*Tort Liability for Belligerent Wrongs,*
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**Abstract**—Most legal systems deny civilians' right to compensation for losses they sustain during belligerent activities. Arguments for recognizing such a right are usually divorced, to various degrees, from the moral and legal underpinnings of the notion of inflicting a wrongful loss under either international humanitarian law or domestic tort law. My aim in this paper is to advance a novel account of states' tortious liability for belligerent wrongdoing, drawing on both international humanitarian law and corrective justice approaches to domestic tort law. Structuring my account on both frameworks, I argue that *some* of the losses that states inflict during war are private law wrongs that establish a claim of compensation in tort. Only in cases where the *in bello* principles are observed can losses to person and property be justified and non-wrongful. Otherwise, they constitute wrongs, which those who inflict them have duties of corrective justice to repair.

**Keywords:** tort liability, warfare, international humanitarian law, corrective justice, compensation

## 1. *Introduction*

It is commonly assumed that civilians lack a right to compensation for losses they sustain during belligerent activities. The main reasons for this lack of liability are twofold. First, under international law, states are not obligated to compensate private individuals for infliction of losses during war.[1] Second, civil proceedings that are ordinarily available for private individuals are

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frustrated in this context by one of two immunities: the 'state immunity doctrine', and the 'combatant activities exception'. Essentially, both provide states with blanket immunity from any liability for injuries inflicted during war.

The hardship of civilians being left to shoulder the costs of losses which were inflicted on them during war has led scholars to make pragmatic arguments for compensation. Yet, these arguments disregard norms of liability under international law and tort law. For instance, it has been suggested that compensation should be imposed whether international humanitarian law was infringed or not, as non-compensation makes little political sense,[2] results in injustice,[3] or fails to provide proper incentives to avoid inflicting losses on civilians.[4] Similarly, it has been argued that liability should be imposed regardless of whether the loss was a tortious wrong, since waging war is an ultra-hazardous activity.[5]

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[1] Andrea Gattini, 'To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?' (2003) 1 Journal of International Criminal Justice 348, 348.

[2] Dieter Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect Balance' in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (2007) 180.

[3] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 529, 551; W Michael Reisman, 'The Lessons of Qana' (1997) 22 Yale Journal of International Law 381, 397–8.

[4] Yaël Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict' (2009) 42 Vanderbilt Journal of Transnational Law 181, 202–8.

[5] Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapons' (2016) 164 University of Pennsylvania Law Review 1347, 1394–5; Marcus Schulzke and Amanda Carroll, 'Corrective Justice for the Civilian Victim of War: Compensation and the Right to Life' [2015] Journal of International Relations and Development 1, 3. Note, a third option has been raised by the international community, according to which states can be held liable for inflicting a loss while infringing international law [Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001]. However, the draft articles suggest a compensation mechanism in which individuals have no standing. The parties to the dispute would be states, and therefore this mechanism is irrelevant for the purpose of this paper, which is to articulate a direct action by private individuals in tort against states for inflicting belligerent wrongs.

The conclusion that liability should be imposed regardless of whether international humanitarian law was infringed or not, or whether a tortious wrong was inflicted or not, would be too hasty, however. Without reference to international humanitarian law we cannot determine the rights and duties of states and individuals during belligerent activities. The very notions of 'war' and what it means to inflict a wrongful loss during war cannot be unpacked without reference to the theory and law of war. Furthermore, without reference to tortious wrongdoing and corrective justice we lose the moral and legal underpinnings of the idea that a wronged individual is entitled to a private law remedy from the person who wronged her, as well as the ability to articulate what constitutes a tortious wrong. To make these ideas apply to war, and hence to be able to claim that civilians have a private law right to compensation for wrongs they sustained during battle (to which I will refer to as "belligerent wrongs"), three preconditions must be established: that there are rights during war; that there is a standard according to which mere harms are distinguishable from wrongs; and that there is a duty to correct wrongs.

In this paper, I argue that belligerent wrongs can and should be corrected through ordinary domestic tort law. I establish my argument and the three preconditions by offering a novel way of understanding the operation of tort law in the context of war. I show that private law rights exist and remain relevant during war. Moreover, while I hold that ordinary tort doctrines can apply, the way to distinguish between harms for which no liability arises and wrongs for which there can be tortious liability is unique in the context of belligerent activities. This evaluation requires gauging whether combatant activities adhered to international humanitarian law.[6] I argue that an infliction of a loss while engaging in belligerent activities is a *prima facie* private law wrong. Yet, such

[6] Throughout the paper I use 'the laws of war', 'international humanitarian law', and '*jus in bello*' interchangeably.

losses are justified, and hence non-wrongful, if they are imposed while adhering to the principles of *jus in bello*. Consequently, I argue that, as rights remain relevant during war and the laws of war provide a standard to assess whether a loss is wrongful, corrective justice requires that tort liability would be imposed for belligerent wrongs.

By structuring tort liability in this way, I offer an account of the limits of liability in accordance with the distinctive features of war. Not all infringements of private rights are actionable, as engaging in combat would not be possible under such liability regime. Likewise, there cannot be blanket immunity from tort liability for all violations of private law rights during combat, as doing so fails to distinguish legitimate forms of warfare from illegitimate forms of violence. Rather, the *in bello* rules demarcate the boundaries of liability, as only losses that are inflicted in breach of these rules will give rise to liability.

To set the stage, I demonstrate in part 2 the difficulty and promise that is entailed in the current international law regime. It does not provide civilians with a right to compensation, but it does provide the normative basis for distinguishing belligerent harms from belligerent wrongs. It is this normative basis that underlies my critique of the solutions that have been suggested in the literature for the problem of remediless civilians – they do not properly capture what is a wrong in the context of war.

In contrast to these proposed solutions, I argue that tort law is applicable to belligerent activities. To establish my claim, and thus the first precondition, I show in part 3 that civilians' rights remain relevant during war. I do so by responding to the two main arguments to the contrary. First, I demonstrate that certain realist arguments about the lack of rights during war are inaccurate. Second, I establish that rights are relevant during belligerent activities as they are not overridden or suspended, nor do states and combatants have an immunity or excuse for infringing rights.

I address the second precondition in part 4, in which I argue that the way to distinguish between merely harmful and wrongful losses is by referring to the principles of *jus in bello*.[7] In the moral and legal sense, a state of war is a sphere that is distinct from a state of peace.[8] Nevertheless, I argue that while the structure of tort law remains the same in times of peace and war, in the latter the standards for imposition of tortious liability are informed by the moral and legal obligations of international humanitarian law. Belligerent activities should be evaluated based on their own norms, as tort liability only arises when the inflicted loss is wrongful.[9] Hence, an imposition of tort liability that is divorced from the normative basis for evaluating wrongful actions in war contradicts the basic structure of tort law. Consequently, some combatant activities are merely harmful, while others are wrongful.[10] When the principles of *jus in bello* are properly adhered to,

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[7] This argument does not mean that the laws of war should not or cannot be used to evaluate the criminal or public law wrongfulness of belligerent activities as well. Nor it is that tort liability can only arise when the laws of war support a finding of criminal or public law wrongfulness. Rather, my claim is that *jus in bello* should not be understood only as a kind of criminal or public law set of norms. The mechanism through which wrongfulness is established in each body of laws is distinct. Therefore, the facts of a single case could support a finding of wrongfulness in tort law, while at the same time they will not yield a similar finding in criminal or public law.

[8] Stephen C Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2007) 58; Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (Mary Campbell Smith tr, 1917) 117–9; Avishai Margalit, 'Decent Peace' (2005) 216 <http://tannerlectures.utah.edu/_documents/a-to-z/m/Margalit_2006.pdf> accessed 10 March 2017.

[9] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349, 349; Jules Colman, 'Tort Law and Tort Theory: Preliminary Reflections on Method, Philosophy and the Law of Torts' in Gerald Postema (ed), *Philosophy and the Law of Torts* (2001) 184; John Goldberg and Benjamin Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (2014) 17; Martin Stone, 'The Significance of Doing and Suffering' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2001) 159–60.

[10] The distinction between harms and wrongs is in fact familiar in the context of peacetime. Non-wrongful harming is the basic notion of causing a loss to which a person has no right of compensation. Lack of liability results from a person use of her body and property in a permissible way, which changed the reality in which other people operated without wronging them. For example, if I open a restaurant near your café, and as a result you lose costumers it could be said that I harmed you. You sustain a financial loss from the fact that I opened my restaurant, as diners come to have lunch in my business rather than yours. But I did not wrong you in the sense that you are entitled to demand compensation from me for that loss. You did not have a right that those customers will go to your café and order your food. Nor have used or

a loss can be harmful but not wrongful because its infliction is justified.

Lastly, I address the third precondition by suggesting in part 5 that wrongdoers have a corrective justice duty to remedy the belligerent wrongs they inflict. Corrective justice is the notion that a wrongful violation of an individual's private rights must be rectified by holding the wrongdoer liable towards the injured individual for the wrongful loss she inflicted.[11] This notion is therefore bipolar, relational, and formal, as it only considers the rights and entitlements of the individual who caused the wrong and the individual who suffered that same wrong.[12] External goals or policies do not affect the determination of whether a loss is wrongful and should liability be imposed.[13]

A corrective justice duty arises in war when a private law right was wrongfully infringed. In part 3 I show that it is possible to infringe private law rights during combat by establishing that rights and duties remain relevant. Furthermore, in part 4 I argue that although inflicting a loss

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damaged your café as a means of doing business. All I have done is changed the reality in which you operated. Alternatively, a loss could be harmful and yet not bring about liability if it is minor and ordinary. When I inadvertently bump into your shoulder in a busy train station I harm you but not wrong you, as my bumping into you is a side-effect of the ordinary use of our bodies. It is a harm we accept as part of what it means to live in a crowded urban environment. Lastly, a loss could be harmful, but no liability is imposed due to some affirmative defence. For instance, if you are trying to steal my bag, I can commit a battery by pushing you away, yet no liability would arise if by pushing you I am exercising my right to self-defence. In this sense, my actions are justified. Similarly, if I hit you while I am unconscious and convulsing I will not be held liable because I was not in control of my actions, and therefore they are excused.

[11] Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 104; Ernest J Weinrib, 'Deterrence and Corrective Justice' (2002) 50 University of California, Los Angeles Law Review 621, 631–8; Weinrib, 'Corrective Justice in a Nutshell' (n 9) 350–3; Arthur Ripstein, *Private Wrongs* (2016) 5; Jules Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2001) 184; John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 9–11, 22-3. Although corrective justice scholars differ regarding several of its aspects, their views generally fit with the description above, and their differences do not affect my arguments in this paper.

[12] Weinrib, *The Idea of Private Law* (n 11) 73, 159-60; Weinrib, 'Deterrence and Corrective Justice' (n 11) 630–1; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press 2004) 11; Ripstein, *Private Wrongs* (n 11) 167; Goldberg and Zipursky (n 9) 27; Stone (n 9) 159.

[13] Weinrib, *The Idea of Private Law* (n 11) 1–10; John Goldberg, 'Twentieth-Century Tort Theory' (2003) 9 Georgetwon Law Journal 513, 571.

while engaging in belligerent activities is a *prima facie* wrong, it is nonetheless justified and non-wrongful if the injurious activity adhered to the *in bello* principles. Compliance with the *in bello* principles extends an affirmative defence, and turns losses that would otherwise be wrongful into merely non-wrongful losses. In dividing things up in this way, I offer a way of determining when a wrongful infringement of private rights occurred during war. When such a wrongful loss has been inflicted, a corrective justice duty to rectify the wrong follows. This duty could be discharged through ordinary domestic tort law doctrines.[14]

That said, while I argue that liability for inflicting wrongful belligerent losses could be addressed through tort law, I do not argue that it could *only* be addressed through tort law. It is possible to, and some states do in fact, provide a kind of reparation through non-tort law means. Unlike tort law, which can only compensate civilians for wrongful losses, non-tort law means do not require a finding that an action was wrongful to provide payment. Therefore, payment can be made whether international humanitarian law was breached or not. For example, many states, including Canada, Israel, and the U.S., employ *ex gratia* payment schemes to address some of the losses they inflict. These are ad-hoc payments, over which states have complete discretion. They are not meant to repair a wrong or assign blame, but only to provide partial payment to the individual who suffered the loss. Thus, the award of an *ex gratia* payment is not dependant on a breach of international humanitarian law or any other law. Similarly, payments made via domestic social insurance, statutory entitlements, or international compensation funds are not dependant on a breach of international humanitarian law. Rather, they depend on conformity to certain factual and legal criteria.

[14] Establishing precisely how particular tort doctrines apply to belligerent wrongs goes beyond the scope of this paper, and therefore I will not address it here.

Yet, while these non-tort law means address losses, they do not correct wrongs. This feature is exactly why there is no need to establish that a wrongful loss was inflicted before providing a payment. In contrast, when tort law is the mechanism through which compensation is obtained, the link between the factual infliction of a loss and its normative nature as a wrong is crucial. When the tort litigation is complete, and the wrongdoer compensates the plaintiff, the former corrects the wrong it inflicted. Therefore, the normative significance of awarding compensation through tort law makes it the ideal mechanism through which corrective justice can be attained. Still, it may be that tort law should be abandoned in favour of other second-best solutions if tort law, as the ideal mechanism, is empirically inferior at achieving corrective justice.[15] This paper will not attempt such an evaluation. Rather, it will only aim to demonstrate that tort law can correct belligerent wrongs.

## 2. *No Redress for the Misfortunes of War*

Under international law there is no obligation for states to compensate civilians for injuring them in the process of belligerent activities. Nevertheless, there are international law duties to compensate other states. Arguably, Article 3 of The Hague Regulations and Article 91 of Additional Protocol I ground such duties, as they hold that a state which infringes the laws of war, and in doing so inflicts a loss on another nation, is liable to pay compensation for it.[16] This

[15] Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1998) 20–1.

[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907; International Committee of the Red Cross, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' 1053–7 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1066AF25ED669409C12563CD00438071> accessed 29 June 2018.

obligation is more explicit in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[17] The obligation to pay compensation for such infringements is between the states which were parties to the conflict. Put differently, The Hague Regulations, Additional Protocol I, and the Draft Articles do not establish a private law duty of compensation towards individuals, nor do they provide recourse for individuals against states.[18]

There are two main issues that arise from this regime. First, civilians who sustain a loss might be the ultimate beneficiaries of compensation made between states, but it is generally viewed that they cannot themselves bring claims for compensation for the infringement of international law.[19] This lack of standing means that civilians are unable to vindicate their rights to life, bodily integrity, and property through the judiciary. Furthermore, as these types of disputes are settled between states, civilians might not be fully compensated for the losses they sustained. This is clear in the case of civilians being indirect beneficiaries. For instance, if the payment owed by State A

[17] DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (n 5) 31.

[18] An articulation of the lack of a creation of a private law duty by the above-mentioned international law sources could be found in Article 2(b) of the United Nations General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005. This Article requires states to ensure compliance with their international law obligations through domestic law, thus suggesting that international law operates strictly between states.

[19] Gillard (n 3) 532; Ben Saul, 'Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights' (2004) 19 American University International Law Review 523, 531–2; Rainer Hoffman and Frank Riemann, 'Compensation for Victims of War: Background Report' (International Law Association Committee on Compensation for Victims of War 2004) 8 <www.ila-hq.org/en/committees/index.cfm/cid/1018>. That said, there have been other sources of international law, namely multilateral treaties, that have been interpreted as giving standing to civilians to bring claims directly against states for wrongful belligerent action. For example, the European Court of Human Rights interpreted Article 41 of the CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 as the source through which it can impose compensation on state parties for infringing rights that are protected by the Convention in cases of belligerent activities [*Isayeva v Russia* (App no 57950/00) (February 24, 2005) (European Court of Human Rights) 231–45; *Tagayeva and others v Russia* (Application no 26562/07 and 6 other applications) (April 13, 2017) (European Court of Human Rights) 642–58].

is directed at rebuilding infrastructure, the individual civilians are not directly compensated for their losses.

The second main issue that arises from the current regime is that many of the misfortunes of war are left without adequate redress. One way in which losses are not properly redressed is that collateral damage is generally permitted during war, subject to certain constraints. Therefore, civilians shoulder many of the costs of belligerent activities, while the injuring state bears no responsibility to ameliorate them. Another way in which losses are not properly redressed, at least from a corrective justice viewpoint, is that even if the individuals have a private or social insurance against belligerent losses, the wrong is not corrected by the wrongdoer.[20]

There have been several attempts to solve these issues. Some of these suggestions seem to be grounded in duties that are completely external to tort law. For example, Dieter Fleck argues that "as a matter of sound policy" states should be under an international law duty of compensation for gross infringements of human rights or international humanitarian law.[21] In contrast, Emanuela-Chiara Gillard claims that the duty of compensation under international law should be expanded much further. She argues that insistence on violation of international law as the basis on which compensation is made will result in injustice, in which civilians who suffered similar losses will be treated differently.[22] Hence, Gillard suggests that compensation should be awarded either for all losses inflicted in the process of belligerent activities that are *jus ad bellum* unjust, or even for

[20] Ripstein, *Equality, Responsibility, and the Law* (n 15) 20–1.
[21] Fleck (n 2) 707–8.
[22] Gillard (n 3) 551. Gillard invites us to imagine a situation in which the houses of two neighbours were destroyed during belligerent activities, but that one house was intentionally targeted while the other was unintentionally damaged. She argues that the former type of loss is a violation of international humanitarian law and hence compensation will be granted, while the latter is permitted collateral damage and hence compensation will not be justified.

all losses without any restrictions.[23] Gillard is not alone in arguing that liability for collateral damage should be divorced from international humanitarian law. W. Michael Reisman holds that civilians should be compensated for any loss states inflict on them in the process of belligerent activities, regardless of whether international law was violated.[24] His argument is based on notions of distributive justice that drive administrative no fault compensation schemes.[25]

Other suggestions seem to either be rooted in tort law, or completely under its domain. For instance, Yaël Ronen argues that compensation for collateral damage should follow a strict liability rule, as it would be more effective in incentivizing states to minimize the harm they inflict on civilians than a negligence rule.[26] Marcus Schulzke and Amanda Carroll also propose adopting a strict liability rule, but their approach is different to Ronen's. Unlike Ronen, who analyses liability from an economic perspective, Schulzke and Carroll argue that liability follows from a corrective

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[23] *ibid*. Note, international humanitarian law encompasses actions that relate to the conduct of belligerency itself, or *jus in bello*. In this sense, the law is indifferent to the *a priori* just or unjust nature of the decision to engage in belligerent action, or *jus ad bellum*. However, Gillard seems to be suggesting that the law should not be ignorant of *ad bellum* considerations, at least for the purpose of awarding compensation.

[24] W. Michael Reisman, 'Compensating Collateral Damage in Elective International Conflict' (2013) 8 Intercultural Human Rights Law Review 1, 10.

[25] *ibid* 4–8. In these schemes, the state will be liable for compensating individuals whom it injured if the state (and hence the general public) benefited from the injuring activity [*ibid* 7; L Neville Brown and John Bell, *French Administrative Law* (5th edn, Clarendon Press ; Oxford University Press 1998) 193–4; Cees van Dam, *European Tort Law* (Oxford University Press 2006) 478–9]. This is a distributive justice notion, as by holding the state liable for such injuries all members of a political community share the burden of an injurious action equally, rather than only a single individual [BROWN AND BELL 184]. Reisman believes that holding states liable for losses that do not violate international law will have two additional benefits. First, he claims that by internalizing the costs of lawful losses states will be incentivized to take more precautions and thus collateral damage will be reduced [Reisman (n 24) 11]. Second, Reisman argues that compensation is a basic human right duty, yet states discriminate in discharging this duty between their own nationals and foreign nationals [*ibid 12*]. Hence, providing compensation in the context of belligerent activities will strengthen states commitment to the rule of law, as it will eliminate unjustified discrimination between national and foreign civilians [*ibid*].

[26] Ronen (n 4) 195–8. In her view, it is possible to divorce liability from culpability, as strict liability does not require proof of fault in the conduct of the injuring state. Still, her argument does not divorce liability from international humanitarian law completely, as she suggests that liability would be imposed only when *jus ad bellum* is infringed [*ibid 205*].

justice duty.[27] They hold that liability should be strict as waging war is an ultra-hazardous activity, and any harm caused to civilians during belligerent activities is an infringement of their rights that could only be vindicated by holding states strictly liable.[28] Therefore, Schulzke and Carroll's suggestion goes further than Ronen's, as they hold that any loss caused in combat establishes a duty of compensation, even if *jus ad bellum* or *jus in bello* were not breached. In contrast, Rebecca Crootof offers a regime in which there are both fault-based and strict liability rules.[29] Crootof argues that when states commit serious violations of international humanitarian law then they should be held liable in tort.[30] In addition, she claims that for certain belligerent activities states should be held strictly liable, for instance activities that are ultra-hazardous and unpredictable such as the use of autonomous weapons.[31] In these cases, liability would not depend on establishing a serious violation of international humanitarian law. Rather, any loss brought about by 'ultra-hazardous' belligerent activities would give rise to a right to compensation.

However, all of these suggestions share a common flaw: the liability regimes they offer are divorced, to various degrees, from international humanitarian law. While this detachment solves the problem of civilians' lack of remedy for losses they sustain during battle, other moral and legal problems arise. Without reference to international humanitarian law we cannot determine the rights and duties of states and individuals during belligerent activities. The very notions 'war' and wrongful losses during war cannot be unpacked without reference to the theory and law of war.[32]

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[27] Schulzke and Carroll (n 5) 13. On the incoherence of strict liability rules from a corrective justice perspective see: Weinrib, *The Idea of Private Law* (n 11) 179–80.

[28] Schulzke and Carroll (n 5) 15–9.

[29] Crootof (n 5) 1386.

[30] *ibid*.

[31] *ibid* 1394–5.

[32] On the problematic nature of treating responsibility without proper account of the nature of war see: Michael Walzer, 'Response to McMahan's Paper' (2006) 34 Philosophia 43.

Moreover, several additional difficulties arise from the suggestions that are not based on tort law in particular. First, they might require the establishment of procedures and institutions that do not exist. Currently, there are no institutions with international jurisdiction that could adjudicate claims for compensation for belligerent wrongs. Indeed, there are some permanent institutions with multinational jurisdiction, such as the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Court of Justice, and the International Criminal Court. But these courts' jurisdictions are limited as they are voluntary, and, consequently, their reach is not global as the courts have jurisdiction only over those states that surrender to it.[33] Furthermore, while there have been some *ad hoc* institutions established for the purpose of awarding compensation to civilians in the aftermath of violent conflicts, for instance the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission, these institutions are exceptional. They represent the convergence of the political interests of states, and as such it is doubtful they could be viewed as a proper template for compensation given they are not likely to be established, and that their jurisdiction is limited to specific violations in specific times and specific states.[34] However, the difficulties posed by international bodies with universal jurisdiction could be overcome, at least in part, by turning to domestic courts for the enforcement of international law.

Second, even if these procedures and institutions will be established, non-tort law liability regimes could address losses, but they will not correct wrongs in the normative sense. In non-tort law regimes, there is no need to establish that a particular person or entity wronged you. Nor is the

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[33] *Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America (Preliminary Question)* [1954] ICJ Rep 19, at 32; Lindsey Camron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (2013) 540; Ronen (n 4) 197.

[34] Ronen (n 4) 205.

wrongdoer necessarily compelled to compensate you for your losses. Instead, all harms – whether wrongful or not – could serve as the basis for payment. In addition, it might not be the wrongdoer who is compelled to pay the person who suffered the loss. Rather, it could be an insurer or the state.

In contrast, when tort law is the mechanism through which compensation is obtained, then the link between the factual infliction of a loss and its normative nature as a wrong is key. When the tort litigation ends, and the wrongdoer compensates the plaintiff, the former corrects the wrong it inflicted. This is the basic obligation that arises from corrective justice – a person who wrongfully infringed the rights of another is under a duty to correct the wrong she created.[35] Thus, there is normative significance to awarding compensation through tort law that is lacking in non-tort law regime, and the two cannot be said to be alternative mechanisms for securing the exact same result.[36]

### 3. *Civilians' Rights Remain in War*

To claim that a person has a duty to compensate another for an injury she caused assumes, among other things, that the injured party has a right to her body and property, and that other people do not have the right to use or damage her body and property. It is the infringement of one's rights

[35] Ripstein, *Private Wrongs* (n 11) 167–8; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 82–3. For an account that divorces liability from causation see: Ehud Guttel, Alon Harel and Shay Lavie, 'Torts for Non-Victims: The Case for Third-Party Litigation' <https://papers.ssrn.com/abstract=3061544>. However, this account is not based on the a corrective justice conception of tort law, but on a utilitarian one.

[36] See Arthur Ripstein's similar position on tort law versus mandatory public participation schemes: Ripstein, *Private Wrongs* (n 11) 294.

that constitutes a wrong which in turn gives rise to an obligation to correct it.[37] Therefore, where there are no rights there are no infringements of rights; no legal wrongs; and no grounds to claim compensation in tort. This is the first of three preconditions that needs to be established in order to show that civilians have a right to compensation for belligerent wrongs.

In the context of war, there are three main arguments regarding the existence of rights of private citizens: a realist argument that there are no rights during war; an argument that there are rights, but they are irrelevant; and lastly, an argument that that rights remain and are relevant during war.[38] In the discussion below I will demonstrate that the latter approach is most coherent and compelling. By negating the realist argument, I will show that there are rights during war, and that they remain relevant during belligerent activities. In doing so, the first precondition will be established.

### A. *There Are Rights During War*

The argument that there are no rights during war is often grounded either on the lack of proper legal structure in which rights could exist, or on the special character of war as an extra-legal domain, though these two explanations can overlap. The realists' depiction of rights during war is a good example of such overlapping account. They hold that war is a situation in which human society falls apart. It is an extreme time of hellish consequences. As such, they argue that there are no laws and no rights during war. In this sense, they seem to be basing their argument on the nature

[37] Weinrib, 'Corrective Justice in a Nutshell' (n 9) 349; Colman (n 9) 184; Goldberg and Zipursky (n 9) 17; Stone (n 9) 159–60.

[38] Some of these options where suggested by: Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books, a member of the Perseus Books Group 2015) 135–6; Yitzhak Benbaji, 'The War Convention and the Moral Division of Labour' (2009) 59 The Philosophical Quarterly 593, 613; Ronen (n 4) 188–92.

of war as a special legal and moral sphere rather than on the structure of international relations.

To establish their claim, realists refer not only to the writings of Cicero, who coined the famous maxim that "in times of war, the law falls silent" (*inter arma enim silent legēs*),[39] but also to Hobbes' structuralist account. He argued that individuals are in a horizontal relationship with one another, but that members of a political community are in a vertical relationship with their sovereign. Put differently, individuals hold the same status in relation to one another and are not in a position of power over one another, while they are all the subjects of the state that has power over them. Furthermore, Hobbes argued that the relationship between states is akin to that among private individuals, namely that it is horizontal. Yet, unlike individuals, who are in a shared vertical relationship with their state, there is no authority to which all states are subject to and they are not a part of a single political community. Thus, nations exist in a state of nature in which there is no law. As Hobbes puts it:

> *"Where there is no common power, there is no law, and where there is no law, there is no injustice…Justice and injustice are qualities that relate to men in society, not in solitude. It also follows that in this same condition, there is no propriety, no dominion, and no distinct mine or thine. All that is a man's is what he can get, and as long as he can keep it."*[40]

As there is no vertical relationship with a sovereign who can adjudicate disputes in a state of nature, it is a condition of constant war as parties will use force to obtain things and maintain their

[39] Marcus Tullius Cicero, *The Speeches of M. Tullius Cicero against Catiline and Antony and for Murena and Milo* (Herbert ED Blakiston tr, 1894) 150.

[40] Thomas Hobbes, *Leviathan* (Routledge 2006), Book I, c. XIII, 84.

hold over them. In this condition, peace is the exception.[41] Individuals left the lawless state of nature only by entering into a shared vertical relationship with a state. Yet, according to the realist account of Hobbes, there is no similar structure for states. Therefore, they have never left the state of nature.[42]

Nevertheless, the realist argument that the lack of a vertical relationship means that there are no laws or rights is puzzling for several reasons. First, even if nations have no rights against each other in a state of nature, this does not show that there are no rights for private individuals. Indeed, the idea that there are no rights for private individuals during war seems to take Hobbes' argument a step too far. Hobbes held that prior to the existence of a shared vertical relationship individuals were in a state of nature.[43] But the fact that states engage in wars does not return *individuals* to a state of nature. If this was the case, then individuals would never have rights beyond those that exist in a state of nature, as according to the realist Hobbesian account nations never left this state and are therefore in a constant state of war. Thus, it cannot be that during war the rights of private individuals expire, as the onset of war does not revert individuals back to a state of nature.[44] As the status of these rights is not dependant on the normative condition that exists between states, individuals can hold those who wrongfully infringed their rights accountable – including states.

Second, in order to establish that there are no laws during war, realists need to repudiate familiar legal doctrines and instruments. The laws of war are just one example. States are bound

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[41] Neff (n 8) 131–2.

[42] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977) 46.

[43] HOBBES (n 40), BOOK I, C. XIII, 84.

[44] For a critique of the Realist reading of Hobbes see: Theodore Christov, *Before Anarchy: Hobbes and His Critics in Modern International Thought* (Cambridge University Press 2015) 104–35. Christov criticizes the particular argument that derives individuals' rights from state rights, holding that this move is illogical considering that states are artificial individuals (*ibid 114*.).

to comply with them, and many military codes adopt them and use them in their rules of engagement. Moreover, when states do not adhere to the laws of war they can be sanctioned by other states and international organizations such as the Security Council, which may even issue a resolution permitting engaging in belligerent activities to enforce the laws of war.[45] These doctrines and institutions do not cease to exist in war. In fact, their very purpose is to deter states from engaging in combatant activities, as well as regulating these activities if they take place. They would not make sense if they did not have any force in war.

Indeed, there is no international institution with universal jurisdiction to settle disputes and oblige states to comply with its resolutions. Nevertheless, the lack of such institution does not mean that there is no law and there are no rights during war, but rather just that there is less effective law enforcement on the international level. Still, the laws of war could be enforced by domestic courts and institutions, even if they are sometimes unwilling to do so.[46] Furthermore, the lack of a common power to adjudicate claims and enforce the law between states on the international level is less problematic when it comes to enforcing the rights of private individuals against states that violated them. If state A inflicts a loss on a citizen of state B, she could bring a claim in tort against state A in its own courts. In this scenario, both state A and the citizen of state B are subject to the power of state A's courts, and the realist Hobbesian problem does not arise. Even if the claim against state A is brought before the courts of state B, state A would only be bound in so far as it willingly subjects itself to the jurisdiction of state B's courts.[47] Thus, it is

[45] Take for example the Security Council's Resolution 1973 (2011). This resolution was adopted in response to the gross violations of international law by the Libyan government as against the forces that were attempting to oust it and the civilian population.

[46] See, for instance: *HCJ 69/81 Abu Ita v Judea and Samaria Commander*; *HCJ 201/09 Doctors for Human Rights v The Prime Minister, PD 63(1) 521*.

[47] Hence, if state A is not willing to subject itself to the jurisdiction of the courts of state B, the realist Hobbesian difficulty remains.

difficult to maintain the realist Hobbesian argument that there are no laws and enforcement mechanisms during war, as to a certain degree there is a common power on the international level to adjudicated disputes and enforced rights.[48]

### B. *Rights Are Relevant During War*

If the existence of rights during war is not necessarily negated, how can we explain that states are able to inflict losses on civilians? This puzzle would be resolved if the argument that during war private law rights are irrelevant could be sustained. By irrelevant I do not mean that rights will have no moral, political, or legal significance. Rather, I mean that the enforceability of rights and duties will be impaired to the degree that states will have a legal right to commit a legal wrong.[49] This would be the case if during war rights were to be overridden or temporarily suspended, or if states could not be held liable for any infringement of private law rights.

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[48] Realists would reply to this argument that although laws and legal institutions exist, they are only a reflection of the interests of the strong world powers, who make and break the laws in impunity while using the laws to keep weaker nations in check [see, for example: [Michael J Glennon, 'The UN Security Council in an Unipolar World' (2003) 44 Virginia Journal of International Law 91, 105–8; Martti Koskenniemi, *The Gentle Civilizer of Nations : The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 459–80; John Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 Transnational Law and Contemporary Problems 1]. However, this view has been criticised. International law and international institutions are more than just power masked as legitimate legal processes. [See, generally: Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 40–7; Jutta Brunnée and Stephen J Toope, 'The Rule of Law in an Agnostic World: The Prohibition on the Use of Force and Humanitarian Exceptions' in Wouter Werner, Marieke De Hoon and Alexis Galan (eds), *The Law of International Lawyers* (Cambridge University Press 2017) 155–61; Eden Sarid, 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges' (2017) 35 Berkeley Journal of International Law 219, 249–54]. Moreover, the fact that laws are broken or changed does not negate their normative power and significance. If someone robs me, my right to my property remains. It does not dissolve by the act of robbing me. Similarly, if the legislature changes laws regulating electoral ridings, for example, it does not mean that the elections act has no normative force.

[49] For an analysis of the legal right to do a legal wrong see: Ori Herstein, 'A Legal Right to Do Legal Wrong' (2014) 34 Oxford Journal of Legal Studies 21, 27. For an opposing view which holds that there can be no legal right to infringe a legal duty if they are categorically enforceable, see: David Enoch, 'A Right to Violate One's Duty' (2002) 21 Law and Philosophy 355, 383–4.

Overriding rights and duties implies the use of one's authority against another. A city can expropriate a parcel of land from a private individual to expand a highway. The police can block streets to cars in order to allow a parade to take place. Parents can ground their children. Furthermore, an override means that rights and duties remain in full force until they are overridden. The override can take one of two forms: either an overridden right expires permanently, or it is set aside in a certain context as other rights and duties take precedence. I shall refer to the first kind of consequences as the override-expiry account, and the second as override-precedence account. After a city expropriates a parcel of land from an individual, she no longer has a right to that land. Once a claim-right expires it can no longer be breached. In contrast, when the police block several streets for a parade to take place, or when parents ground their children, one right or interest are held to be superior to another. The superior right or interests takes precedence, and the inferior right does not expire. It simply has lesser force in this particular context.[50]

An alternative description could be that during war private law rights and duties are suspended, in which case they cannot be breached or overridden. They are temporarily 'out of commission', and anything that would violate them in other circumstances could be done while the suspension is in force.[51] Unlike the override-precedence account, in which one claim-right or duty is suppressed by another specific claim-right or duty, suspension could have either an *in rem* or *in personam* effect, depending on the type of right that is suspended. For instance, if one person's right over her bicycle is suspended, then anyone else can use or damage it without infringing the owner's rights. As property rights are *in rem*, their suspension means that anyone can use or

[50] Raz, Joseph, 'Legal Rights' (1984) 4 Oxford Journal of Legal Studies 1, 19.

[51] That said, there may still be other limitations which remain in force while rights and duties are suspended. These limitations could explain why certain weapons and tactics cannot be used despite the fact that force could generally be applied.

damage the property without wronging the owner. In contrast, if a person had a lease on a bicycle, which gave her the right to ride it, and that right was suspended, no one would have a right to use or damage the bicycle. The bicycle owner's property right remained in force, while the lessee's *in personam* right was suspended.

As rights and duties are equally suspended for all parties to a conflict, no state is acting in a position of authority over another state. They are all acting equally in liberty, and consequently there is a conceptual fit with the horizontal relationship of states. The suspension account also sheds light on why certain actions are rightful during war and wrongful at its conclusion. Given that rights and duties are only suspended for the duration of the belligerent activities it is clear why once they have ended rights and duties regain their full force.

Both the override and suspension accounts focus on the status of the rights of non-combatants. Yet, another way of thinking about how states might have a legal right to do legal wrong focuses on the state and its combatants, rather than on the civilian population. In this context, it could be argued that private law rights are irrelevant during war when combatants and states are either immune to or excused from liability for infringing the rights of civilians, or if inflicting such losses is permitted to them. For an immunity to render private law rights irrelevant, it would need to apply whether the combatants inflicted a wrongful loss or not,[52] and extend to all sides to a conflict.[53] In contrast, an excuse means that while a breach of rights is a wrong, there could be an affirmative

[52] Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press 2017) 27.

[53] Note, Hague argues that as all states have an interest that they and their own combatants will not be criminally liable for their actions they agreed to grant each other immunity [*ibid 28*]. While Haque only refers to immunity from criminal liability, it seems that this model could also apply to civil liability [*ibid* 25–6].

defence to liability. While the breach of a norm is wrongful, no liability arises.[54] The rationale behind this defence is that under certain conditions the prospect of liability could not guide behaviour, such as in cases of mistake, duress, and temporary insanity.[55] Lastly, according to the permissible harms account, while private law rights and duties remain in force, their breach is nonetheless permissible when they are inflicted as a side-effect of the ordinary use of our body and property. They are simply the harms we accept as part of what it means to be able to take these kinds of actions and pursue our purposes while ensuring that others are able to do the same.[56] However, we cannot use other people's body and property without proper authority, as doing so inhibits their ability to use their body and property.[57]

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[54] Weinrib, *The Idea of Private Law* (n 11) 54; Kent Greenwalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 Columbia Law Review 1897, 1900; George Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 759; Heidi M Hurd, 'Justification and Excuse, Wrongdoing and Culpability' (1999) 74 Notre Dame Law Review 1551, 1558; John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 82–3; John Goldberg, 'Tort Law's Missing Excuses' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (2015) 54.

[55] Arthur Ripstein, 'In Extremis' (2005) 2 Ohio State Journal of Criminal Law 415, 423–4; Gardner, *Offences and Defences* (n 54) 86; George Fletcher, 'The Right and the Reasonable' (1985) 98 Harvard Law Review 949, 955.

[56] Ripstein, *Private Wrongs* (n 11) 167. Note, there is disagreement amongst scholars as to whether all justified actions are part of an account of permissible harms and vice versa [*see:* RA Duff, 'Rethinking Justifications' (2004) 39 Tulsa Law Review 829, 831; Malcolm Thorburn, 'Justifications, Powers, and Authority' (2008) 117 Yale Law Journal 1070, 1090; Fletcher, 'The Right and the Reasonable' (n 55) 977–8]. However, I find these two categories to be sufficiently distinct for the following reason: Inflicting a permissible harm means acting in a way that is intrinsically not wrongful, whereas having a justification means that the infliction of harm would be wrongful without the extrinsic influence of the justification.

[57] Ripstein, *Private Wrongs* (n 11) 167. The element of use without authority operates on a horizontal and a vertical level. The relationship between private individuals is horizontal in the sense that all individuals are equally their own masters, and are thus free from the will of others. As such, they can agree that their means will be used by others. When such agreement is reached, individuals have horizontal authority to use the rights of others. Therefore, consent negates the possibility of inconsistent use of another person's rights [Ernest J Weinrib, 'The Monsanto Lectures: Understanding Tort Law' (1989) 23 Valparaiso University Law Review 485, 514–5]. In contrast, the relationship between the state and its subjects is vertical in the sense that the state and its agents can interfere with individuals' rights unilaterally under certain circumstances. Taxes can be collected. Lands can be expropriated. Freedom of movement could be limited. These are all examples of the state acting in a way that is inconsistent with the rights of private

That said, each of the override, suspension, immunity, excuse, and permissible harms models is inadequate in capturing the status of private law rights during war, as they either fail to account for the horizontal relationship between states or they result in conclusions that cannot and ought not be supported. For instance, the override account is not apt to describe what happens to rights and duties during war for two reasons. First, as the loss of binding force of rights and duties is only temporary and limited to the duration and engagement in belligerency, the override-expiry account cannot be the right fit. When a claim-right or duty is overridden, it expires. It cannot be revived. Thus, according to the override-expiry account, if combatants of one state take control over a house in the heat of battle it becomes a property with no owners. Hence, either the combatants or their state can take ownership over the house. However, this is not how we understand the legal implications of that takeover. When the fighting is done, the combatants must return the house to its owner. The override-expiry account does not explain what happens to rights and duties at the conclusion of belligerent activities such as this.

Second, as the relationship between states is horizontal, the override account more generally is ill suited to describe what happens to rights and duties during war. The horizontal relationship between states means that in any engagement with each other, states do not exert authority over one another as they hold equal status. The conduct of belligerent activities does not change the nature of the relationship of states from horizontal to vertical. Nonetheless, an override implies that one state is exercising its authority over another state and its citizens. If the override account was applicable, one possible conclusion would be that all states are simultaneously in a position

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individuals without requiring their consent. Yet, by acting in these ways no wrong is committed when the state and its agents are acting in accordance with their public powers, as they are exercising their vertical authority over private individuals.

of authority over their rival state, and hence that rights and duties of each party could be simultaneously overridden by and overriding the other's. This conclusion is starkly opposed to the horizontal relationship of states. As no state is in a position of authority over another, no state's rights and duties can override those of a rival state.

The suspension account is also insufficient, as it does not properly explain why parties to a conflict remain under a duty to comply with *jus in bello*. A suspension of private law rights in the context of war would only apply between states that are parties to the conflict, and it would be conditional because only certain kinds of losses are justified. If rights and duties are suspended, then combatants and states should be at liberty to inflict losses on civilians. Yet, this liberty is qualified, as losses can only be imposed as long as they abide by the principles of *jus in bello*.

Two conclusions follow from this qualification. First, the *in bello* principles mean that combatants and states are always under a public law duty to refrain from acting in a way that violates them. Put differently, *jus in bello* does not provide states with permission or liberty to inflict certain losses. Rather, it is a set of prohibitions on states' conduct that is constantly in force.[58] Second, under the suspension account, private law rights can be simultaneously relevant and irrelevant. The right to property, for example, would be considered as suspended and irrelevant in relation to a combatant who shot a civilian's car while adhering to the *in bello* principles, and as effective and relevant in relation to a combatant who violated these principles. As property is an *in rem* right, it is incoherent to hold that it is relevant and irrelevant at the same time in this

[58] The debate about the nature of *jus in bello* as permissive or restrictive goes beyond the scope of this paper. For an account of this debate see: Jeff McMahan, *Killing in War* (Oxford University Press 2009) 52–3; Jeff McMahan, 'On the Moral Equality of Combatants' (2006) 14 Journal of Political Philosophy 377, 389–90; Thomas Hurka, 'Liability and Just Cause' (2007) 20 Ethics and International Affairs 199, 210; Haque (n 52) 34; Walzer (n 38); Arthur Ripstein, *Kant and War* (Unpublished manuscript).

context. Thus, the suspension account does not seem to aptly capture what happens to rights and duties during war.

Likewise, the immunity model is similarly deficient, and it could be understood in two ways. A broad interpretation of the model would extend immunity for any losses inflicted during battle: immunity would not only extend to actions that adhere to *jus in bello* but also to actions that are done in breach of it. In this sense, there would be no private law repercussions for war crimes, while it would be possible to impose criminal liability for violating them, as current domestic and international criminal law demonstrate. This result is unwarranted and unjust.[59]

In contrast, a narrow interpretation of the model would grant immunity only for certain losses that were inflicted during battle. For instance, Adil Haque argues that the immunity under international humanitarian law only extends to combatants whose actions do not violate *jus in bello* but do violate the enemy state's domestic criminal law.[60] As long as *jus in bello* is not infringed, states and combatants will be immune from liability. It does not mean that these actions are wrongful or not, but simply that they follow certain constraints on the use of force. However, by extending immunity only to combatant activities done in accordance with *jus in bello*, this immunity model seems to be going back on its own premise. Remember, the immunity model is supposedly agnostic on the question whether a loss was inflicted wrongfully or not. The only relevant issue to determine whether immunity should be extended or not is whether the baseline

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[59] In H.L.A. Hart's words: "*law might be unjust while treating all alike. The vice of such laws would then not be the maldistribution, but the refusal, to all alike, of compensation for injuries which it was morally wrong to inflict on others. The crudest case of such unjust refusal of redress would be a system in which no one could obtain damages for physical harm wantonly inflicted. It is worth observing that this injustice would still remain even if the criminal law prohibited such assault under penalty*." [HLA Hart, *The Concept of Law* (Penelope A Bulloch and Joseph Raz eds, 3. ed, Oxford Univ Press 2012) 164].

[60] As I stated above, while Haque only refers to immunity from criminal liability, it seems that this model could also apply to civil liability [*ibid* 25–6].

criteria that was set for the immunity is met. Yet, by referring to adherence to *jus in bello* as the criterion for immunity, the narrow interpretation is not agnostic to the nature of the loss as wrongful or not as immunity is only extended when losses are not wrongful. Hence, the narrow interpretation fails to do what it is purported to be doing, which is providing an immunity regardless of the nature of the loss. Instead, the narrow interpretation of the immunity model appears to be operating more akin to an affirmative defence, in which case rights remain relevant.

As for the inapplicability of the excuse model, it is commonly viewed that excuses are not an available defence to tort liability.[61] Following this view results in the conclusion that excuses would not properly capture the reason for lack of tortious liability to compensate wrongful interference with rights in war. Nevertheless, there are two additional reasons for which the excuse model is ill-fit to capture what happens to rights and duties during belligerent activities. First, the basic assumption of the excuse account is that the infliction of wrongs was committed without authority, that is why losses are wrongful. Applying this assumption to combatant activities results in a puzzle. When combatants are acting within the confinements of *jus in bello* they are exercising their public powers properly, as combatants are authorized to inflict losses that are consistent with the *in bello* principles. However, if they act within the scope of their powers, then the excuse model does not seem to be the reason why no liability arises, as this defence is only relevant when the actions are done either without authority or outside its scope. Therefore, even if we oppose the

[61] James Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 82–3; John Gardner, 'Justification under Authority' (2010) 23 Canadian Journal of Law and Jurisprudence 71, 92; Jules L Coleman, *Risks and Wrongs* (Oxford University Press 2002) 224; Goldberg, 'Tort Law's Missing Excuses' (n 54) 54; Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30 Oxford Journal of Legal Studies 1, 9–10; Ripstein, *Equality, Responsibility, and the Law* (n 15) 138–9. The exception to this widely accepted view is George Fletcher argument, who without offering an exhaustive account claims that excuses may be available in tort law [George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harvard Law Review 537, 551–3].

common belief and assume that the excuse model could apply to tort liability, it seems that this model is nevertheless an inappropriate way of thinking about defences to tort liability in the context of war.

Second, an excuse operates to exclude liability on the basis that a wrong was committed, but considering the particular circumstances of the case there is a reason to refrain from an imposition of liability as the wrongdoing is understandable.[62] Applying this rationale to combatant activities would mean that all injuries that are inflicted during battle are wrongful, but complying with the principles of *jus in bello* makes the infliction understandable considering the circumstances. Admittedly, there could be some appeal to this view, as it does not dismiss the losses and tragedies that befall on civilians during armed conflicts. Nevertheless, it would be mistaken to think about losses that are inflicted during war in this way. Much like the arguments for tort liability that were made by Ronen, Crootof, and Schulzke and Carroll that I have discussed above, the problem with holding that all losses that are inflicted during belligerent activities are wrongs is that it conceives of war as a peacetime activity. In doing so, this view does not properly account for the nature of warfare and the moral and legal norms that guide it. Combatants who killed civilians while adhering to the principles of *jus in bello* are not murders that are excused from liability. They have not committed murder. It is not that the deaths of civilians in these circumstances are not regrettable, but rather that combatants have not acted in an inappropriate way.[63] Hence, it is clear that the excuse model cannot properly capture rights and duties in the context of belligerent activities.

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[62] Goldberg, 'Tort Law's Missing Excuses' (n 54) 62.

[63] John Goldberg argues that in relation to excuses, the wrongs are regrettable not only because they occurred as a matter of fact, but also because they were brought about by acting in a deficient way: John Goldberg, 'Inexcusable Wrongs' (2015) 103 California Law Review 467, 472.

Lastly, the permissible harms model also seems to be offering an inadequate way of thinking about rights during war. In the context of war, I argue that the key to articulate the types of conduct and losses that would be considered ordinary lies in the principles of *jus in bello*.[64] These principles require that combatant activities adhere to three criteria: necessity, distinction, and proportionality. It is not that the *in bello* principles themselves are a source that grants states and combatants with authority, and hence permission, to act in certain ways. Rather, I view them as restrictions on the power to engage in belligerent activities. Still, by restricting certain forms of conduct, other forms remain permitted. Thus, applying the permissible harms model in this context would mean that losses that were inflicted during battle while adhering to these three criteria would be viewed as permissible harms that we accept as part of what it means to be able to engage in combat lawfully. Yet, when these criteria are breached the subsequent losses are no longer in the range of permissible harms. Directly targeting civilians or inflicting disproportionate loss, for instance, are the kinds of losses that are wrongful.

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[64] Note, some Just War theorists argue that a breach of *jus ad bellum* means that any subsequent infliction of loss is wrongful [McMahan, 'On the Moral Equality of Combatants' (n 58) 379; Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) 15; Brian Orend, *The Morality of War* (Broadview Press 2006) 162; Emer de Vattel, *The Law of Nations* (Béla Kapossy and Richard Whatmore eds, Liberty Fund 2008) 489; Francisco de Vitoria, 'Relectiones: On the Law of War' (1557) 11 <http://www.constitution.org/victoria/victoria_5.htm> accessed 20 March 2017; Francisco Suárez, *Selections from Three Works* (Gwladys L Williams tr, Liberty Fund 2014) 820]. Yet, I reject this position in light of two considerations. First, the decision to wage war and actually engaging in it are done by separate moral and legal agents. Assigning blame based on the actions of a different entity is difficult, as it conflates the different moral agents in war to a single entity. Second, the lack of a strict divide between *ad bellum* and *in bello* criteria could produce negative incentives to wage war while disregarding *jus in bello* [Gabriella Blum and John CP Goldberg, 'War for the Wrong Reasons: Lessons from Law' (2014) 11 Journal of Moral Philosophy 454, 474]. Thus, the infringement of *jus ad bellum* should not mean that any damage caused in the heat of battle is wrongful. That said, a breach of *jus ad bellum* is a moral wrong, and it might place greater burdens on the unjust state in the *jus post bellum* phase. Engaging in an *ad bellum* disproportionate war, for instance, could require an imposition of punishment, for instance for the crime of aggression [Article 5(1) of THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 2002]. Nevertheless, engaging in an *ad bellum* unjust war does not lead to the conclusion that all losses that are inflicted by the *ad bellum* unjust state are wrongful, and hence that there is a duty of compensation.

Nonetheless, there is some difficulty in holding that the permissible harms model applies in times of war in the same way it applies in times of peace. The underlying assumptions of the permissible harms model are that either the harms themselves, or the chances of their realization, are fairly minor.[65] In the context of war neither seems to be true, even when *jus in bello* is adhered to. Bumping into someone's shoulder on a busy train station could hardly be the same as incidentally shooting a civilian. Therefore, this model also does not seem to properly capture what happens to private law rights and duties during war.

Thus, I have established the first of the three preconditions that are required in order to claim that civilians have a private law right to compensation for belligerent losses: that rights exist and are relevant during war. By negating the realist Hobbesian argument, I demonstrated that there are rights during war. Through this discussion I have also shown that the override, suspension, immunity, excuse, and permissible harms accounts are not the proper way of articulating what happens to rights and duties during war, and hence that private law rights remain relevant in this context.

The next key precondition that I will address in the following section is whether there is a standard that applies while belligerent activities take place, according to which certain losses could be considered merely harmful while others constitute wrongs. I will argue that in the context of belligerent activities, this standard is informed by the principles of *jus in* bello. Accordingly, when states interfere with individuals' rights during combat the interference is harmful but not wrongful as long as it occurred while adhering to the principles of *jus in bello*.

[65] Weinrib, *The Idea of Private Law* (n 11) 148–50.

## 4. *Harmful and Wrongful Losses*

The justification model provides the conceptual basis for distinguishing between non-wrongful belligerent harms and belligerent wrongs. According to this model, while an infringement of rights is wrongful in theory, the existence of a justification rules out the wrongful nature of the breach.[66] For instance, murder is the commission of a wrongful act of taking another person's life. However, if this outcome was brought about while acting in self-defence, then not only is the act not wrongful; it is no longer considered to be murder.

In the context of belligerent activities, individuals do not lose their rights. Therefore, while combatants can wrongfully interfere with these rights, they are under the ordinary private law duty to refrain from doing so. Such interferences would be deemed wrongful when they are brought about in a defective way.[67] My argument is that belligerent activities that interfere with individuals' rights are *prima facie* defective and wrongful, but by complying with the *in bello* principles, an affirmative defence is extended – making the infringement of rights merely harmful. Inflicting losses under these conditions is justified since doing so is within the scope of a state's authority to inflict these kinds of belligerent losses. The *in bello* principles are, in this sense, a set of restrictions on states' authority to engage in acts of war. Hence, when losses are inflicted while in breach of

[66] Greenwalt (n 54) 1900; Fletcher, *Rethinking Criminal Law* (n 54) 759; Hurd (n 54) 1558; Ripstein, 'In Extremis' (n 55) 424–5; Coleman (n 61) 217; Goldberg, 'Tort Law's Missing Excuses' (n 54) 54. This view of the nature of justification is most common. For an opposing view, according to which justifications do not rule out the wrongful nature of the act but only provide for a defence from liability see: Goudkamp (n 61) 78–82. The permissible harms model is thus distinguishable from the common view of the justification model in the sense that according to the former some harms are simply not wrongful, whereas according to the latter some wrongful actions could be redeemed if a proper justification is established. This difference suggests that the two models also differ in the burden they place. The permissible harms model places the burden on the plaintiff to show that the defendant has actually acted in an impermissible way. In contrast, the justification account assumes that the defendant acted wrongfully, and the burden is placed on her to establish that an affirmative defence can redeem the nature of her injurious action.

[67] Ripstein, *Private Wrongs* (n 11) 167.

the *jus in bello* principles, then these losses are outside the legitimate scope of states' authority, and therefore could not be justified. The violation of the *in bello* principles renders the justification defence unavailable, and hence combatants' interference with individuals' private rights would be deemed as defective and wrongful.

Thus, the justification model provides a way to distinguish between harms and wrongs by evaluating whether the principles of *jus in bello* were breached or adhered to. This evaluation could be done in one of two ways. First, it is possible to assess to what degree the combatant activities align with *jus in bello* directly. When the activities adhere to the principles of *jus in bello* then the losses they inflicted are justified. States have the authority to engage in combatant activities that adhere to *jus in bello*, as well as to inflict the losses that are a product of engaging in such activities. In contrast, when these principles are infringed no such justification exists, as in these instances, the activities are done without proper authority.

For example, combatants may take over a house and use furniture as cover against enemy forces. The owner cannot force them to leave, nor did they wrong her by using or damaging her property for the purpose of waging war. The reason that no wrong has been inflicted is that by acting in adherence with *jus in bello* the combatants acted within the scope of their public authority. As such, the loss they inflicted are justified, and hence they are merely harmful. But once the fighting has concluded they must return the house to her, and any damage they caused that is unrelated to the combatant activities could lead to an imposition of liability. For instance, if combatants wrote slogans on the walls for their amusement then they have committed a wrong against the owner. These actions and subsequent losses go beyond the scope of their public power, and are therefore unjustified and could establish an intentional tort.

It is important to note in this context that assessing whether the *in bello* principles were

infringed is done by using an objective standard,[68] and generally requires taking into account the impact a belligerent activity had on a group of individuals collectively, and not individually. For example, according to the principle of proportionality, more indirect civilians' injuries are permissible as more combatants and military installations are targeted for greater military advantage.[69] Suppose that for a certain belligerent activity the deaths of 10 civilians would be proportionate. However, an attack that would kill 100 civilians was planned. All 100 deaths will be wrongful and in breach of *jus in bello*, not just the extra 90, as the breach of the principle of proportionality is not associated with inflicting a loss on a particular individual. Rather, it is the estimated aggregated losses and aggregated gains that determine whether the principle was violated or not. Nevertheless, if *jus in bello* proportionality was infringed, there can be no justification for an infliction of loss on any of the members of that group individually. Consequently, each individual who sustain this wrongful loss has a private claim against the state that caused it.

The second means of evaluating adherence to the principles of *jus in bello* is indirect. This indirect evaluation can be accomplished by examining the compliance with the rules of

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[68] In this sense, courts do not examine the individual combatants' actual beliefs, but the view of a reasonable combatant in those particular circumstances [see, for example: *Prosecutor v Galić* Trial Chamber Judgment of 5 December 2003, paragraph 58]. Thus, the *in bello* principles can be violated even when combatants believe they are complying with them, and in fact intend to do so.

[69] Yuval Shany, *The Principle of Proportionality Under International Law* (The Israeli Democracy Institute 2009) 59. Article 51(5)(b) of Additional Protocol I states that "among others, the following types of attacks are to be considered as indiscriminate: […] (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." [ADDITIONAL PROTOCOL I]. Similarly, Article 8(2)(b)(iv) of the Rome Statute holds that "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects … which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" constitutes a war crime in international armed conflicts [ROME STATUTE].

engagement states set in their military manuals. The rules of engagement are a concretized and detailed version of *jus in bello* in the sense that they are a specification of *in bello* principles by way of requiring combatants to take only certain actions in response to specific events.[70] They inform combatants what type of force they can use, against whom, and under what circumstances.[71] However, the rules of engagement do not explain to combatant *why* they allow the use of force. Rather, the rules of engagement only clarify to combatants what are the certain conditions according to which the use of force is permitted. If combatants adhered to the conditions that are set out in the rules of engagement, then the action is complying with the requirements of *jus in bello* and vice versa. Therefore, all belligerent activities that are conducted in breach of these rules will create risks that, if materialized, will constitute wrongs. Conversely, all losses that are inflicted while the rules of engagement are observed will only constitute non-wrongful harms.

Unlike the *in bello* principles, a direct breach of which can generally only be established by examining the losses imposed on a collective, an infringement of the rules of engagement hinges on the actions of a particular combatant. In fact, the rules of engagement could be infringed even when no individual sustained an injury, though such a situation will not give rise to any claim in

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[70] Note, that *in bello* rules do not inform combatants about which actions they may do. Rather, they inform them about which actions are prohibited [Detlev F Vagts and others (eds), 'So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs' in Richard Baxter, *Humanizing the Laws of War* (Oxford University Press 2013) 38; Derek Jinks, 'International Human Rights Law in Time of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 666.]. In contrast, rules of engagement do specify to combatants which actions they may or may not take.

[71] See, for example: Rules of Engagement for U.S. Military Forces in Iraq as cited in: Human Rights Watch, 'Off Target: The Conduct of the War and Civilian Casualties in Iraq' (Human Rights Watch 2003) 138–9 <https://www.hrw.org/reports/2003/usa1203/usa1203.pdf> accessed 17 September 2017. Also see the Rules of Engagement for the Israel Defense Forces, as cited in Btseelem, 'The Security Forces Open Fire in the Territories' (1990) <http://www.btselem.org/sites/default/files/ptykhh_bsh_l_ydy_kvkhvt_hbytkhvn_bshtkhym.pdf> accessed 17 September 2017.

tort. Thus, according to this indirect evaluation there is no need to weigh the total harm caused to a group collectively. Rather, the focus is only on the bilateral relationship between the combatant who inflicted a loss while in breach of the rules of engagement, and the individual who sustained this wrongful loss. As a breach of these rules could be either intentional or negligent, both tort claims could be established.

### 5. *There Is A Duty to Compensate*

The discussion above illustrates that the first two preconditions that are required in order to establish a right to compensation in tort apply. Rights and duties do not expire during war, nor are they overridden or suspended. Moreover, the justification model provides us with a way of distinguishing between harms and wrongs. Nevertheless, it could still be argued that there is something unique about combatant activities that suggests that the third precondition should be inapplicable, and hence that there should not be a duty to correct belligerent wrongs. However, I shall argue in this section that this argument is inconsistent with the specific duties which arise from the structure of corrective justice. Thus, I will show that states have a duty to correct the wrongful belligerent losses they inflicted.

Many arguments have been made in opposition of recognizing a duty of compensation for losses that were inflicted during war. For instance, Seth Lazar contends that there should not be a *post bellum* duty of compensation for four reasons.[72] First, that it will impose what he defines as "crippling burdens" on all parties to a conflict, as they will have to compensate for the vast losses

[72] Seth Lazar, 'Skepticism about Jus Post Bellum' in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 207–11.

inflicted during war. Second, that compensation will be awarded to the holders of property, who are likely not those most in need. Third, that the cost of compensation will be passed on to all of the state's citizens so that those who are morally liable will not be held legally liable, and the cost will also be borne by faultless individuals. Finally, that the process of adjudicating claims can revive or deepen the animosity between parties to a conflict instead of letting bygones be bygones. Lazar is therefore not only opposed to the idea of have a tort law duty of compensation for belligerent wrongs, but rather he is opposed to the notion of compensation for losses that were inflicted during war more generally.

Others have argued against a duty of compensation under tort law in particular. For example, in the U.S. *Koohi* case, Judge Reinhardt holds that an imposition of liability will over-deter combatants, making it less likely that they will take all measures needed for securing victory.[73] He also holds there that compensation in these circumstances would be unjust, as they will necessarily discriminate between individuals who sustained losses, and will punish the combatants for fulfilling their duties.[74] Relying on the *Koohi* case, Chief Justice Barak of the Israel Supreme Court held that tort law is ill-equipped to deal with the special risks that are created during belligerent activities, and therefore it should not be applicable.[75] Lastly, it has also been argued that tort law should not be available to enemy civilians who were injured during battle, as if it was available then filing claims in tort would become another means by which warfare is conducted.[76]

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[73] *Koohi v United States* 976 F2d 1328 (1992) 1334–5.

[74] *ibid*.

[75] *CA 5964/92 Jamal Kasam Bani Uda v Israel* 57(4) PD 1 (2002) 7–8.

[76] *CC (Beer Sheva) 45043-05-16 A v Israel* (Nevo, November 4, 2018) 79–80. While discussing the amendment of the Israeli combatant activities exception, the Minister of Justice stated that: "The Bill that was tabled is meant to prevent false claims against Israel. There is almost no country in the world that pays compensation during armed conflict, or even opens the door to those people who might be injured in such a conflict to file a claim against it…the 260 million ILS that were paid were deducted from the Ministry of

However, my articulation of the status of rights during combat and the structure of belligerent wrongs demonstrates how the arguments against a duty of compensation fall short. Once we have reached the conclusion that rights remain relevant during war, and we have identified what would constitute their wrongful breach, corrective justice duties exist including the tort law duty of compensation. This duty of compensation exists, as the effects of wrongs must be corrected in order to maintain civilians' status as free and equal agents.[77] This reasoning is true whether the losses were inflicted in times of peace, or in times of war.

My argument is made clear by examining the structure of corrective justice: (1) I have a right to my body and property; (2) Other individuals cannot use or damage my body and property without my consent or proper use of authority; (3) If someone uses or damages my body or means without my consent or proper authority then she wronged me; (4) All wrongs must be corrected by the wrongdoer.[78] This structure is not blind to the circumstances in which a loss has been inflicted.[79] Still, once what is understood to be a wrong has been committed the circumstances no

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Defense' budget" ['Protocol 405, Constitution, Law, and Justice Committee, December 25, 2001, 12:00' 4]. In a later session, the Minister of Justice was even more explicit: "There is no country in the world, only a foolish country, that provides its enemies with the option of suing it and get compensation. We are the only foolish country that allows such a thing" ['Protocol 493, Constitution, Law, and Justice Committee, June 24, 2002, 11:30' 493].

[77] Ripstein, *Force and Freedom* (n 35) 82. Positioning corrective justice within Kant's philosophy of right, Ernest Weinrib states that "since the vindication of right includes the prevention or reversal of violations of right, the freedom of all is immediately joined with a reciprocal universal coercion" [Weinrib, *The Idea of Private Law* (n 11) 107].

[78] Ripstein, *Private Wrongs* (n 11) 167–8; Ripstein, *Force and Freedom* (n 35) 82–3.

[79] In Nicomachean Ethics, Aristotle describes what constitutes a wrong in corrective justice terms as follows: "*There is a difference, therefore, also between the acts that are unjust towards each of these classes of associates, and the injustice increases by being exhibited towards those who are friends in a fuller sense; e.g. it is a more terrible thing to defraud a comrade than a fellow-citizen, more terrible not to help a brother than a stranger, and more terrible to wound a father than anyone else. And the demands of justice also seem to increase with the intensity of the friendship, which implies that friendship and justice exist between the same persons and have an equal extension*." [Aristotle, *Nicomachean Ethics* (Martin Ostwald tr, Bobbs-Merrill 1983) 1159–60 a]. Holding that the standard of care in war is not the same as that in times of peace is thus adhering to the corrective justice principles described by Aristotle.

longer have an effect on the existence of a corrective justice duty. Put differently, what matters is whether someone suffered a wrong, and someone inflicted a wrong.[80] When a wrong was inflicted, and no defence is available to the wrongdoer, a duty of compensation must be discharged. In the context of war, the only defence that should be available is that of a justification when a loss was inflicted while adhering to the principles of *jus in bello*. It is not the violation of the *in bello* principles that constitutes a private law wrong. Rather, adherence to these principles simply provides a justification that turns what would otherwise be a wrongful infringement of ordinary private law rights to person and property to mere harms for which there is no corrective justice duty. Thus, when the *in bello* principles are violated, tort liability can and should be imposed.

Therefore, my account of tort liability for belligerent wrongs is narrow and ordinary. It is narrow in the sense that not all harms that are inflicted in the course of conducting belligerent activities give rise to tortious liability. Only wrongful losses do. Therefore, the kind of concern from crippling liability that Lazar raises is irrelevant in relation to my account of liability, which is inherently narrow. Furthermore, liability is also narrow as it is based on a formal account of corrective justice. It is this formality that rules out the possibility of enemy states using tort law as means of warfare. Liability will only arise when a wrong has been inflicted and through judicial review. Hence, tort liability is within the realm of right, and not within the realm of might. The narrow scope of liability also undermines the arguments that it will result in over-deterrence or inappropriately "punish" public officials. As liability will only be imposed for infringing the principles of *jus in bello*, rational combatants should not be over-deterred from taking actions that are adhering to these principles. Liability for violating the *in bello* principles will therefore be

[80] *ibid* 1132a.

appropriate, as inflicting a loss under these circumstances is a wrong that cannot be justified.

My account is also ordinary, which helps to elucidate why some of the arguments against a duty of compensation are mistaken while others are not unique to the context of belligerent activities. The claim that only holders of property rights will obtain compensation, rather than those who are most in need, is mistaken. Corrective justice applies to individuals who have property and to those who do not. It is not extended based on any standard of worthiness other than that a right was wrongly violated. While empirically the possibility that liability to compensate might be greater for individuals who own property than for those who do not, all will have a right to compensation. Moreover, as I have argued above, the forum in which a claim for compensation against a state for inflicting a belligerent wrong should be that of the alleged wrongdoer. Therefore, this process is ordinary in two main ways. First, states' own courts routinely review the conduct of public officials through tort claims. Second, the litigation is not between two states, but between an individual who sustain a wrongful loss and the state that inflicted it. Hence, it is unlikely that tort litigation will escalate relationships between states to the degree that they will once more engage in belligerent activities against one another.

Furthermore, the claim that there is an issue with holding states liable, as they will pass the costs of compensation on to their citizens and consequently the wrongdoer will not bear the costs of the wrong, is relevant even in the context of peacetime. As the resources of the state are the resources of its public, it is unavoidable that the costs of compensation for state liability will be passed on to its citizens. This is true for liability that is imposed for a belligerent wrong or a peacetime wrong. Thus, there is no relevant difference in terms of the costs the public bears between holding a state liable for a police officer negligently shooting a civilian and holding it liable for a combatant negligently shooting a civilian. This issue can suggest that tort law should

be abandoned in favour of other second-best solutions. Yet, insofar that tort law remains as a possible recourse, it should be available for both belligerent and peacetime wrongs.

## 6. *Conclusions*

In this paper, I set out to establish that there are belligerent wrongs for which liability in tort law arises. I argued that the key to understand the operation of tort law in the context of war is to evaluate combatant activities according to the norms which govern them, namely *jus in bello*. By doing so, I was able to demonstrate that rights remain relevant in times of violent conflict, and that certain losses are only harmful (but not wrongful) if and when they are justified. Furthermore, I argued that when a belligerent wrong is committed a duty to correct it arises, due to the requirements of corrective justice.

By providing this account I am not offering a normative structure that can address all of the misfortunes of war. Indeed, many of these misfortunes will continue to be borne by civilians without a tort law right of action. Nonetheless, this account is in line with the general argument – that tort law applies in times of war as well as in times of peace. Just as not all of the misfortunes of everyday life have a tort law remedy, so are the tribulations of belligerency. In tort law, harms and misfortune are not synonymous with wrongs. Yet, when a wrong is committed, liability arises, and private individuals should have a means to vindicate their rights and gain remedies.

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