

Forgotten Victims of Military Humanitarian Intervention: A Case for the Principle of Reparation?

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Abstract The purpose of this article is briefly to present a case for the principle of reparation as a new *jus in bello* principle for just humanitarian intervention. The article is divided into three sections. In “[Restorative Justice and Civilian Protection](#)”, I investigate the idea of restorative justice in order to consider whether or not it can complement the shortcomings of the just war tradition in civilian protection. In “[The Legal Framework on Reparation: Its Scope and Limitations](#)”, I examine the scope of the law of armed conflict on reparatory measures in order to consider whether and how ideas of and measures for restorative justice might be incorporated in the *jus in bello* framework for military humanitarian intervention. In “[The Issue of Civilian Victims: A Case for Reparation](#)”, I explore the implications of reparatory measures for victims in order to suggest that these measures are not only beneficial to civilian victims but also imperative to be taken by the interveners if they undertake military intervention within the *jus in bello* framework and claim its moral justifiability.

Keywords Just war · Civilian protection · Ethics of war · Noncombatant immunity · Restorative justice · *Jus in bello*

Introduction

Contemporary armed conflicts almost inevitably cause civilian casualties. The issue of civilian protection in armed conflict is primarily discussed within the *jus in bello* (justice in war) framework, which is one of the two sets of principles for the just war tradition. This framework is a useful tool for considering the moral justifiability of particular means and methods of military operations, and indeed its ideas are reflected in the law of armed conflict. When just war thinking is applied to military intervention on humanitarian grounds, however, it does not seem to work as a useful ethical guideline

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for the protection of civilians. The reason for this is that consideration of the issue of civilian victims who are incidentally killed or maimed as a result of the legitimate use of military force by the interveners is lacking in the current *jus in bello* framework. This raises a concern about the core idea of just humanitarian intervention: that is, the protection of civilians. The lack of considerations for this kind of civilian victim seems to indicate the limitation of the *jus in bello* framework of contemporary just war thinking when it is applied to military humanitarian intervention, primarily because the right of civilian victims to restorative justice is not envisaged in its framework.

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Restorative Justice and Civilian Protection

In the just war tradition, ethical issues concerning civilian protection are discussed in the *jus in bello* framework, in which the principles of distinction and proportionality determine the moral justifiability of a particular attack. The principle of distinction stipulates that noncombatants should not be *directly* attacked, and the principle of proportionality dictates that incidental damages to civilians and civilian objects must be proportionate to the military advantages anticipated if and when attacks against military targets are considered or actually undertaken (Johnson 1999, p. 36). These principles specify that needless harm and destruction should be avoided in order to achieve justified ends.

What is lacking in the *jus in bello* framework is, however, a policy to deal with civilian victims who are harmed in military operations. A fundamental limitation of the just war tradition in civilian protection is that reparatory measures for those civilian victims who are harmed in a military attack justified by the principle of proportionality are not taken into account. This lack of accountability for civilian victims is exemplified by the fact that the just war tradition does not make any general or specific recommendations for a post-attack situation in which the loss of life of civilians, injury to civilians and/or damage to civilian property are caused as a result of legitimate attacks. The lack of accountability for harm caused to civilian victims in legitimate attacks gives rise to an issue of concern, which is that the just war tradition denies the rights of civilian victims to restorative justice.

Civilians who are harmed in military interventions may be considered to be victims of injustice regardless of whether or not the military intervention is undertaken on humanitarian grounds. Indeed, if the issue of civilian victims is not

addressed, then the idea of *just* military humanitarian intervention becomes oxymoronic, because an act (e.g. an attack against a military target) that can be justified by the *jus in bello* principles has the potential incidentally to cause injustice (i.e. harm) to civilians who are supposed to be being protected. From the perspective of these civilian victims who suffer, causing harm to them seems to violate the idea of justice in terms of fairness, equality, desert and rights. They may rightly claim: ‘it is unfair and unequal that harm is inflicted upon us, not others; we do not deserve to be harmed; and causing harm to us violates our basic human rights despite the fact that the attack is lawful and legitimate. It is we who suffer, not others; but why?’

From this point of view, it seems reasonable to assume that if the interveners are responsible for causing harm to civilians irrespective of whether harm is caused as a result of direct or indirect attack, then the intervening government is obligated to discharge its responsibility to the victims. If this is the case, then the issue to be explored here is the idea of restorative justice to civilian victims in military operations. Margaret Walker argues that ‘restorative justice keeps the victim’s plight central, orienting the process and outcome toward genuine repairs of harm victims have suffered (Walker 2006, p. 217). The purpose of and method for restorative justice are, according to Walker, ‘repairing relations through acknowledging the needs of victims and requiring accountability of those responsible for harm, through truth-telling, apology, and restitution or compensation’ (Walker 2006, p. 15). The concept of restorative justice requires that if the interveners are responsible for causing harm to civilians, then they are obligated to take restorative measures. In the next section, let us examine the provisions of the law of armed conflict on reparation in order to consider whether and how the limitations of the just war tradition can be ameliorated.

The Legal Framework on Reparation: Its Scope and Limitations

The law of armed conflict is useful as a source for investigating the idea of restorative justice concerning civilian protection because it codifies state responsibility for unlawful acts, and sets out that a state is obliged to take reparatory/compensatory measures for any loss or damage caused. The responsibility of warring parties for reparation to the victims is codified in Article 91 of Additional Protocol I to the Geneva Convention of 1949. It reads:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This rule establishes that a state responsible for violations of the law of armed conflict is required to make full reparation for the loss or injury caused ‘as a norm of customary international law applicable in both international and non-international armed conflicts’ (Hencharts and Doswald-Beck 2005, p. 583). State responsibility for reparation to the victims of armed conflicts who are injured or killed by an unlawful act is also confirmed in by-laws: for example, in *The Manual of the Law of Armed Conflict*, the issue of compensation is stated in the following way:

It is a principle of international law that a state responsible for an internationally wrongful act is obliged to make full reparation for the injury caused by that act.

This principle extends to the law of armed conflict in that a state is responsible for violations of the law committed by persons forming part of its armed forces and, if the case demands, is liable to pay compensation. (UK MoD 2004, p. 418)

Although the law of armed conflict might seem to support the idea of restorative justice, its limitation with regard to civilian protection is that no provision is made for reparation for any loss of civilian life or damage to civilian property incidentally caused as a result of legitimate attacks against military targets. In other words, in the legal framework, parties to the conflict are exempt from responsibility for and therefore reparation to civilian victims for their loss or damage as long as such loss or damage is incidentally caused and proportionate to the concrete and specific military advantage anticipated in such *lawful* attacks. This line of reasoning, by extension, leads to the conclusion that a degree of loss and damage to civilians is legally permissible, and that intervening parties are thus exempt from legal obligations for reparation for the loss and damage caused; therefore the civilian victims in these *legitimate* attacks do not have the opportunity to claim justice, with the exception of occasional official apologies and condolences. In a nutshell, the limitation of the just war tradition on reparation to civilian victims is that the provisions of the law of armed conflict, which the interveners are required strictly to observe, do not envisage reparation to civilian victims who are harmed in attacks justified by the principle of proportionality. In this regard, the current framework of military humanitarian intervention is therefore inadequate.

The Issue of Civilian Victims: A Case for Reparation

One promising way to solve the problem of providing justice for civilian victims who are killed or maimed in lawful attacks is to introduce the idea of restorative justice within the *jus in bello* framework in order to eliminate or at least to mitigate any injustice which the interveners inflict upon civilians during military operations. Walker suggests four potential means to achieve restorative justice, namely: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition (Walker 2006, p. 11n8). These four elements are interrelated, and all four are necessary conditions to restore justice. Walker cites the Committee for Truth and Reconciliation in post-Apartheid South Africa and the National Commission for Reception, Truth and Reconciliation in East Timor as two successful examples of restorative justice using these methods (Walker 2006, pp. 14–15).

When considering these four restorative measures as potential means to eliminate or mitigate injustice which civilian victims have suffered, it must be noted that the implementation of restorative measures is usually assumed to be undertaken in a post-conflict phase when the conflict has already ended and the recovery process has functioned (see also, Mani 2002, pp. 173–178; Kutz 2004; Kasher and Yadlin 2005, p. 27). In the same vein, in the just war tradition, restorative measures are envisaged in the framework of *jus post bellum* (Orend 2001, 2006; Walzer 2004). However, it must also be noted that reparatory measures or, more importantly perhaps, immediate measures to help and support civilian victims, are often more urgently required *during* the armed conflict. In this regard, restorative measures need

somehow to be incorporated within the *jus in bello* framework despite the possibility that they can at best work as ad hoc measures during an armed conflict.

If and when reparatory measures are undertaken during an armed conflict, such measures may be restricted, in terms of practicality, to reparation and limited satisfaction. The reason for this is that two of the other measures which Walker lists, namely restitution and rehabilitation, would face many difficulties for implementation in terms of opportunity cost and resources available in a combat zone. Take the restitution of a house destroyed by an airstrike. Rebuilding a house while hostilities continue does not seem very promising (there is a likelihood that the house may be damaged again by future airstrikes, and the means and methods to procure human and material resources for construction also raise a number of issues and problems). Take rehabilitation then. Medical rehabilitation for civilian victims needs constant and continuous treatment and care as well as appropriate facilities, which require a large amount of human and material resources not always available while military operations continue. The most realistic and customarily practised measures seem to be financial reparation or compensation and an official apology from the intervening government for damages which the intervening force has caused to civilians. Walker argues that when exercised in combination, apology and compensation ‘enhance significantly the perceived fairness’ (Walker 2006, p. 216), and this combination seems a useful way to achieve ad hoc restorative justice during the conflict.

Taking the above-discussed elements into consideration, a new operational principle for just military intervention, which I propose may be called the principle of reparation (or compensation), might stipulate that reparatory measures must be taken for civilian victims who are harmed in attacks justified by the principle of proportionality. On the principle of compensation, Kasher and Yadlin argue that the ‘democratic state has...the moral obligation to eventually appropriately compensate people when reversible damages have been caused to them’ (Kasher and Yadlin 2005, p. 27). The principle of reparation to civilian victims appears to play a crucial role in the *jus in bello* framework when we recognise the fact that military intervention seldom perfectly satisfies the just war criteria, and that a state or group of states is sometimes forced to resort to the use of military force on humanitarian grounds, which almost inevitably causes civilian casualties. This act of injustice—causing harm to civilians—frequently occurs in military operations, as has been evidenced in many armed conflicts. Within the *jus in bello* framework, such an act of injustice against civilians might not automatically negate the overall justice of military humanitarian intervention. In this regard, Fernando Tesón is correct to argue that ‘humanitarian intervention understood as a morally constrained form of help to others accepts that sometimes causing harm to innocent persons is justified’ (Tesón 2006, pp. 103–104). However, harm to civilian victims caused in legitimate attacks remains unsolved unless and until it is redressed and somehow compensated. From the viewpoint of civilian victims, it matters very little whether they are harmed in direct or indirect attacks undertaken by the intervening force, although there is a crucial difference between the two types of attack in terms of the law of armed conflict as well as in the just war tradition. The most important issue for civilian victims is that they are victims of military intervention and therefore entitled to reclaim justice which they deserve. In this sense, some measure to compensate civilian victims for loss and damage inflicted in military operations is not only

desirable but also required so that the intervening force can claim that they have upheld just conduct in war. Indeed such measures seem necessary, not only to strengthen the claim to justice in military humanitarian intervention and the justification for the use of military force within the *jus in bello* framework, but also, perhaps more importantly, for the sake of civilian victims and their families, relatives and friends who suffer from unjust acts being inflicted upon them.

There may be several problems and difficulties when exercising reparation: we have to consider, for example, what criteria are applied to determine the eligibility and amount for compensation. One of the most troublesome problems is how to value civilian loss or damage. Christopher Kutz seems correct to argue that 'compensating victims at a generally devalued rate for the particular loss they suffered is ethically awkward' (Kutz 2004, p. 292). However, these difficulties and problems do not remove the obligation of the interveners to take reparatory measures to civilian victims. Indeed, these considerations have to be taken into account regardless of difficulties in terms of theory and practice, so that the principle cannot be used as an excuse for conducting military operations that are likely to cause a number of civilian casualties. When reparatory measures are undertaken, what must be avoided is the possibility that reparation could be abused as a mere excuse for harming civilians, and that political and military leaders could exploit it as a means for political and military purposes. To offer a comparison, parking tickets are taken by some offenders to be a type of fee for an allowable behaviour, rather than a fine imposed upon illegal activity. Political and military leaders, thus, must be reminded that the exercise of reparation does not automatically justify harming civilians while it nevertheless gives them the opportunity to claim justification for the use of military force, by showing their respect for justice for civilian victims.

We should also consider the converse argument that from the viewpoint of the interveners, the principle of reparation might raise a serious concern about its practical impact on military conduct. Once introduced, would this principle inhibit the interveners from carrying out lawful attacks or prevent them from executing their necessary duties and unduly damage military effectiveness? An extreme difficulty in answering this kind of question is that the principle has not been established as having a formal status in the law of armed conflict or the *jus in bello* framework, let alone exercised; we cannot pre-judge its implications for military conduct in the operational theatre. Nevertheless, it must be remembered that the principle of reparation is not primarily envisaged as a restrictive principle such as those of distinction or of proportionality, but as a remedial one, which would be expected to complement the shortcoming of the existing *jus in bello* framework as a guideline for just conduct. In other words, the principle of reparation would act not only as a last safety net for civilian victims to reclaim justice but also as a measure to reinforce a claim to legitimacy of attacks and exemplify responsible conduct by the interveners. If so understood and implemented, the principle would be unlikely to prevent the intervening forces from carrying out legitimate attacks necessary from a military point of view. Indeed it would potentially act as a morale-booster for armed forces as responsible interveners.

In fact, the principle of reparation, if properly applied, could potentially be beneficial not only to civilian victims but also to policy-makers and military practitioners who want the use of force to be considered justifiable. The principle

contributes to states' claims to justice in military intervention in such a way that an ethically controversial act could at least be mitigated by reparatory measures, if not completely vindicated. Furthermore, state practice on reparation to civilian victims could mitigate charges against soldiers who had caused harm to civilians.

Conclusion

When military force is used, regardless of its actual or professed purposes, civilian casualties are almost always inevitable. Military intervention cannot avoid causing any harm to civilians, regardless of the intention of the interveners. However, there may be extreme situations in which the use of military force is considered to be the one and only practical way to prevent, stop or mitigate the plight of civilians. If military intervention is undertaken on humanitarian grounds, then the interveners need to take into account reparation to civilian victims who were incidentally harmed in legitimate attacks. Contemporary just war thinking could claim its legitimacy as a political, military and ethical doctrine for humanitarian intervention if the principle of reparation were incorporated in its *jus in bello* framework for the use of military force. Unless and until some reparatory measures for the civilian victims of military operations are introduced into its framework, the idea of *just* military humanitarian intervention can only be as an oxymoron.

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