the validity or force of rights and obligations of CJ. This, at any rate, is what I would like to argue.

Consider the following ideal-typical picture of the circumstances of massively destructive wars. Real-life wars may approach this type to greater or lesser degrees, and how much they approach it may be quantified and measured to some extent. In massively destructive wars:

- i. *Harm is the rule rather than the exception.* Massively destructive wars cause harm directly on over half of the population of a country. Forms of harm include loss of life or bodily integrity, losses in social capital (social networks are damaged or destroyed), and material losses in immovable property, movable goods, etc.
- ii. There is *generalized uncertainty*. There is no reliable source of information available to make plans or create well-founded expectations during war. This uncertainty can affect both the micro-world of one's private activities and the macro-world of institutional decision-making. As Tilman Brück has put it in a study on the economic effects of the massively destructive civil war in Mozambique, “[w]ar uncertainty operates at both micro- and macro-levels of the economy. Capital, for instance, may be exposed to war destruction and dislocation at the micro level, through theft and violence (micro-war uncertainty) and, at the macro-level, through the abuse of state power in a partisan way (macro-war uncertainty). In addition, macro war uncertainty includes the use of the government fiscal machinery and economic regulation for war-related purposes, which inevitably reduces transaction efficiency”.<sup>24</sup>

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<sup>24</sup> Tilman Brück, 2001, “Mozambique: The Economic Effects of the War”, in *War and Underdevelopment*, Frances Stewart and E. V. K. Fitzgerald (eds.), Oxford: Oxford University Press: 61.

- iii. State *institutions collapse* and basic state functions unravel. Crucially for my argument, the state is no longer able to secure property rights, for example because it has no capacity to adjudicate rights, as in Rwanda, where 95% of lawyers and judges were killed, imprisoned, or exiled,<sup>25</sup> or because the cadastral registry is destroyed, as in East Timor, where the cadastral registry was a deliberate target of pro-Indonesian militia in 1999.<sup>26</sup>
- iv. *Productive sectors collapse*. Economic infrastructure is destroyed; there is shortage of skilled labor; social capital is lost by massive population displacement.<sup>27</sup> There is a nationwide breakdown of markets and reduced ability in firms to operate efficiently and with sufficient levels of certainty.

Massively destructive wars thus cause losses so extensive and widespread that it becomes impossible to reestablish the conditions of the *status quo ante bellum*, in particular the *ante bellum* plans and projects of particular individuals. A story may convey the relevant differences between just conditions in peacetime and in the aftermath of war. Take an individual whose house was seriously damaged by fire. If the fire occurred in peacetime, it is likely that his house was the only one in the street to burn, and that restoring the house would allow him to recover his previous way of life. After the house is repaired he may, for example, bike again every morning to his office, which is conveniently close; visit his friends, who live nearby and with whom he shares the enjoyment of this particular area of the city; he can again shop and visit museums and parks in the city, catch up with acquaintances he has made throughout the years he has lived in the neighborhood, etc.

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<sup>25</sup> At the end of the genocide, the Ministry of Justice had seven attorneys and their staff to define the situation of 115,000 Rwandans held in prison; see Shelton, *supra* n. 1: 320.

<sup>26</sup> Daniel Fitzpatrick, 2002, "Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor", *New Issues in Refugee Research*, Working Paper No. 58: 8.

<sup>27</sup> As it has happened in Colombia, see Ana María Ibáñez Londoño, 2008, *El Desplazamiento Forzoso En Colombia: Un Camino Sin Retorno a La Pobreza*, Bogotá: Universidad de los Andes.



Now imagine that his house burned in war during a bomb raid. Along with his house, a majority of the houses in the street is likely to have burned too. During the war, most shops in the area closed because there were severe shortages of goods and clients, and some suffered severe physical damage. His office, moreover, had to close due to the economy's shrinking. Now, even if his house were repaired after the war, that would not come close to restoring his earlier plans and projects: his social network has dissolved, the places he used to have around have been damaged or destroyed, and his office no longer runs. Destruction in war has been so massive that token reparations would no longer suffice to restore individual plans and projects, and the cost of repairing everything necessary for reestablishing these plans and projects are impossible to meet.

The point of this story is that *corrective rights and duties make sense only if harmful disruptions are the exception rather than the rule*. The more widespread and extensive war destruction is, and the longer the war lasts, the harder to recover past plan and projects, and so the weaker the rights of CJ. If most things go on as usual, in predictable and stable patterns, then there is hope of recovering *ex ante* plans and projects through compensatory measures. But if a large number of things have been disrupted more or less simultaneously, then CJ loses force, and other interests and needs should consequently gain priority. After war, those in direst need must be given top consideration, but aside from these, it seems that rights and principles of SJ should trump corrective claims. Those who are below the minimum threshold of primary goods at the end of the war should have priority access to public resources. This would seem to apply equally to those who were put below the threshold directly by the war and to those who were not, because excluding the latter on the sole basis of the particular history of their condition seems arbitrary (I qualify this point below). The following rule of thumb for the allocation of resources in the aftermath of massively destructive wars may be seen as a corollary of this argument: *for people below a suitable SJ threshold, SJ-priority trumps competing CJ-entitlements; reparation is due to those above the SJ threshold only if no one is below that threshold*.

While the aim of CJ is to uphold the value of autonomy, it seems that in the aftermath of massively destructive wars, securing that value

is done best not through CJ but through SJ. When transitional authorities (re)establish effective background social institutions, they redefine and make stable the sphere for the exercise of autonomy, and once this is accomplished to a sufficient degree – and only then – CJ procedures can again resume. In order to reestablish legitimate expectations, it appears more important to define titles quickly and equitably than accurately or in proportion to earlier endowments, and so, instead of establishing conditions for resuming earlier ways of living, resources should be invested in securing fair conditions for a new life. This involves in particular reallocating fairly the burdens of loss suffered during war, which tend to affect civilians unevenly. A progressive reconstruction tax can be instrumental in this task, which should at any rate preserve the equal opportunity of all to reconstruct and resume their lives as they see fit after war.<sup>28</sup>

In the following section I will discuss an important objection to this argument, but first I would like to clarify the argument's overall nature and scope. A first important point to note is that its practical relevance may be limited due to the fact that in war often those who are most harmed also have highest SJ-priority, and vice versa. To use the language of Table 1, the more the groups of the “poor” (III) and the “poor victims” (I) overlap at the end of war, and the more the group “well-off victims” (II) shrinks, the less practical relevance my argument has.<sup>29</sup> Nonetheless, in war there can often be groups with SJ-priority which were not directly affected by armed actions, and hence

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<sup>28</sup> I discuss in depth the question of fair allocation of burdens in Pablo Kalmanovitz. Forthcoming. “Sharing Burdens after War: A Lockean Approach”, *Journal of Political Philosophy*.

<sup>29</sup> This is the case in East Timor, judging from the following passage from the final report of the East Timorese Commission for Reception, Truth and Reconciliation (CAVR): “All East Timorese people have been touched and victimized by the conflict in one way or another. However, in the course of its contact with many communities the Commission became acutely aware of those among us who still suffer daily from the consequences of the conflict and whose children will inherit the disadvantages their parents face as a consequence of their victimization. They include those who live in extreme poverty, are disabled, or, who – due to misunderstandings – are shunned or discriminated against by their communities [...] We must acknowledge this reality and lend a hand to those who are most vulnerable” (§12.1).

have no CJ-entitlements; more rarely, there can also be people who suffered directly from the war but stay relatively well-off. For these groups, the argument has significant practical implications.

A second point to note is that there is a good reason for giving priority to members of the group of poor victims (I) over that of the poor (III), namely, rehabilitation. Often people harmed during war may need special assistance to develop the same level of functioning and capacity of enjoyment as those unharmed who are below the SJ threshold. In the interest of allowing them to be as functional as those who were not crippled by the war, special investment in rehabilitation programs is necessary.<sup>30</sup> This rehabilitation is often classed together with reparations and compensation as part of a CJ package, but it is really distinct: its purpose is to maximize the capacity to use and enjoy primary goods in the present and future, and therefore its justification belongs more to SJ than to CJ. Reaching a given level of use and enjoyment of primary goods may require higher public investment in the case of victims of harm during war than in the case of unharmed but materially deprived groups.

A third important point to note is that the argument for the priority of SJ is not just about logistical feasibility. An argument from logistical feasibility has often been made to the effect that, even though corrective rights and duties are valid and have legitimate standing at the end of war, post-war institutions are often so dysfunctional and underfunded that these rights and duties cannot possibly be adjudicated and enforced.<sup>31</sup> Ideally, they should be adjudicated and enforced, but it is unrealistic to hope that this can be done fully. My argument submits that the reasons to hope that CJ should be adjudicated and enforced in

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<sup>30</sup> Crippling harm need not be physical. In the Colombian case, internally displaced people are forced to move from rural to urban settings, but their skills are not attractive in urban labor markets, and for this reason they can be seen as *economically crippled* by the armed conflict (see Barberi and Garay's contribution to this volume, and more extensively Ibáñez Londoño, *supra* n. 27). As a consequence, displaced populations would need either additional investment in training in new skills, if they stay in cities, or public investment in relocation in rural settings. Ideally, the choices between these options should be theirs.

<sup>31</sup> For a forceful version of the argument, see Pablo De Greiff, 2006, "Justice and Reparations", in De Greiff, *supra* n. 1.

the aftermath of massively destructive wars are weak and defeasible. In particular, I would qualify a suggestion sometimes made in tandem with the argument from logistical impossibility, that instead of full CJ a diluted version of CJ should be undertaken. Since the logistical and material costs of full CJ are prohibitively high, this suggestion goes, one should instead try more limited CJ programs, which for example avoid the strictures of tort law and do not try to reflect past losses accurately or even proportionally but follow administrative procedures and award lump sums. From my argument it follows that such programs of diluted CJ should also be subject to a SJ test, so that if the program's beneficiaries do not have SJ-priority and there are non-beneficiaries who have SJ-priority, then the program should not be undertaken before the latter have guaranteed access to sufficient primary goods. SJ-priority trumps CJ-entitlements also in diluted CJ programs.

A last important point is that there can be room for reasonable disagreement about whether an actual war is massively destructive or not. A continuum of cases may be defined, from peacetime in a well-ordered society on one end to massively destructive wars on the other. World War II in the Eastern and Central European Countries (ECEC) was clearly a massively destructive war, and this history illustrates, to some extent, the potential of a war aftermath to create conditions for extensive redistributions of wealth. Indeed, as Istvan Pogany has shown, in the aftermath of World War II the accumulated dislocation and poverty of two world wars had radicalized peasants and landless laborers in the ECEC. He notes how this radicalized peasantry, who “represented a genuine and spontaneous product of the dislocatory effects of war, and an inevitable reaction to the gross economic inequalities and chronic rural poverty characteristic of the inter-war period”, had also some urban supporters.<sup>32</sup> These very particular historical circumstances created the conditions for an unprecedented program of land reform, to which the massive – and arguably unjust – expulsion of ethnic Germans from the area contributed a great deal. Poland implemented the most far-reaching measures. Some 9.3 million hectares

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<sup>32</sup> Istvan S. Pogany, 1997, *Righting Wrongs in Eastern Europe, Europe in Change*, Manchester: Manchester University Press: 41.

were taken into public ownership, of which 6 million were redistributed to peasants. By 1949, 5 million families had received land that formerly belonged to ethnic Germans. Interestingly from a distributive justice perspective, there was a cap on holdings of 100 hectares per family, of which no more than 50 could be cultivated. The cap was enforced, large estates were confiscated, which led to the elimination of the class of landowning gentry “at a stroke”.<sup>33</sup>

More recent cases of massively destructive wars have not undertaken redistributive programs on the scale of the ECEC in the aftermath of World War II. The civil war in Mozambique (1981-1992) caused massive destruction of economic infrastructure, particularly in the agricultural sector. Nearly half of all irrigation systems, dams, and seed production centers were destroyed. About 40% of the main categories of immobile capital were totally destroyed.<sup>34</sup> Of the total population, 25% was internally displaced, 10% became refugees, and 20% of those who stayed had their livelihood destroyed; the life of at least half of the total population was thus radically transformed by the war.<sup>35</sup> Notwithstanding the size of destruction, reconstruction in Mozambique has focused mainly on rebuilding pre-war, even colonial institutions and infrastructure, even though superior alternatives (for example, incorporating egalitarian provisos, criteria of sustainable development, and more efficient production systems) are possible. In Brück’s opinion, with which I fully concur, “it is not so much the total war-related loss of capital, but its unequal destruction and the increasing inequality of distribution which may prevent sustainable and equitable post-war economic development. Income inequality in Mozambique could thus be seen as one of the most enduring legacies of the war”.<sup>36</sup> This is regrettable, particularly given the known positive impact of endowing peasants with enough land.<sup>37</sup> A large portion of the population in Mozambique depends wholly on subsistence farming,

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<sup>33</sup> *Id.*, 46-47. See also Nalepa’s contribution to this volume.

<sup>34</sup> Brück, *supra* n. 25: 65.

<sup>35</sup> *Id.*, 67.

<sup>36</sup> *Id.*, 87.

<sup>37</sup> See Berry’s contribution to this volume.

with econometric studies estimating that a 10% increase in cultivated land would lead to almost 3% increase in consumption per capita.<sup>38</sup>

In clear-cut cases, the argument for the priority of SJ has most force, but there is also a grey area of cases in which its applicability may elicit reasonable disagreement. In a country, some circumscribed areas may have suffered acute levels of destruction, while other areas remain under relatively normal and stable conditions. One might consider suspending claims of CJ and giving central place to SJ in those affected areas; alternatively, one may consider diluted programs of CJ, which would be justified both by the practical impossibility of applying CJ fully and by SJ reasons that weaken CJ reasons. The Colombian case provides an illustration. It has been estimated that in Colombia the total number of hectares seized or abandoned in the context of the armed conflict up to year 2008 amounts to 10.8% of the national total cultivated area.<sup>39</sup> Even though far lower than 50%, these seizure and losses have been concentrated on some regions of the country, particularly on the eastern and northern colonization periphery, where *de facto* changes in tenancy may indeed involve a majority of the land.<sup>40</sup> If the effect of the massive losses in these areas amounts to the dissolution of earlier social structures and ways of living – in the likes of Mozambique – then it follows that claims of recovery would lose some of their force. These areas might provide resources for an ambitious land reform program, which could benefit both former landholders in that region and landless farmers from other regions. If the quality of land is good enough to allow landless farmers to put their skills into productive work, a policy of relocation would be just.

It should be noted, however, that this goes nowhere to justify or favor the legalization of the emerging big landowning elites in these regions. On the contrary, my argument is first and foremost about social justice and equal opportunity, which is to say that only egalitarian redistributive programs, not the forceful accumulation of armed power

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<sup>38</sup> Carlos Bozzoli and Tilman Brück, 2009, “Agriculture, Poverty, and Post-war Reconstruction: Micro-Level Evidence from Northern Mozambique”, *Journal of Peace Research* 46, 3: 388.

<sup>39</sup> See Barberi and Garay’s contribution to this volume.

<sup>40</sup> See Ibañez’s contribution to this volume.

and resources by a few, can defeat corrective rights and duties. If there is an exclusive choice in this case between upholding the CJ claims of former smallholders and validating the titles of new big landowning elites who have appropriated land by force or buying at deflated prices, then clearly the former is to be preferred *on SJ grounds*. Nonetheless, a superior option would be a land reform that addressed the situation of both peasants displaced from these areas and of peasants from other areas who are below the minimum threshold of SJ.<sup>41</sup>

### 3.5. The Problem of Accountability Deficit

The Colombian case serves to illustrate the objection I would like to consider in this section. Does the argument for giving priority to SJ over CJ in the aftermath of massively destructive wars undermine accountability for wrongdoing during war? Current transitional justice and international legal discourse tends to emphasize accountability as a justificatory basis for CJ. So far, I have said virtually nothing about *duties* of corrective justice, that is, about the justice of making those who are responsible for the harm liable to pay compensations. Here it is crucial to note that my main argument is not about what should be done to wrongdoers on account of their wrongful deeds but rather about how to allocate resources in the aftermath of war. I have considered in particular the force of CJ entitlements relative to those from SJ priority. My focus on this aspect of CJ is partly motivated by the fact that current discourses about compensation tend to leave out the fact that resources for post-war reconstruction are scarce, and that funds for compensation have to compete with funds for providing social minima. Once we take the latter into account, it may be easier to see how the right to compensation may be defeated in cases of competing poverty. Nonetheless, since the supply side of corrective justice is also important, something must be said about it.

Wrongdoers should indeed be made liable to pay for the wrongful losses they have caused. In transitional cases, however, this liability is complicated by prudential and practical considerations. The pruden-

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<sup>41</sup> This option is superior from the standpoint of justice but it may be suboptimal from the standpoint of political feasibility. For an elaboration of this contrast, see Uprimny and Saffon's contribution to this volume.

tial consideration is familiar in the context of retributive justice: the threat of forcing large compensatory payments, like that of imprisonment, may undermine the incentives of belligerents to enter peace negotiations and stop the violence.<sup>42</sup> As with retributive justice, the good of making wrongdoers fully accountable in corrective justice may have to be sacrificed in some cases for the sake of future peace, a sacrifice which is in effect a choice of the lesser evil. The practical consideration is that even if wrongdoers were effectively made liable for the losses they caused during war, destruction can often be so extensive that the assets of wrongdoers are insufficient to cover fully the costs of reconstruction. Consequently, the question of how to distribute the burdens of loss may remain standing even after perpetrators have been made fully liable in their private assets.<sup>43</sup> Moreover, it is not obvious that the perpetrators' compensation payments should be invested in restoring the pre-war lives of their direct victims. The argument for the priority of SJ suggests a different approach: all compensatory payments should be pooled in a collective reconstruction fund, which should be used according to broader principles of justice. In addition to compensatory payments, this fund can receive international humanitarian assistance funds and local reconstruction taxes, and should be used in more forward-looking ways.<sup>44</sup>

A third response to the objection from accountability is that corrective justice is not the only way to deliver it. Other mechanisms of transitional justice can contribute to making perpetrators accountable, foremost of which is of course punishment, but also truth-elucidation

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<sup>42</sup> For discussion of the transitional dilemmas of retributive justice, see, e.g., Luc Huyse, 1995, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law and Social Inquiry* 20, 1; Jack Snyder and Leslie Vinjamuri, 2003, "Trials and Errors", *International Security* 28, 3; Jon Elster, 2004, *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press: 188-98.

<sup>43</sup> Garay and Barberi estimate that the full compensation of internally displaced people in Colombia may amount to over 10% of GDP.

<sup>44</sup> For further discussion of the reconstruction fund, see Kalmanovitz, *supra* n. 29.



procedures, professional or political debarment, etc.<sup>45</sup> Moreover, if the point of accountability is to hold wrongdoers responsible for their deeds in order to restore civil trust, solidarity, and human dignity, then corrective justice is unlikely to be sufficient, and it may not be necessary. In the aftermath of war, it is no doubt crucial to vindicate the moral standing of victims, and to create new public normative understandings of the value of autonomy and the dignity of human agency, but in this enterprise social justice may be as important as corrective justice. In Rawls's theory, having "a sense of one's own worth" figures as a basic primary good, which the background institutions of society must constantly strive to protect and secure.<sup>46</sup> The expectation that one-shot compensation payments can accomplish profound normative transformations in society seems illusory; investment in social justice may in fact be a more enduring and robust bet.

All this said, there may be lingering issues regarding lack of accountability via CJ. One important issue is the "problem of demoralization". Will the public be convinced that the perpetrators of wrongdoing did not profit easily from their wrongs if we fail to undertake accountability measures via CJ?<sup>47</sup> This question refers ultimately to the perceived legitimacy of giving priority to SJ at the expense of CJ in the aftermath of a war. If giving priority to SJ ends up weakening the liability of perpetrators to return their war booty and pay for their wrongs, then there is indeed a problem of legitimacy. Upholding in the law the duties of CJ and giving victims the right to recover their own losses may be the best way of making wrongdoers liable, because it creates incentives in the victims to coordinate their actions and litigate against wrongdoers, in domestic and international legal fora. Two things may be said in response. The first is that organizations of victims may be an efficient way of making wrongdoers liable, but they are not the only way. Civil society conceived more broadly and the state

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<sup>45</sup> On accountability via truth commissions, see generally Mark Freeman, 2006, *Truth Commissions and Procedural Fairness*, 1st ed. New York: Cambridge University Press.

<sup>46</sup> Rawls, 1999, *supra* n. 13: 79.

<sup>47</sup> Bruce A. Ackerman, 1992, *The Future of Liberal Revolution*, New Haven: Yale University Press: 76.

judicial organs can (and should) take action too. The second is that an ambitious program of land reform or of social justice broadly conceived may alleviate the problem of legitimacy. By undertaking the effective provision of social minima, post-war authorities may come to be seen as legitimate with time.<sup>48</sup> The key question here seems to be whether the public perception that wrongdoers can get away with their wrongs will delegitimize transitional authorities to a degree that undermines their ability to effectively give priority to SJ measures in the aftermath of war. As Elster has put it in a related context, if transitional authorities have enough legitimacy, “people will be motivated to endure the costs of transition and the extensive trial-and-error procedures that may be required before a viable implementation is found”.<sup>49</sup> Whether or not the public perception of lack of accountability after war would undermine this motivation is an important open question in each particular case.

### 3.6. Conclusion

In this chapter my discussion of reparations and compensations focused exclusively on the theory of justice, and in particular in the theoretical relationship between corrective and social justice. This focus neglected alternative arguments that may favor certain reparation programs in the aftermath of war. One important argument for reparation of land is that land can create *special attachments* that should be upheld and protected. These attachments are most plausible in the case of groups whose traditions, history, or religion involve strong ties to a particular geographical area. Unlike movable goods, land can virtually always be returned, so the question of reparation, as opposed to mone-

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<sup>48</sup> In Nicaragua, the Sandinista policy of giving land to peasants, especially in the Northeast region, was motivated by the interest of stopping recruitment to the Contras. It has been argued that the unfulfilled expectation that the Sandinista government would give them land fueled grievances and motivated their involvement in the Contras insurgency. See Fitzgerald and Grigsby, *supra* n. 3: 127.

<sup>49</sup> Jon Elster, 1988, “Arguments for Constitutional Choice: Reflections on the Transition to Socialism”, in *Constitutionalism and Democracy*, Jon Elster and Rune Slagstad (eds.), Cambridge: Cambridge University Press, Maison des Sciences de l’Homme: 319-20.

tary compensation, can virtually always be raised.<sup>50</sup> In cases of ancestral ties to land, one may need to weigh the collective life of the affected groups with that of current residents of the land, if there are any. While a strong traditional attachment may weigh heavily on the balance, it cannot override completely the claims of those who have lived for years in a particular area.<sup>51</sup> This may be seen as a situation of competing claims of autonomy, which may have to be resolved by division or sharing. At any rate, it is indeed a case in which claims of land reparation may be strong enough to trump the application of SJ principles.

Also excluded from my analysis were arguments from economic development and efficiency. This omission, of course, in no way implies that efficiency is not important, or that it may not in some cases justify compensatory payments in ways that are immune to the argument for the priority of SJ. This further discussion, however, must be left for another occasion.

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<sup>50</sup> I say virtually because land mines or otherwise causing irreparable environmental damage during war may leave land beyond repair. Note, moreover, that access to land and the productivity of land may be affected destruction of infrastructure during war, e.g. roads, railway systems, water supply and irrigation systems, livestock, etc.

<sup>51</sup> See Elster, *supra* n. 43: 172.

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## **Distributive Justice in Transitions**

Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and Maria Paula Saffon (editors)

The chapters of this book explore, from different disciplinary perspectives, the relationship between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts. They specifically discuss the role of land reform as an instrument of these goals, and examine how the balance between different perspectives has been attempted (or not) in selected cases of internal armed conflicts, and how it should be attempted in principle. Although most chapters closely examine the Colombian case, some provide a comparative perspective that includes countries in Latin America, Africa, and Eastern Europe, while others examine some of the more general, theoretical issues involved.

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