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“Do Humanitarian Interventions Generate Postwar Obligations?”

According to Michael Walzer, a state that militarily intervenes in another state for humanitarian purposes incurs a post-conflict obligation to help rebuild the troubled state.¹ Even though the intervening state incurs great expense and much risk while intervening, its reward is simply the obligation to do more. As Walzer puts it, “the work of the virtuous is never finished.”²

In a similar vein, Minako Smart and Shunzo Majima claim that intervening states must compensate any civilians whom the intervening forces have collaterally harmed – even though the harm was the unintended consequence of trying to prevent atrocities.³

Against Walzer, Smart, and Majima, I argue that states choosing to engage in supererogatory acts of humanitarian intervention do not incur postwar obligations to rebuild, and almost never incur obligations to pay restitution to collaterally harmed parties. I argue for my position by appealing to the justifications the intervening state has for most of the harm in causes.

Regarding the intended beneficiaries, it’s reasonable to assume they’d consent to the risks of the intervention – so long as the risks posed by the aggressing parties outweighs the risks posed by the intervening forces. If so, then the intervening forces have a presumed consent justification for collaterally harming some of the intended beneficiaries – and generally consent justifications block compensatory obligations toward the harmed parties.

Regarding harm to the aggressing parties, these agents have made themselves liable to be harmed because they’re egregiously violating the rights of innocent others. If so, then harming these people who are liable to be harmed does not wrong them, and thus does not generate an obligation to compensate.

I conclude that since the intervening forces have justification for inflicting harm on the intended beneficiaries as well as the aggressing parties, the intervening state does not incur post-conflict obligations toward either group. The exception, however, is when intervening forces collaterally harm innocent bystanders. Here, the intervening forces permissibly infringe the rights of innocent parties by way of lesser evil justification – and rights infringements generally ground an obligation to compensate. However, I conclude by arguing that this compensatory obligation should first shift to the aggressor parties, and then to the intended beneficiaries. Only in cases where neither of these groups is able to pay does the compensatory obligation fall to the intervening state.

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¹ Michael Walzer, “The Triumph of Just War Theory (And the Dangers of Success),” in *Arguing About War* (New Haven: Yale University Press, 2004), 20-21.

² Ibid.

³ Minako Smart and Shunzo Majima, “The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions: Beyond the Just War Tradition.” *International Journal of Applied Philosophy*, 26:2 (2012), 185.

Do Humanitarian Interventions Generate Postwar Obligations?

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Introduction

Suppose a state militarily intervenes into another state for the humanitarian purpose of stopping massive human rights violations such as genocide. At intervention's end, does the intervening state incur any specific post-conflict obligations? Several just war theorists answer "yes" to this question. According to Michael Walzer, states that militarily intervene in other states for humanitarian purposes incur post-conflict obligations to rebuild the troubled state.¹ Even though the intervening state incurs great expense and risks the lives of its troops to halt egregious human rights violations, its reward is simply the obligation to do even more. As Walzer puts it, "The forces that intervened did well, but they are not finished," adding "the work of the virtuous is never finished."²

In a similar vein, Minako Smart and Shunzo Majima argue that intervening states must compensate any civilians whom the intervening forces have collaterally harmed – even though the harm was the unintended consequence of trying to prevent atrocities.³ According to Smart and Majima, failing to compensate the harmed civilians would impose an unfair cost on them.

We can refer to the general position advocated by Walzer, Smart, and Majima as the "strict liability approach" to post-intervention obligation. In short, their

claim is that states that voluntarily choose to intervene in the affairs of other states for humanitarian purposes *necessarily* incur post-conflict obligations.

In this paper, I'll argue against the strict liability approach to post-intervention obligation. Instead, my claim is that states that voluntarily choose to engage in the supererogatory act of humanitarian intervention do not necessarily incur post-conflict obligations to rebuild, reconstruct, or pay restitution. I will, however, argue that intervening states *sometimes* incur an obligation to compensate collaterally harmed civilians.

Before proceeding, I should note several assumptions that will be made throughout the paper. To begin, I will evaluate the topic through the lens of a reductivist account of war, meaning that the moral principles governing war reduce to the same principles governing individual defense. Accordingly, I will sometimes appeal to domestic defense scenarios to help illuminate how we should think about the relations between parties during larger conflicts.

Second, I will assume the intervening state is conducting a justified humanitarian intervention to halt serious rights violations, and that the persecuted parties (i.e., the intended beneficiaries) welcome the intervention.

Finally, I will assume that the intervening state was neither morally nor causally responsible for the emergency situation to which the intervening state responded, and also that there exists no special relationship between the intervening state and the state intervened against.

The paper will proceed as follows. I'll begin by presenting and evaluating the strict liability views put forward by Walzer, Smart, and Majima. Next, I'll show why the strict liability approach is mistaken. I'll finish by presenting the normative grounds for why intervening states might sometimes incur post-conflict obligations to compensate collaterally harmed civilians.

Walzer's Strict Liability Approach

Walzer's position on post-intervention obligation begins with the broad claim that one can make a moral mess of a humanitarian intervention if one fails "to help the people you have rescued rebuild their lives."⁴ But in what way, one might wonder, are interveners required to rebuild the lives of the people they've saved? According to Walzer, at conflict's end the intervening state is obligated to "provide law and order, food and shelter, schools and jobs."⁵ And once these necessary "provisions" are provided, Walzer further claims "the state responsible for the invasion and the rescue will also be responsible for the political and social reconstruction of the invaded country."⁶

Needless to say, Walzer envisions an extensive array of post-conflict obligations falling to the intervening state. But on what grounds does a state that voluntarily puts its troops in harm's way to help others incur such extensive obligations? In answering this question, Walzer begins simply by noting that "doing the right thing brings with it the obligation to do many more right things," adding that "there is no escaping the dire consequences of good behavior."⁷ As far as explanations go, these observations do little toward grounding the intervening

state's supposed obligations because they explain nothing about the moral connection between intervention and obligation.

Elsewhere, however, Walzer gives a slightly more principled explanation: "Once we have acted in ways that have significant negative consequences for other people (even if there are also positive consequences), we cannot just walk away."⁸ The problem with this proposal is the principle is obviously much too vague – people routinely act in ways that negatively affect other people without generating obligations toward the negatively affected parties.

So in short, I think Walzer has failed to provide compelling grounds for why intervening states that voluntarily stop human rights violations should be strictly liable for rebuilding the victims' lives. Moreover, I think Walzer's position faces two additional problems.

First, notice that Walzer's claim goes against what we generally think in analogous domestic situations. Imagine, for example, a scenario in which an aggressor unjustly attacks a parent and child. Suppose the aggressor kills the parent, and then a bystander successfully intervenes to protect the child – all the while risking significant harm to himself. Few people would think the bystander is now obligated to rebuild the child's life, perhaps by adopting and raising him, putting the child through college, etc. Instead, most of us likely think the bystander did enough by intervening, and that any further obligations to care for the child's welfare should shift to the community writ large. So too, one might think, intervening states have done enough by incurring the expense of intervention and

exposing their troops to harm's way. If additional aid is needed, such as providing schools and jobs, or engaging in political and social rehabilitation, such obligations should shift to the international community writ large. The intervening state, in other words, has already done more than its fair share.

The second problem with Walzer's proposed strict liability approach is that it would only deter well-intentioned states from intervening if they know they'll incur the crushing long-term obligations for which Walzer advocates. In other words, Walzer's position provides a strong disincentive against helping people in need. To highlight this point, return to the domestic analogy. How many bystanders would intervene to protect an innocent child knowing that by intervening they'd have to adopt and raise the child? Instead, we should encourage bystanders to intervene to protect the innocent by minimizing their expected obligations at conflict's end.

Smart and Majima's Strict Liability Approach

The position Smart & Majima put forward differs from Walzer's in two ways. First, whereas Walzer argues that an intervening state incurs obligations toward the targeted state as a whole, Smart & Majima argue that an intervening state incurs an obligation to personally compensate collaterally harmed individuals. At no point do they claim that an intervening state owes the target political community anything. Second, unlike Walzer's brief assertions, Smart & Majima offer a nuanced argument for their position.

According to Smart and Majima, states that militarily intervene into other states for humanitarian purposes incur a special moral obligation to repair the

collateral harm they cause to civilians in the targeted state.⁹ The required reparative obligation might take the form of an acknowledgement, an apology, as well as monetary compensation.¹⁰

Smart & Majima offer two normative groundings for their position, which they refer to as “restorative” and “corrective” justice. It’s not clear what role each form of justice plays – seemingly, each would be sufficient to ground the post-conflict obligations they envision, with the conjunction of the two apparently overdetermining the case.

Restorative justice, they argue, is the requirement that agents restore the human relationships in post-conflict societies. Because the imperiled civilians came to rely upon the intervening forces to protect their welfare, restorative justice requires the humanitarian forces to restore their relationship with the victims whom they’ve collaterally harmed.¹¹ According to Smart and Majima, the intervening troops have “betrayed” the expectations of the imperiled civilians who thought they’d be militarily protected rather than harmed.¹²

In reply, it’s worth noting that Smart and Majima might be right to claim that the intervening state owes an acknowledgment, and perhaps even an apology, to the civilians collaterally harmed during the military operation. Even when an agent intends to benefit another, perhaps she should somehow acknowledge when things don’t turn out well for the intended beneficiaries. The problem concerning claims about compensation, however, are more problematic given that the intended

beneficiaries likely would have consented to the risk of being collaterally harmed. We'll return to this issue shortly.

In addition to restorative justice, Smart and Majima also argue that corrective justice grounds the intervening state's reparative obligations. The aim of corrective justice is to correct for the consequences of risky activity to ensure that any eventuating harms are not unfairly imposed on innocent others.¹³ Applying the corrective justice concept to the case of humanitarian intervention, the claim is that intervening forces should not unilaterally impose risks upon the innocent civilians in the targeted state. Should those risks eventuate in harms to innocent people, then as a matter of corrective justice the intervening state should compensate the civilians accordingly.

According to Smart and Majima, strict liability is the right approach in these situations because of the asymmetric relation between the intervening troops and their intended beneficiaries. After all, they point out, the intervening state voluntarily chose to employ military force in a way that posed a threat to innocent civilians, while the latter posed no threat to the intervening forces.¹⁴ Smart and Majima liken this situation to the relation between motorists and pedestrians. By voluntarily driving down the street, motorists impose an asymmetric threat of harm to pedestrians in a way that the pedestrians do not toward the motorists. So long as the pedestrians exercise due care, the authors claim that motorists should be strictly liable for any ensuing harms they cause to pedestrians. Smart and Majima then extend this analogical reasoning:

To the extent that the injurers (intervening forces) are more likely to contribute to the possibility of accident than the victims (civilians), and it is impractical and undesirable to restrict the daily activity of the civilians, simple application of this model to the context of civilian casualties suggests that strict liability should be adopted.¹⁵

By this line of reasoning, the intervening state's reparatory obligation follows from the risks and subsequent harms that the intervening forces impose on the hapless civilians. Although the civilians can do little to avoid the threat of harm, "they have to pay the full cost in most cases of civilian casualties caused by legitimate attacks."¹⁶ Thus, Smart and Majima conclude, as a matter of fairness the intervening state should be obligated to compensate the collaterally harmed civilians – even if the intended beneficiary population as a whole has benefitted from the intervention.¹⁷

In response to Smart's and Majima's corrective justice argument for strict liability, one might begin by pointing out that the motorist analogy seems particularly inapt and misleading. The motorist presumably drives her car to benefit herself, all the while imposing an asymmetric risk on nearby pedestrians. But this typical relation between motorists and pedestrians is fundamentally different in kind from the relation between intervening troops and imperiled civilians in the humanitarian intervention situation. In the latter case, the intervening forces act not in their own interests, *but instead act in the interests of the civilians who need protecting*. In other words, the intervening forces impose a risk

on the imperiled citizens for the latter's own good – and presumably in their best interests.

The problem with Smart and Majima's corrective justice argument is that it fails to distinguish among the types of civilians who are collaterally harmed during the intervention and, importantly, the different justifications that intervening troops have for causing harm. This last point leads us to the broader argument against the strict liability approach to post-intervention obligation for which Walzer, Smart, and Majima advocate.

Why the Strict Liability Approach is Mistaken

The problem with holding intervening states strictly liable either for rebuilding the lives of those saved or for requiring compensation for those harmed during intervention is that this approach fails to consider why the intervening troops imposed harm. Instead, in order to determine whether an intervening state incurs post-intervention obligations, one must consider whether the intervening troops were justified in inflicting the harm they did.

As Jeff McMahan argues, there are three basic forms of justification for harming others: presumed consent justification, liability justification, and lesser evil justification.¹⁸ In a humanitarian situation, intervening forces will almost always harm in accordance with the first two types of justification, and sometimes with the last.

In the case of consent justification, the claim is that if an imperiled party consents to the risk of being harmed, then an intervening agent who harms that

party while trying to aid her does not wrong the harmed party – thus incurring no reparatory obligation towards her. Of course, in most cases of other-defense, the intervening agent will rarely be able to receive consent from the imperiled party. Instead, as McMahan explains, “the presumption is that the potential victim would welcome defensive assistance and thus that if self-defense is permissible, so is third-party defense.”¹⁹ So for example, if an aggressor is unjustly attacking victim, a bystander who intervenes and subsequently incidentally harms the victim while trying to defend her does not wrong the victim because presumably she would have consented to the risk – even if she doesn’t expressly do so. Accordingly, even though the intervening bystander harms victim, he does not incur a reparatory obligation toward her given her presumed consent.

The principle of presumed consent applies to all cases of other-defense, whether involving a single individual in a domestic case or a large number of people in a humanitarian scenario such as genocide. The one caveat, however, is that in order to be justified in presuming consent on the victims’ behalf, the risk the intervening agents pose to the victims must be less than the risk posed by the aggressors toward the victims. As Gerhard Overland explains, “If the to-be-liberated civilians have reason to accept a particular risk of being harmed and/or being killed in order to be liberated from their oppressive regime, intervention not exceeding that risk would not wrong them.”²⁰ According to Overland, the risks of intervention still serve the victims’ interests “when the alternative is an even more precarious status quo.”²¹

To highlight this point with an historical example, it's reasonable to believe that in Rwanda in 1994 the Tutsis would have consented to the risks of intervention rather than be left to the machetes of the Hutu had any state decided to intervene on the Tutsis' behalf. Supposing that some forces had intervened and incidentally killed or harmed some Tutsis in the process, the intervening state would not incur any reparative obligations toward the harmed civilians given the Tutsis' presumed consent to those risks.

We can also look to the Rwandan genocide example to understand the liability justification for harming. According to the liability justification for harming, agents (through their actions) can forfeit their right to not be harmed. In doing so, agents make themselves liable to be harmed, which means that harming them does not wrong them.²² So the claim here would be that the Hutus – through their unjust aggression of the Tutsi population – made themselves liable to be harmed in order to protect the innocent Tutsis who did nothing to make themselves liable to be harmed by the Hutu. Accordingly, if a state had chosen to intervene in Rwanda and in the process harmed Hutu aggressors, the intervening forces would not have wronged the Hutu and thus would not have incurred any reparatory obligations toward them (assuming the interveners used necessary and proportionate force).

So against the strict liability approach, simply causing harm is not sufficient to generate obligations toward the harmed parties if one harmed them with justification. Holding intervening states strictly liable for the harm their troops cause fails to appreciate that the intervening forces had a presumed consent justification for collaterally harming the intended beneficiary civilians and a liability

justification for intentionally harming the aggressing forces in the targeted state. Accordingly, an intervening state wouldn't incur reparatory obligations toward either of the two parties. There remains, however, a group of people who might be collaterally harmed with neither a liability nor a consent justification – and these harmed parties potentially might be owed some kind of compensation by the intervening state.

The Normative Grounds for Potential Post-Intervention Obligations

Thus far, I've argued that military forces intervening in another state for humanitarian purposes likely have justification for much of the harm they cause, whether the harm is intentionally against the aggressing forces or collaterally against the intended beneficiaries of the intervention.

Yet depending on the perilous situation, there might be people in the targeted state who are neither aggressors, nor intended beneficiaries. For lack of a better term, we can call these people "bystanders." Bystanders would include any parties who (for whatever reason) aren't under any threat, and who have done nothing to make themselves liable to be harmed. One could imagine, for example, foreigners of a different ethnicity who in the midst of a racial genocide could live with minimal risk. If harmed by intervening forces, such persons would suffer wrongful harm, that is to say, harm to which they neither consented nor were liable to.

Nevertheless, if we suppose that the intervening troops are all things considered justified in their intervention, then by McMahan's taxonomy the

intervening forces must have a lesser evil justification for collaterally harming the bystanders. So even though the bystanders have done nothing to forfeit their right not to be harmed, a lesser evil justification permits the intervening forces to infringe the rights of the bystanders if doing so is necessary to avert the greater catastrophe that would result from non-intervention. As McMahan explains:

Most of us concede that it can be permissible to infringe a person's rights, even intentionally, if that is necessary to avert a significantly greater harm. The person's rights are, we say, "overridden," though the infringement leaves a residual obligation to compensate the person later, if possible.²³

The important point here is that even though the intervening state is all things considered justified in harming some bystanders, those bystanders nevertheless must be compensated for the wrongful harm they suffer.

Now returning for a moment to Smart and Majima's corrective justice argument, I think the mistake they made was to treat the intended beneficiaries as bystanders, thus concluding that collaterally harmed intended beneficiaries suffered wrongful harm. As previously argued, I claim that intervening forces do not inflict wrongful harm on the collaterally harmed intended beneficiaries because the latter presumably would have consented to that risk.

Bystanders, on the other hand, have no reason to consent to the risk posed by the intervention if they're genuinely under no threat themselves (though one might question whether this is really possible in the midst of something like genocide). So if the intervening forces have neither a consent justification nor a liability

justification for harming the bystanders, then any harm to the bystanders – even if justified as a lesser evil – should generate a reparatory obligation to compensate for the harm. But should the intervening state necessarily be the party obligated to pay such restitution?

Shifted Responsibility for Compensating Collateral Harms

Unfortunately for intervening forces attempting to halt egregious rights violations, oftentimes they will only be able to do so if they collaterally harm some innocent people. As previously argued, the intervening forces may nevertheless be permitted to act, though in doing so the collaterally harmed innocent parties will suffer wrongful harm for which they are due compensation. Given that the intervening forces causally inflicted the harm, one might conclude that the intervening forces should compensate the bystanders.

Yet such a conclusion would be too quick. Although the bystanders are due compensation, perhaps the reparatory obligation should fall to other parties instead. On this point, we can appeal to what Francis Kamm refers to as “shifted responsibility.” According to Kamm, “shifted responsibility occurs when A may permissibly transfer its moral responsibility for negative effects of its acts to B.”²⁴ For example, suppose an aggressor attacks victim with lethal force. An intervening agent, acting in defense of victim, shoots aggressor. Unfortunately, the bullet passes through aggressor’s torso and ricochets, striking a bystander in the leg. In this case, the bystander suffers a wrongful harm for which she should be compensated. Yet although the intervening agent caused bystander’s harm, most would agree that the

responsibility – and thus also the compensatory obligation – should shift to the aggressor. After all, aggressor’s culpable action is what triggered the need for the defensive harm in the first place.

Similarly, it’s reasonable to think that in the humanitarian situation, the obligation to compensate the collaterally harmed bystanders should shift to the aggressing forces whose actions necessitated the intervention in the first place.

But suppose the aggressor forces were unable to compensate the harmed bystanders. Should the intervening state now be on the hook for restitution? Perhaps not. Consider a variant on the domestic case just discussed. Suppose the aggressor was destitute and died from the gunshot wound. In other words, harmed bystander cannot be compensated by the culpable party. In this situation, if bystander is going to be compensated, then her claim falls to either the original victim or the intervening agent. In this case, it seems that the original victim should compensate the bystander rather than the intervening agent. After all, the rescuer only inflicted the harm for the sake of protecting victim’s life. Presumably, victim would have consented to compensating collaterally harmed parties on the intervener’s behalf.

Likewise, it’s reasonable to think that if the aggressing parties in the humanitarian intervention scenario are unable to be forced to compensate any harmed bystanders, then the compensatory obligation should shift to the victims on whose behalf the intervening troops employed defensive force. And only in those situations in which neither the aggressing forces nor the intended beneficiaries are

able to pay should the compensatory obligation fall to the intervening state. Yet even in this scenario, the intervening state's obligation should be greatly mitigated given that its use of force was to protect innocent life.

Conclusion

In this paper, I've argued that the strict liability approach to post-intervention obligation is mistaken. Against Walzer, I've argued that intervening states do not incur long-term obligations to rebuild the lives of the people the rescuers have saved. If such obligations exist at all, they should fall to the broader international community rather than to the state that has already voluntarily incurred great expense and risk in stopping the atrocity.

Against Smart and Majima, I've argued that intervening forces are not strictly liable to compensate collaterally harmed parties because the former have a liability justification for intentionally harming the aggressors and a presumed consent justification for incidentally harming some intended beneficiaries. Instead, the only normative ground for post-intervention compensatory obligations results from collaterally harming bystanders. And even in these latter cases, my claim is that the compensatory obligation should first shift to the aggressing parties, and then to the intended beneficiaries when necessary. Only in cases where both of those two parties are unable to compensate the bystanders should the obligation fall to the intervening state – and even then the obligation should be mitigated given the compelling good for which the rescuers acted.

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- ¹ Michael Walzer, "The Triumph of Just War Theory (And the Dangers of Success)," in *Arguing About War* (New Haven: Yale University Press, 2004), 20-21.
- ² Ibid.
- ³ Minako Smart and Shunzo Majima, "The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions: Beyond the Just War Tradition." *International Journal of Applied Philosophy*, 26:2 (2012): 185.
- ⁴ Michael Walzer, "Just and Unjust Occupations," *Dissent* (Winter 2004): 61.
- ⁵ Michael Walzer, "The Aftermath of War: Reflections on *Jus Post Bellum*," in Eric Patterson, ed., *Ethics: Beyond War's End* (Washington D.C.: Georgetown University Press, 2012), 43.
- ⁶ Ibid., 41.
- ⁷ Ibid., 40.
- ⁸ Walzer, "The Triumph of Just War Theory," 20.
- ⁹ Smart and Majima, "Moral Grounds for Reparation," 181.
- ¹⁰ Ibid., 191.
- ¹¹ Ibid.
- ¹² Ibid.
- ¹³ Ibid., 189.
- ¹⁴ Ibid., 188.
- ¹⁵ Ibid., 189.
- ¹⁶ Ibid., 190.
- ¹⁷ Ibid.
- ¹⁸ Jeff McMahan, "The Morality of Military Occupation," *Loyola of Los Angeles International and Comparative Law Review* 31, no. 1 (2009): 104.
- ¹⁹ Jeff McMahan, "Humanitarian Intervention, Consent, and Proportionality," in N. Ann Davis, Richards Keshen, and Jeff McMahan, eds., *Ethics and Humanity* (Oxford: Oxford University Press, 2010), 49.
- ²⁰ Gerhard Overland, "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* (Burlington VT: Ashgate Publishing Co., 2011), 75.
- ²¹ Ibid., 74.
- ²² See, for example, Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 7-10. See also Jeffrie G. Murphy, "The Killing of the Innocent," *The Monist* Vol. 57, no. 4 (Oct 1975): 155.
- ²³ McMahan, "Morality of Military Occupation," 108.
- ²⁴ Frances Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114, no. 4 (2004): 689.