

Reparations, Restitution, and Transitional Justice  
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This is an essay in the new field of international law called transitional justice. Recently the term transitional justice has been coined, primarily to signify normative principles that should govern political and legal practices and institutions employed in the aftermath of mass atrocity or war, as a society moves toward a position of peace. So far, transitional justice, as a form of justice, has been under-theorized. It is not yet sufficiently clear how transitional justice can be seen as a form of justice alongside of the traditional forms of justice: distributive and compensatory justice that Aristotle identified. And, assuming there is a third branch of justice, it has not yet been worked out how transitional justice is different from these other forms that turned on the general normative position that people should get what is their due. I want to discuss an idea, also from Aristotle, that there might be a form of justice that asks that people take less than their due, or that they pay compensation even though they have not done wrong.

In this paper, I will be especially concerned with such issues as restitution and reparations understood quite broadly to include all aspects of compensation of victims who have been harmed during war or mass atrocity.<sup>1</sup> I will not discuss other forms of transitional justice that are harder to institutionalize such as apologies and acknowledgements. Restitution is the restoring to the rightful owner what has been lost or taken away. Reparation is the restoring to original, or good enough, condition of something that has been damaged. Restitution and reparation have the same root, restoration, which is itself a kind of rectification or compensation. But each emphasizes

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<sup>1</sup> See Ruti Teitel Transitional Justice, Oxford: Oxford University Press, 2000, p. 119.

different aspects of the idea of restoring. I will argue that in achieving transitional justice, unlike normal compensatory justice, sometimes the one who has caused the damage is not the only one who has a duty of restoration.

This paper will proceed as follows. First, I will discuss the general idea of transitional justice. Second, I will offer an account of restitution. Third, I will give an account of reparations with some examples from war and mass atrocity cases. Fourth, I will discuss one important controversy, namely who is responsible for providing restitutions and reparations in the aftermath of war, and how might the costs of wars be spread to those who did not perpetrate the harms of war. Fifth, I end by considering a controversial proposal for how to assign restitution and reparations payments.

## **I. Transitional Justice and Meionexia**

Transitional justice overlaps with the older idea of *jus post bellum*, which is also under-theorized, in that both concern how to regard just practices and institutions after war or mass atrocity has come to an end. The justice considerations here are often markedly different from those concerning traditionally understood justice in distribution or compensation. This is because the aim of transitional justice is unique: it is to achieve a just and lasting peace in a society that has been ravaged by war and atrocities such as genocide. And to accomplish this goal of justice certain compromises must be reached, including those concerning rights, even as the very rights compromised are normally thought to be the cornerstone of traditional ways to conceive justice.

In my view, transitional justice calls for moderation because that is often what is needed for a previously fractious society to achieve lasting peace. I will start with Aristotle, who first set the modern terms of debate about justice and first gave the

traditional account of justice in distribution and compensation. Aristotle begins Book V of his Ethics by asking “what sort of a mean justice is, and what the extremes are between which justice lies.”<sup>2</sup> Initially, Aristotle proposes that “the unjust man takes more than his share,” whereas the just man takes or demands only what is his due.<sup>3</sup> But in the very next paragraph, Aristotle says:

The unjust man does not always choose the larger share (*pleionektes*); of things that are bad in themselves he actually chooses the lesser share, but he is nonetheless regarded as trying to get too much, because “getting too much” refers to what is *good*, and the lesser evil is considered to be in some sense good.<sup>4</sup>

One is tempted to say that justice for Aristotle lies between the extremes of taking too much (*pleionexia*) and taking too little (*meionexia*), and context matters, except for the fact that Aristotle does not directly mention *meionexia* - perhaps it is one of the unnamed vices. But he clearly does hold that justice involves taking only what is one’s due.

In my view, Aristotelian moderation is also the key to transitional justice. Even though Aristotle does not consider *meionexia* as a virtue, he does set the stage for such a possibility. Aristotle’s general idea is that we must distinguish two kinds of good: things good in themselves and things good for the individual. The aim of moral education is that eventually people will become habituated so that they see the things that are good in themselves as also good for them. But part of the task of pursuing things good in themselves is that one restrain oneself, perhaps demanding less than is one’s due, and not pursue some things that are good for the individual person at the moment. This is one of the types of moderation that is crucial for living the virtuous life for Aristotle.

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<sup>2</sup> Aristotle, Nicomachean Ethics, 1129a4-5, translated by J.A.K. Thompson, Penguin Books, 2004, p. 112.

<sup>3</sup> 1129b2, p. 113.

<sup>4</sup> 1129b7-10, p. 114.

One of the few references to *meionexia*, the disposition to accept less than one is due, comes from Xenophon. In his work, The Education of Cyrus, he says the following:

Thus they were encamped by regiments, and in the mere fact of common quarters there was this advantage, Cyrus thought, for the coming struggle, that the men saw they were all treated alike, and therefore no one could pretend that he was slighted, and no one sink to the confession that he was a worse man than his neighbors (*meionexia*) when it came to facing the foe.

Here *meionexia* is thought of as a vice for soldiers in that soldiers should not demand of themselves less than was their due.

Indeed, Xenophon believes that disabusing soldiers of their tendency to think that they were not as capable as their fellow soldiers was a key source of providing them with a conscience well framed for battle:

Moreover the life in common would help the men to know each other, and it is only by such knowledge, as a rule, that a common conscience is engendered; those who live apart, unknowing and unknown, seem far more apt for mischief.

To have a military conscience, soldiers needed not to think too little or too much of what was their duty.

In this respect, Xenophon partially followed Aristotle in thinking of *pleionexia*, demanding too much, and *meionexia*, demanding too little, as vices. But in another respect Xenophon does not follow Aristotle who allowed that we should be habituated not to demand what we are owed at the moment so that we can aim at that which is good in itself, the true sign of conscience. But perhaps this is because Xenophon was addressing soldiers and Aristotle was addressing Athenian civilians, or perhaps because

Xenophon was addressing wartime, not transitional, situations. The only ancient philosophers who saw *meionexia* as a virtue were the Cynics, who were also the first cosmopolitans.<sup>5</sup>

As far as I am aware, Hugo Grotius is the first modern thinker to talk of something like transitional justice in terms of *meionexia*. In his early work, De Jure Praedae (1605), on why the Dutch fleet should not have to give back booty seized in just victories against the Spanish fleet, Grotius follows Xenophon in thinking of *meionexia* as a vice for victors:

Justice consists in taking a middle course. It is wrong to inflict injury, but it is also wrong to endure injury... the truly good man will be free from *meionexia*, that is to say, from the disposition to accord himself less than his due.<sup>6</sup>

But Grotius here also regards *meionexia* as a vice for those who are victims in war – saying it is wrong to endure injury because one thinks one does not deserve to be spared.

Concerning reparation, Grotius gives the common sense principle: “Repay what you owe” which he says “is just in the highest degree.” This is a “natural obligation” as well as something affirmed by “the law of nations.”<sup>7</sup> And indeed, few would dispute Grotius’s assumption of the importance of this maxim originally articulated by Seneca. If reparations involve redressing past wrongs, it seems clear that requiring people to pay for the repair of the damage they *have caused* is important. This is important so that wrongdoers pay their due. But it is also important that there be repayment to victims for harms done to them, so they get their due - both components of reparations.

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<sup>5</sup> William Desmond, Cynic, Berkeley: University of California Press, 2008, p. 124, says that “Pseudo-Lucian uses an unusual antonym for *pleonexia* (‘wanting too much’) – *meionexia* (‘wanting too little’): the Cynic prays the he may be able to persevere in his virtue of *meionexia*.”

<sup>6</sup> Hugo Grotius, De Jure Praedae, p. 3.

<sup>7</sup> *Ibid.*, p. 18.

Interestingly, in his later writings, especially his monumental work De Jure Belli ac Pacis (1625), Grotius continues to regard *meionexia* as a vice at least concerning how *victims* should view what is their due. But the general idea of *victors* taking less than they deserve is seen as a virtue insofar as it is part of a general strategy that Grotius offers so that peace might more easily be achieved. Reconciliation sometimes requires, and often counsels, that victors should moderate their demands, even if these are justified demands, so as to attain other more important goals. By the end of this later treatise Grotius counsels that one should act in the spirit of humanitarianism. And in part this means that victors not demand what they are otherwise entitled to demand so that a just and lasting peace can be achieved.

I propose that we follow the later works of Grotius and see *meionexia*, at least concerning victors, as a virtue in order better to achieve humanitarian goals in the transition from war or mass atrocity to peace. *Meionexia* should also be seen as a vice for victims in that they should still demand all that is their due, and the world community should come together to provide compensation for victims of war and mass atrocity. In this respect there is an asymmetry in the idea of *meionexia* that needs further support.

Historically, individual victims have often been forced not to get proper compensation at the end of war or mass atrocity, especially if the victims came from the “unjust” side. On the other hand, victors have been treated as fully warranted in demanding often crushing penalties from vanquished nations, especially if the vanquished were considered to have engaged in an unjust war. My view is that an asymmetry can be justified, but not the one that has been traditionally accepted. Rather, in my view transitional justice demands that victims receive their due, even if victors may

have to provide the majority of the compensation for victims to achieve their due, and even though victors will thus not get what is their due. This asymmetry is premised on the idea that those who are most vulnerable must get what is their due first, in situations of scarcity. In discussion of the rules of war, other forms of asymmetry have been recognized, such as the longstanding view that civilians should be treated much better than soldiers during war. The rationale for this so-called principle of discrimination is similar to that for recognizing the claims of victims before the claims of victors – namely a concern for first protecting those who are vulnerable.

Here we might remember that at the end of the First World War, Germany was heavily penalized so that the victorious Allies could get their due, at least in part at the cost of victims in Germany not getting compensated. And many believe that German resentment led to the Second World War. It is also noteworthy that at the end of the Second World War the victorious Allies paid most of the costs of reparation and restitution for the victims in Germany and Japan, in order to achieve, what has in fact transpired, a long-term just peace in those nations. I next turn to an analysis of restitution and reparations before turning back to the issue of who is due what, as a matter of transitional justice.

## **II. The Concept of Restitution**

As I said above, restitution is the restoring to a rightful owner of what has been lost or taken away. On the traditional account, for restitution to be relevant, the rightful owner has to be wronged by the acts of another, either through intentional wrongdoing of the thief or by the wrongdoing of the person who finds a lost item and keeps it as his or her own, once the true owner is identified. Of course, from the beginning here we can

see that it might make a difference if one is an intentional or unintentional wrongdoer. But the central idea of the traditional account is that the one who has created the wrong has a duty to make amends by returning the thing taken to its rightful owner. This way of thinking treats the wrongdoer as the one who has causally created a situation where someone else suffers a loss, and who because of this wrongful act now bears the responsibility for restoring the loss by providing restitution.

To restore something is to return it to a previous state. This is to say that it is to return that thing to its status quo ante, namely the situation it was in before it was damaged or lost. But when restoration is discussed as a moral concept there is the additional idea that a wrong is being rectified by this restoration. Rectification is one of the most important moral means to right a wrong. Rectification is to set the scales right which is the key to at least one prominent form of justice. But rectification often cannot be completely performed through legal or political institutions since we cannot literally turn the clocks back to where things were long ago. When an old car is restored it is brought back, as close as one can, to its original condition, but there is always something new that is different from the old, perhaps because they simply don't make that part anymore, or if they do it isn't exactly the same in any event.

The idea of a status quo ante is thus a complex one. If it is not possible to restore the thing to its original condition, then perhaps some other form of compensation is required to right the scales, such as interest that the stolen money could have earned if it had not been stolen from the original owner. Or we might think of the concept of opportunity cost, namely what the rightful owner could have accomplished with the object had it not been stolen. But things can go the other way as well, so perhaps the

stolen good is a stock that would have subsequently lost half of its value if the stock certificate had not been stolen. Here the status quo ante appears to be less than the original value. And rectification might require, as a matter of justice, that we take account of gains that might not have occurred, such as when one is motivated to work harder to make up for what had been stolen. Or perhaps a car that was stolen would have been stolen at a later time but then the robbers would have harmed the driver as well as stealing his car. Without a car to steal, the original owner is left unharmed when the status quo ante would involve him being harmed.

Some have argued that restitution should not have this risk of loss connected to it. After all, the person who stole the object did something wrong and certainly now shouldn't be allowed to profit from this wrongdoing. The rectification part of restitution requires that the injustice of the loss or damage be recognized, and this seems to rule out letting the party who caused the loss or damage partially off the hook because the thing stolen or damaged would have lost value in the mean time. So, we ask that the object be returned or that the damage be literally repaired as the first step toward restoration, and only allow the wrongdoer to provide something else if the first step is blocked by factors beyond the control of the wrongdoer. And then as a second step we disregard what has or would have happened in the negative, looking only to positive gains that could have occurred, for the secondary form of restoration. The wrongdoer takes his objects as he finds them and must return them as close as possible to the original, discounting any losses that might have occurred to the rightful owner if the object were not stolen.

Restitution is the simplest concept associated with the longstanding general idea that wrongs are to be righted. If one has in one's possession a certain good that properly

belongs to someone else, then one has the responsibility to return that good to its rightful owner. And in this simple model it is the person who has benefited, whether intentionally or not, who has the duty to make amends. There are other ways that restoration can occur, including by an act of a third party who finds the lost or stolen good in the possession of another and simply takes it away in order to give it back to the rightful owner. But the simplest model of restitution is to place the duty for restitution on the party who has benefited from the position of loss of the wronged party. Normally the way one benefits is comparative – the rightful owner now lacks something that the wrongful owner or occupier has attained and should give back.

In the case of intentional benefiting, there are some cases where the passage of time has been said to be enough to negate the wrongdoer's duty in restitution. But the conditions for negating someone else's claim to possession are hard to work out and more difficult yet to justify morally. The legal doctrine of adverse possession allows that if one has notoriously seized another party's good and that party has not complained about what would otherwise be simple theft, and if a long time has elapsed (such as 20 years in many US jurisdictions), then one can get title to the object, at least if it is a parcel of land. Notice that the adverse possession must be public in the sense that the adverse owner does not hide the fact that he or she has seized someone else's parcel of land.

The idea of adverse possession, or of other types of possession gained by long custom rather than by clear title, is ancient in origin. Yet, the idea of adverse possession seems to fly in the face of the idea of restitution. The formal legal conditions of adverse possession in the United States make it clear that the original owner must not exercise his or her claims against what has been sought by adverse possession. And it is also

necessary that the person claiming adverse possession make it publicly known that he or she is making such a claim and over a long period of time. In this sense adverse possession has sometimes been likened to relinquishing of ownership or even transfer in that the original owner seems to care so little for his property that he or she does not object when someone else uses the property and makes open declaration of the intent to seize the property as his or her own in the future. It is as if the original owner waived his or her rights and hence can no longer be said to have suffered a loss. For these reasons, it is not clear that adverse possession is completely at odds with the principle of restitution.

Another question is whether or not the unintentional wrongdoer has a duty of restitution and why this party is even called a wrongdoer. We may wish to use a circumlocution and say that the party who has benefited is the party who has played a causal role in bringing about another party's loss, leaving open the question of whether or not this is truly a wrong. But the general idea here is that one should not be allowed to benefit by unjust enrichment. There may be wrongdoing if one does not return the good after being made aware of its rightful owner.

Injustice occurs when one benefits from another's loss. And the actual state of injustice occurs whether one knows that one benefits or not. This is controversial but can be made less so by realizing that the use of another's good for one's own profit is something that needs to be made right – the classic indicator that an injustice has occurred. The crucial point is that once one is made aware of the injustice, one then must satisfy one's duty of restitution. Otherwise, it will then make sense to speak of a wrongdoer, even if one unintentionally benefited, since it is the wrongness of not making restitution that is now in play. So, on this account there are two ways that one is in the

wrong when one benefits from another's loss. First, one can be a wrongdoer in that one intentionally caused the other's loss. Or, second, one can be a wrongdoer for not restoring the item lost to the person who has lost it, even if one didn't cause the loss. Indeed, one can be a wrongdoer in both of these senses if one has intentionally taken and now refuses to return the lost item. And it is also possible that one could be a wrongdoer in the first sense and not in the second although this is rare.

In the history of these debates, one question that has arisen is whether the unintentional beneficiary has duties to return the benefit that last as long as the good remains in his or her possession or whether the possession of another party's goods turns into a proper title with the passage of time. Think of someone who possesses my grandfather's watch that was stolen from my grandfather a decade earlier. The person in possession of the watch did not steal it and only now realizes that he or she is benefiting from an act of wrongdoing. And even though it is clearly a wrong to my grandfather, there are strong reasons to respect recent chain of title and to deny the ten-year old claim on the watch. Indeed, it may be said that since there was no wrongdoing by the current possessor of the watch, there is no role for justice to play here. Yet, it seems to me that this is to take too narrow a view of justice – if there is a victim here then failure to rectify the victim's loss, once it is known by the current possessor, is a kind of injustice. Here we have a violation of something like transitional justice.

### **III. An Account of Reparations**

Reparations are due when an object or relationship has been damaged. On the traditional account, it is normally thought that reparations differ from other forms of compensation in that reparations do, but compensation does not always, require that an

injustice has occurred.<sup>8</sup> I will generally agree with this view, but argue that it does not have the implications normally attributed to it, namely that only the wrongdoer should pay. Compensation can be needed because of acts of God such as the floods that inflicted Nashville last year. But, on the traditional view, the idea of the need for repair is normally thought to be that one party has wronged another party in terms of a violation of justice.

Margaret Walker provides a good start at conceptualizing reparations on the traditional account:

Reparations are made when those who are responsible for repair of a wrong intentionally give appropriate goods to victims of wrongs in a specific act (or process) that expresses acknowledgement of the wrong, responsibility for the wrong or its repair, and the intent of rendering just treatment to victims in virtue of wrongful treatment.<sup>9</sup>

For the traditional view, the “goods” in question need not be money but can include apologies as well as other gestures such as the construction of memorials. As I said, I won’t take up apologies or memorials in this paper.

Reparation is the restoring to original, or good enough, condition of something that has been damaged. When objects are damaged it is different than when they are lost or taken away. When damage occurs the objects are still in the possession of the original owner. It is just that these objects have ceased to perform their normal function and are in that sense less valuable than before. Reparation also concerns payments for loss suffered when wrongs are done that undermine livelihood or significant interests. One

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<sup>8</sup> See Bernard Boxill, “The Morality of Reparations,” *Social Theory and Practice*, vol. 2, no. 1, Spring 1972, pp. 113-123.

<sup>9</sup> Margaret Walker, *What is Reparative Justice?* Milwaukee, WI: Marquette University Press, 2010, p. 19.

may think of some of these cases as involving damage to earning capacity or the loss of opportunity that would have been beneficial. Reputation or status is also something that can be damaged and for which reparations can be sought.

One of the issues that distinguishes restitution from reparation is that in restitution it is normally possible to return things to the status quo ante whereas in reparations this is normally much more difficult to achieve. Indeed, the legal literature has focused on the concept of satisfaction to mark the difference between return to the exact status quo ante and the approximate form of compensation that is called for in reparations, especially when the damage done is at least partially psychological.<sup>10</sup> Psychological damage is hard to rectify, as courts have found, because of vast differences in how people react to damage or wrong both in terms of how much they suffer at the time of the damage and in terms of what it would take to make amends. Apologies suffice for some, but others may require expenditures of resources.

The idea of satisfaction then is a very difficult one in post war situations of reparations. The International Law Commission's Articles on State Responsibility speak of: "reparation in particular for moral damage such as an emotional injury, mental suffering, injury to reputation and similar damage suffered by nationals of the injured State."<sup>11</sup> Failing to take this form of damage into account has serious risks that the reparations will not set the stage for reconciliation. In addition, the idea of repairing a relationship helps explain the close connection between reparation and reconciliation.

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<sup>10</sup> See Pablo de Greiff, "Justice and Reparations," in Pablo de Greiff, editor, The Handbook of Reparations, Oxford: Oxford University Press, 2006, pp. 451-477. Also see Richard Falk, "Reparations, International Law, and Global Justice: A New Frontier," in Pablo de Greiff, editor, The Handbook of Reparations, pp. 478-503.

<sup>11</sup> Quoted in Falk, *ibid.*, p. 483.

Repairing a damaged relationship is one of the central ideas in reconciliation in its many forms. Ruti Teitel claims that

The vocabulary of ‘reparatory justice’ [is] laying a basis for redistributive policies associated with radical upheaval... Because of their versatility, reparatory practices have become the leading response in the contemporary wave of political transformation.<sup>12</sup>

Satisfaction can take on this radical cast when redistribution of goods is called for.

The root idea behind the various forms of reparations is that payments are due, as a result of damage done, which will restore the aggrieved party to the position he or she was in before the wrong occurred. In the case of war reparations the idea is that one party owes reparation to the other party for the ravages of war or for the costs incurred to fight the war. In the case of violence to ethnic groups, it is similarly the case that what is called for is payment for wrongs such as slavery or genocide that have harmed the group in question and made it suffer losses that need now to be compensated. Often, in both war and mass atrocity cases, it is highly controversial what it will take to restore things so that the damage of historical injustice or the perpetration of unjust war is in fact repaired. One way to think of these cases is in terms of the harm to the status or reputation of the group, although such an analysis often fails to capture the severity of the wrongs, especially in terms of such hard to quantify factors as harms to emotional well-being.

The damage that is the focus of reparations is a wrong to the party in question not because of some loss of a physical thing, as in restitutions, but normally because of a loss of opportunity. In this sense, the loss is much more difficult to calculate in the case of reparations than in the case of restitutions. And similarly it is harder to calculate what

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<sup>12</sup> Ruti Teitel, Transitional Justice, Oxford UP, 2000, pp. 119-20 and 127.

will make amends for the loss in many cases where reparation in particular is called for. In part this is because normally returning the object lost is sufficient for restitution, whereas it is often difficult to determine how or even whether something damaged can be returned to its former value. In addition, restitution generally is much easier to accomplish than reparation since reparation may take generations and may involve payments from later generations who were not themselves the ones who caused the damage. Such an eventuality challenges some of the normal ways that reparations are understood since here we would have reparations made not by the party responsible for having caused the harm.

The multi-generation case exhibits the thinking that someone other than the wrongdoer may have duties of reparation. In this first case to move beyond the traditional model, reparations are owed because the party who has the duty of repair has benefitted from the wrongdoing even if she has not also caused the wrong to the victim. This is perhaps a special case of unjust enrichment through gain of an opportunity. Because someone does now benefit, and benefits in a way that is similar to that of the thief's use of the watch stolen from your grandfather, the current benefiter should pay for that benefit so as not to be tainted in the wrongdoing that occurred when the watch was originally stolen.<sup>13</sup> If so, there would be a challenge to the idea that only the wrongdoer has a duty of repair.

A second consideration that is quite important is that in post war situations, or in transitions from mass atrocity, the damage done to a society is normally extensive. There are important political questions about whether all or even any reparations should be paid

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<sup>13</sup> See my paper, "Metaphysical Guilt and Moral Taint," in Larry May and Stacey Hoffman, Collective Responsibility, Rowman and Littlefield, 1991.

by the defeated or vanquished side given that requiring such payments is likely to make reconciliation very difficult and even possibly to stymie long-term peace-making goals such as returning to a position of economic self-sufficiency. And making the vanquished pay all of the reparation costs, after it has already suffered the losses of defeat, can also cause festering over time that undermines a just and lasting peace.

The failure by victors or others to make reparations to vanquished victims will leave the society that has been damaged with an unresolved grievance that can fester and grow over time to such an extent that it also jeopardizes long-term peace in the region. Repair turns on ability to repair as much as it does on causal history of the damage. To effect repair in the aftermath of war or mass atrocity the victors will often have to contribute and this will mean that the victors must accept less than is their due. This is why, at least in part, I introduced the idea of *meionexia* as crucial for transitional justice earlier in the paper.

#### **IV. Who is Responsible?**

On the traditional model, restitution or reparation normally involves a situation where the one who has done the wrong is the one who must rectify that wrong. As I have said, there are two aspects of rectification:

making sure that victims are compensated,

and making sure that wrongdoers do not benefit from their wrongdoing.

It is normally optimal that these two goals of rectification go together, so that the party who compensates the victim is also the party who is deprived of profit from his or her wrongdoing. But sometimes, for victims to be compensated, a party other than the wrongdoer may have to rectify.

First, think of the situation where the wrongdoer is no longer in possession of the seized property. If only the wrongdoer is required to pay, then neither of the two goals of rectification will be served since the victim will not be compensated for loss and the wrongdoer will not be made to suffer by having to give back the wrongfully seized property. In some cases, monetary compensation can be extracted from the wrongdoer even if the wrongdoer can no longer return the object stolen. But at the end of war there are several factors that complicate restoration after war or mass atrocity. For example, it is sometimes true that the vanquished aggressive party is also economically devastated. Wrongdoers may lack resources to compensate, due to the devastating effects of war on both sides. In addition, in wars of long duration, the people who were originally in charge of a State may be dead, or the leaders may now be different from when the wrongdoing occurred. Compensation in such cases may have to be done by parties different than the wrongdoers.

Restitution or reparation can be accomplished, as a descriptive matter, by anyone who has the means to pay compensation. Of course, in the case of land, not everyone is in a position to give the seized land back to the rightful owner. But if monetary compensation will restore, then many parties other than the wrongdoer may be in a position to provide the compensation. And we may prefer to have the “least cost provider,” namely the person who can pay compensation at least loss to itself, provide the compensation, as a matter of efficiency and even to a certain extent of fairness. But to say that the “least cost provider” is “responsible” for restitution may seem counterintuitive. And it may seem especially counterintuitive to think of the party who is responsible to

pay war reparations as the State that is the just victor, especially where reparations will go to the unjust vanquished State.

A second consideration, in addition to thinking of cases where the victim will not receive compensation if only the wrongdoer has to pay, is that during war, it is not always just the two major antagonists who are responsible for the war. This is especially true if we are talking about a civil war. In a civil war, the internal groups fighting are often influenced by external groups, especially States that have an interest in having one ethnic group, the one to which they also belong, dominate another ethnic group in the war. In this sense then there may be more than one party responsible for the restitution or reparation at war's end. And if the external party had involvement in initiating the war, or the party that has greater resources, than the vanquished party in the civil war, it may be the external party should pay for restitution as well as for reparations. In the case of an external party with greater resources but not more guilt in initiating the war, then it may be that the unjust vanquished party is not who should pay for restitution or reparations.

A third consideration is to wonder whether or not the victorious party who was not the one to initiate an unjust war, should nonetheless be responsible for restitution or reparations. This may seem to be an unwarranted proposal. If a State, or party to a civil war, is merely defending itself justifiably, why think that that party has a responsibility of restitution or reparation to the unjust party after the war is over? There is a concept called the "moral equality of soldiers" which holds that the rules of war apply equally to all *soldiers* regardless of whether they fight on the just or unjust side of a war. Perhaps

there is a similar principle that says that all parties in a war have equal responsibilities of restitution or reparations whether they were defenders or aggressors during the war.

I will end this section with a brief consideration of an objection to my view. The objection is that I am in effect calling for redistribution of assets from those who have done no wrong, and have indeed been wronged themselves, to those who have done wrong - stretching justice considerations beyond recognition. Margaret Walker's account of reparations, with which I also began my discussion, made it a necessary condition of reparations being owed that the party having the obligation to repair was the party who did wrong.

My response is to point out that loss often occurs to innocent civilians who were not responsible or even liable for the aggressive war even though their government was indeed the aggressor. We need to distinguish between two kinds of victim – the State and the individual. The State may need to have its bridges repaired, or the individual to have her house rebuilt. Concerning the latter case, reparations paid to individuals are not necessarily going to the party, namely the State, responsible for the aggression; and hence the reparations are not necessarily benefiting the wrongdoers. Also, even aggressor States can suffer damage that is not related to their aggression: think of the firebombing of Tokyo. Such examples make me think that transitional justice must look to a different model of compensation than has been traditionally employed in domestic matters of tort law, in order to achieve the kind of reconciliation needed for a just and lasting peace.

## **V. Compensating Victims**

Let us take stock of where we are based on the last three sections. First, in restitution cases, being a wrongdoer is not restricted to those who caused wrong, because

knowingly benefiting from someone else's wrongdoing creates a duty of restitution. Second, in reparation cases, it may take longer for repair to be accomplished in a society than a single generation can accomplish, making it the case that people may have duties of repair who were not even born when the wrong was committed. Third, there may be parties external to the conflict who nonetheless played a role in the conflict and hence have a duty to repair the harms. Fourth, in order to effect reconciliation, necessary for a just and lasting peace, it may be important that victims be compensated who were on the unjust side of a war, and yet this may not be possible on the model that the wrongdoer has to pay, because of the extent of the repair needed and the lack of ability to pay on the part of the vanquished. Fifth, those in need of restitution or repair may be individuals who had little to do with the aggression that was mounted by their States, so that compensating them is not necessarily to compensate wrongdoers.

In considering practical proposals, let me just say a few words in support of a controversial plan – a world-wide no-fault insurance scheme for paying the restitution and reparation costs to those who are the victims of war and mass atrocity. Here every State of the world would have to pay into a fund that would be used to pay all restitution and reparations at the end of war or mass atrocity. This scheme would disconnect paying these costs from the question of “fault” in that it would not matter whether a State is a victor or vanquished or merely a bystander State – the funds from all States will be used for the victims. This will disconnect the payment to victims exclusively from those States that were at fault, or even that participated in the war or mass atrocity. In this way, the victims will indeed be compensated more surely than viewing reparations and restitution as solely the responsibility of wrongdoers.

One way to justify such a scheme is to think of it as a system of retributive rectification. Joel Feinberg proposed a system of what he called “retributive torts,” where all parties who drive drunk must pay into a fund that is then used to pay costs incurred by victims of drunk driving accidents<sup>14</sup> States might be thought of like drunk drivers in that they are all facilitating war and mass atrocity by their reckless behavior. Very few States do their utmost to avoid war, and far too many States have a cavalier attitude toward the possibility that war may ensue in the not too distant future. For this reason, it is not farfetched to say that all States are complicit in war and no States can be fully said to be without fault concerning the ravages of war or mass atrocity.

A related idea, proposed by Jules Coleman, is to think of a system of compensation as just insofar as its goal is to aid victims and there is no less costly way to achieve this normatively desirable objective.<sup>15</sup> Here we are thinking of systems or institutions of compensation that do not follow the traditional model where the wrongdoer pays to compensate the victim. Instead, we are focused more on the idea of compensating victims and much less on getting wrongdoers to pay. Indeed, the idea is more like compensating flood victims for acts of God than like traditional forms of compensation in tort law. In Coleman’s view, we look to provide for victims and then we look to make sure that the way victims are compensated is achieved by a system or institution that is the least objectionable normatively. Of course, this still allows for the possibility that compensation systems could still be objectionable, just not any more so than any other efficacious system of providing victim compensation.

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<sup>14</sup> See Joel Feinberg, “Sua Culpa,” in his book Doing and Deserving, Princeton University Press, 1970.

<sup>15</sup> See Jules Coleman, “Tort Liability and the Limits of Corrective Justice,” reprinted in Larry May and Jeff Brown, Philosophy of Law, NY: Wylie/Blackwell, 2010, pp. 330-337.

The main disadvantage of holding victors, as well as other States, responsible for restitution and reparations is that it may place an undue burden on the just party and give an advantage to the unjust party. There is thus a sense in which this arrangement may encourage aggressors. Aggressors may think that even if they are unsuccessful in their war efforts, the parties they attack will have to help them rebuild after the destructive effects of the war. And then the rest of their war damages will have to be paid by the general fund that has been established from all other States. It might be thought that this will reduce the disincentives to initiate unjust wars in the first place.

I suppose I might agree that if a State is attacked in an utterly unprovoked way it could avoid some or all of its obligations of restitution and reparations. But practically, I am willing to bet that this admission will rarely make much of a difference. It is rare that one State is the clear aggressor and the other State the clear defender. In most cases, the State that is attacked has done something to provoke the attack, or has made it more likely by acting in some sense unreasonably. This is why the United Nations has virtually outlawed all war.<sup>16</sup>

While recognizing the unlikelihood of this plan being accepted, I would like to point out the parallels between this plan and the no-fault auto insurance schemes that are now so prevalent in the US but were also once thought to be highly unlikely ever to be adopted. The rationale behind such plans is that the victims of auto accidents as well as wars and mass atrocities have rarely even been contributorily negligent in the cause of their harms; whereas many States could have been involved in the actual war from which compensation is claimed. In war civilian casualties are most often referred to as “collateral damage.” This suggests that the victims have been harmed not due to their

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<sup>16</sup> See Preamble and Article 2/4 of the United Nations Charter.

own fault. And yet, in the history of modern warfare, increasing numbers of civilians are harmed during war and atrocity. So, establishing a fund that all States pay into and from which compensation can be paid to these victims is an idea that I think has a significant normative rationale behind it even if it is largely impractical at the moment.

It might be objected at this point that it is unfair to ask victors, to say nothing of all the States in the world, to pay restitution and reparation costs to victims and yet not to ask victims to settle for less than is their due, and not demand full compensation especially from States who took no role in these victims' harms. In response, I would point out that in some of my other work I have asked victims not to press for trials of State leaders who may have caused their suffering if such prosecutions will have a markedly adverse effect on reconciliation.<sup>17</sup> But having asked victims to not demand all of their due in terms of the transitional justice value of retribution, I now think that they should at least get compensated for their suffering, especially in cases where such compensation also advances the goal of reconciliation.

This last point brings us back to the idea of *meionexia*. In one respect *meionexia* remains a vice, when victims are asked to accept much less of what is their due in terms of restitution or reparations at the end of armed conflict or mass atrocity. But *meionexia* is also a virtue in that just victors should demand less than they are due from the vanquished. And in addition, as I have argued, those who have not done wrong should have to do more than their due in terms of aiding those who are the victims of war and mass atrocity, so as to contribute to a just and lasting peace. Indeed, all those who are able to pay compensation to victims, should feel that justice requires this of them, even

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<sup>17</sup> See chapters 2 and 3 of my book-manuscript, *After War Ends: Normative Principles*, forthcoming with Cambridge University Press. The current paper is also cut from other chapters of that manuscript.

though they have done no wrong to these victims. It may be utopian to hope for an end to all wars, but it should not be seen as utopian to try to ameliorate the worst effects of war – the harms that occur to individuals who are simply often caught in the cross fire.

If we think of justice as narrowly giving to each his or her due, then it appears that problems arise for reconciliation since we cannot support effective plans for paying reparations and restitution to victims of war and mass atrocity. But, if we realize that in most cases a larger good can be achieved by providing a scheme by which all victims of war and mass atrocity are compensated, we can see why requiring States to pay for victims' harms that those States did not cause is an idea that is still consistent with at least one form of justice, one that has an ancient lineage – and is grounded in *meionexia*. Transitional justice focuses our attention on achieving a just and lasting peace, surely an Aristotelian good in itself that we all need to be habituated into thinking of as our own good as well.