



# Corrective Justice vs. Social Justice in the aftermath of War

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# Grounds for action in the aftermath of war

- Security & stability
- Development and economic efficiency
- **Social justice**
- TJ
  - Retributive justice
  - **Corrective Justice**
  - Truth elucidation
  - Lustration and purges

# Background: TJ and IL discourse

Imperative to repair or compensate — “righting wrongs”,  
“make whole what has been smashed”

“ § 15. Reparation should be **proportional** to the gravity of the violations and the harm suffered [...]

§ 20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as:

(b) **Lost opportunities**, including employment, education and social benefits;

(c) Material damages and **loss of earnings**, including **loss of earning potential**.”

UN General Assembly Resolution 60/147 of 16 December 2005

# Some questions & doubts

1. CJ aims to reestablish *status quo ante*. But if *status quo ante bellum* led to war, why should we want to restore it?
2. In the case of wars fought against a tyrant or oppressive regime, restoring *status quo ante bellum* amounts to restoring an illegitimate regime. E.g.:
  - **Nicaragua**: Sandinista revolution (1979) nationalized property of Somoza and allies: 25% of the country's industrial capital and 20% of the farmland (Fitzgerald and Grigsby 2001)
  - **El Salvador**: FMLN vs. high inequality in land tenure: “16 families” controlled nearly all the fertile soil and owned 60% of the land (del Castillo 1997)

# Some questions & doubts

3. What is the baseline? E.g.:
  - Eastern Europe 1990: WWI (1914-1918) dislocations / interbellum (1918-1939) / WWII expropriations (1939-1945) / massive redistributions (1945-1950) / communist nationalizations 1950-1970
  - Nicaragua 1990: Somoza period (1937-79) / Sandinista revolution / Contras CW (1984-90)
  - Mozambique 1992: Colonial period (c1500-1975) / post-independence (1975-77) – CW (1977-1992)
4. Impracticable: too many cases (De Greiff 2006)

# Main thesis

Connection between CJ duties & SJ principles +  
likely social & economic effects of war



In the aftermath of war, SJ programs should have  
priority over CJ programs

Wars tend to undermine conditions that give  
force to CJ duties, under a liberal egalitarian  
conception.

# Main thesis (cont.)

	CJ	~CJ
SJ	Poor victims	Poor non-victims
~SJ	Affluent victims	Affluent non-victims

Vs.

	CJ	~CJ
SJ	Poor victims	Poor non-victims
~SJ	Affluent victims	Affluent non-victims

When victimhood and poverty overlap, CJ programs do SJ work (often with refugees and IDPs). But:

- What about SJ-priority and not CJ-priority?
- Attention to *ex ante* endowments or to *sufficiency* of current endowments?
- Reparation to *ex post* affluent victims? (no CJ grounds for exclusion)

# 0. Concepts

## Corrective Justice

There is a duty in individuals (or the State) to repair or compensate for illegitimate harms.

- Individualistic
- Backward looking: *some* investigation and assessment of harm
- Proportional: more serious harms deserve larger compensation

Ideal: reparation gives “a full and perfect equivalent” for the thing lost (*restitutio in integrum*).

Crucially: The point of compensation is “not just to make people better off but to bring them back to where they were.”  
(Goodin 1991)



# 0. Concepts

## Note:

- CJ ≠ punishment
  - No fault liability or collective insurance vs. punitive damages.
  - State as compensator of last resort
- Purely symbolic measures not part of CJ as defined (e.g. public apologies, acts of atonement, commemorative days, museums).

# 0. Concepts

## Social Justice

### **Just distribution of goods and opportunities in society.**

- Provision of social minima (shelter, health, nutrition, education, etc)
  - Basic goods, basic capabilities.
  - Employment under fair conditions.
- Securing conditions of equal opportunity:

“In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed.” (Rawls, *TJ* § 12)

# 0. Concepts

Note that, *in contrast to CJ*, SJ is:

- Institutional (“basic structure as subject”), not individualistic.
- Forward looking, not backward looking.
- Egalitarian, not proportional.

# 1. CJ & SJ

Main justification of CJ: **individual autonomy**

- Safeguard stability and predictability of plans and choices: “compensation, if sufficiently swift, full, and certain, would restore the **conditions that people were relying upon when framing their plans**, and so allow them to carry on with their plans with minimal interruption.” (Goodin 1991)
- Uphold and protect legitimate expectations.
- Responsibility for one’s acts and omissions.

# 1. CJ & SJ

Sphere of individual autonomy and legitimate expectations defined by just background institutions.

“What we look for [...] is an **institutional division of labor** between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.” (Rawls, *PL*, pp 268-269)

# 1. CJ & SJ

**Duties to repair are triggered by illegitimate “moves” within the practice of social cooperation as established by just background institutions.**

- Eliminate as far as possible the effects of faulty moves.
- Persuade people to take due care and to observe rules and procedures in the future.

## 2. Effects of war

*Stylized facts:*

- 1. Harm is rule rather than exception:** Extensive disruptions in people's plans and choices. In some cases, >50% of population experience directly war-related harms. (CJ makes sense when harm is exception rather than rule.)
- 2. War uncertainty:** widespread risks & uninsurability  
Impossible to quantify lost opportunities and lost earning potential. Theft & violence, abuse of state power, use of state power for war (Brück 2001)

### 3. **(Semi)collapse of state functions** – uncertainty relative to basic state functions

- Forced takings and occupancy, legitimate and illegitimate (WWII, BiH, East Timor, Colombia)
- Destruction of land register (deliberate policy in East Timor 1999 [Fitzpatrick 2002]; in some cases, no land registry [Boone 2007]).
- Legal profession breaks down (Rwanda: 95% of lawyers and judges either killed or exiled or imprisoned).

### 4. **(Semi)collapse of productive sectors**

- Deliberate destruction of infrastructure (Mozambique: agricultural sector: 47%; all categories of immovable capital: 40%)
- Massive flows of refugees and IDPs



# Circumstances of justice after war

- After war, pre-war choices and plans are irretrievable: majority of elements are missing.
- Collapse of background institutions that uphold and define the limits of autonomy.
- War instability and uncertainty → pre-war individual plans and choices unravel. War contingency planning: short-term, informal, subsistence.

**The more widespread and extensive war destruction is, and the longer the war lasts, the weaker the duties and rights of CJ.**

# And so...

Two suggestions:

- Below a suitable SJ threshold, SJ-priority trumps CJ claims.
- Reparations due to *ex post* affluent only if no one is below a suitable SJ threshold.

# Special Tasks of SJ after CW (1)

For the sake of autonomy:

1. (Re)build background institutions
2. (Re)establish stability and predictability
  - If necessary *redefine* legal titles: more important to preserve ongoing projects than previous titles. Mid- to long-term active possession trumps pre-war titles.
3. (Re)establish legitimate expectations.
  - More important to define titles quickly and equitably than accurately or in proportion to loss (e.g. term limits for filing claims in BiH; caps on land claims in post-WWII Hungary).

# Special Tasks of SJ after CW (2)

4. Assure fair conditions for *new* life rather than conditions for resuming previous life. Aside from standard SJ programs:
  - Reallocate burdens of loss: wars affect civilians undeservedly and unevenly. Principle of equitable allocation of burdens (e.g. progressive reconstruction tax).
  - Attend to special post-war needs. E.g.:
    - Single mothers and assistance with child-rearing.
    - Physical injuries and diminished capabilities (Sen): rehabilitation, provision of special needs.
    - Psychological treatment.

# Pending questions (1)

Gray cases: between full-blown war and peace. E.g.:

- Ireland
- Internment of ethnic Japanese in USA (1942-1945)
- Protracted low-intensity conflicts
- Regionally focalized wars (Sri Lanka)
- **Colombia?** *Partial* institutional collapse, *some* rule of law, urban life vs. country life...

**Acid test: is harm exception or rule?**

# Pending questions (2)

- Is land special?
  - Attachment to sacred land (Palestine, indigenous groups)
  - Rootedness and identity: loss of land → loss of identity and therefore of agency.
- “Problem of demoralization” (Ackerman 1992): getting away with unfair advantage + lack of recognition of wrongs.
  - Alternative mechanisms? Retributive justice, truth elucidation, apologies.
- Psychological grip of CJ, via resentment, indignation.
  - CJ a powerful vehicle for SJ?