

# Two Doctrines of *Jus ex Bello*\*

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This article discusses two doctrines of *jus ex bello* concerning whether and how to end wars. In Section I, I defend the claim that there is a distinct morality of ending wars. Section II rebuts a challenge that the account is too permissive of war. Section III rejects a forward-looking conception of proportionality for *jus ex bello*. In Section IV, I allow an exception in cases in which the just cause for the war has changed. In Section V, I defend five principles governing how to end a war.

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According to an account of the morality of ending wars, which I call “*jus ex bello*” and David Rodin calls “*terminatio* law,” there are two broad questions, whether to end the war and how to do so.<sup>1</sup> Responses to these two questions comprise two doctrines of *jus ex bello*. In this article I address the content of these two doctrines. In Section I, I rehearse some

\* This article was first written for and presented at a 2012 Ethics, Law, and Armed Conflict (ELAC) workshop at Oxford University. The invitation provided the motivation for writing the article. I am very grateful for that invitation and to the participants for the comments, especially to Bradley J. Strawser who offered careful criticisms of the article at the workshop. A version of the article was also presented at the University of Johannesburg. I would like to thank the organizer, Thad Metz, and the participants for that opportunity to discuss the material. I also had the opportunity to present arguments that feature centrally in the article at a conference at Goethe Universität, Frankfurt, and to a group at the US Naval Academy. I am grateful for the invitations to do so and for the feedback from the audiences. Some of the arguments in the article result from an ongoing discussion that I had with David Rodin and Jeff McMahan at some of the aforementioned events. I thank them for their collegial participation in that discussion, which has helped me to clarify my thinking. Finally, I’d like to thank the two anonymous reviewers for *Ethics* and Henry S. Richardson for comments that encouraged me to recast certain arguments and revise various claims in ways that improved the article tremendously.

1. These two broad questions are suggested in my “Jus ex Bello,” *Journal of Political Philosophy* 16 (2008): 123–36. In that work I use the term “*jus ex bello*.” David Rodin, who was

*Ethics* 125 (April 2015): 653–673

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reasons that support the claim that there is a distinct morality of ending wars and consider a challenge to that view. Section II is devoted to rebutting a challenge that the doctrine of *jus ex bello* is too permissive of war. Section III discusses the conception of proportionality relevant to *jus ex bello*. I reject a conception of proportionality that looks only forward and would allow increasing the permissible moral costs of war beyond the (presumptive) correctly judged *ante bellum* limits for the war. In Section IV, I make an exception to the position that I defend in Section III. The exception applies to cases in which the just cause for the war has changed. The considerations relating to how to end a war have been largely ignored. In Section V, I try to make some progress toward rectifying that. The results of this article are very far from a complete account of *jus ex bello*, but my hope is that they nevertheless advance our understanding of these doctrines.

## I

The claim that there is no necessary connection between the justice of resorting to war and the justice of continuing it can be called *the independence thesis*.<sup>2</sup> I have defended this claim in detail elsewhere.<sup>3</sup> In this section I briefly discuss the initial plausibility of the independence thesis, and I take up a challenge to it that might be formulated on the basis of Michael Walzer's account of *jus ad bellum*. Because of the influence of Walzer's account, this is a challenge that merits a response.

Part of the plausibility of the independence thesis derives from the recognition that after a war begins circumstances change very dramatically, so much so that a reconsideration of the application of the criteria appropriate for evaluating the morality of the war may be required. Even if the same formal constraints on the morality of the war are valid after the war has begun, the conditions to which they apply could be radically changed. Such reconsideration of the morality of a project after it has been initiated is not peculiar to war. It is appropriate for any lengthy and complex enterprise governed by moral considerations. Take an obvious example. Different answers are possible to the following two questions: Should I make a particular promise? And, having made it, should I fulfill

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thinking about the issues independently at about the same time, uses the term "*terminatio* law." See David Rodin, "Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression," in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: Asser, 2008), 53–75. In "The War Trap," in this issue, Rodin uses the term "*jus terminatio*."

2. I would like to thank Bradley J. Strawser for suggesting this name in his comments on my article at the ELAC workshop.

3. See my "Jus ex Bello." The independence of considerations of *jus ex bello* from those of *jus ad bellum* is defended in considerable detail by Cécile Fabre in "War Exit," in this issue.

it? Perhaps I should never have raised legitimate expectations by promising. It might have been better for the person's self-esteem or sense of responsibility that he complete the project on his own. But, having promised to help, I should—within reason—direct my efforts toward fulfilling it. Or, perhaps, in a different case, given the promisee's need and my antecedent ability to help, it was right for me to promise to help, but intervening events have dramatically raised the moral opportunity costs of doing so. Unless I stop to aid a disoriented elderly person she may wander into traffic, but if I do stop I will miss the appointment to help. In that case, although it was morally praiseworthy for me to have made the promise, to fulfill it could be morally disastrous. In general, the moral considerations that govern the appropriateness of initiating a complex course of action extending over a significant period of time do not usually settle the matter of whether the action should be continued until its objective has been realized.

Assuming certain traditional tenets of just war theory, the distinction between evaluating the initiation and continuance of a war is all the more compelling. War is an evil that we should work hard to prevent, both by being loath to go to war and by remedying the conditions that give rise to belligerence. Indeed there is a compelling moral ideal of a world without war. But there are conditions, individually necessary, that when fulfilled make resorting to war morally licit—in some cases perhaps even obligatory. Because there are several such conditions, and because once war begins things usually change in unpredictable ways, either the circumstances or our reasonable beliefs about them may change.<sup>4</sup> This changes the evaluation of whether the war satisfies the morally necessary conditions, even if it might be the case that generally the same formal conditions are relevant to a war's continuation as to its initiation.

In the case of the US-led NATO invasion of Afghanistan in 2001, doubt that the *jus ad bellum* condition of necessity had been fulfilled was not unreasonable.<sup>5</sup> A defense and a precise understanding of this condition is itself an important matter.<sup>6</sup> But for now I simply assume that it requires that a party not resort to war until it is reasonably clear that either diplomatic alternatives for achieving the end that supplies the just

4. Several of the conditions of just war theory may be applied subjectively in light of what it was reasonable to believe or objectively in light of the facts. I here set aside the question of whether the evaluation of a war is belief or fact sensitive. The present analysis is neutral with respect to that. In my "Jus ex Bello," in an effort to distinguish *jus ex bello* from *jus ad bellum*, I consider both belief- and fact-sensitive interpretations of the justifying conditions of war.

5. I defend this claim in "Is the War in Afghanistan Just?" *Imprints: A Journal of Analytical Socialism* 6 (2002), <http://eis.bris.ac.uk/~plcdib/imprints/moellendorf.html>.

6. Michael Walzer is, e.g., skeptical of the criterion of last resort. See *Arguing about War* (New Haven, CT: Yale University Press, 2004), 155 and 158. Thomas Hurka understands it, plausibly I believe, as the comparative assessment of the proportionality judgments of

cause are sufficiently unlikely to be efficacious or pursuit of diplomatic measures would result in greater net moral costs than would war. But once a war has been initiated, not resorting to war is logically impossible. Let's suppose that all of the other conditions of *jus ad bellum* had been met in the case of the invasion of Afghanistan; it would make no sense to claim that the war should not be continued because *ante bellum* there had been diplomatic alternatives to starting it. The relevant issue becomes whether there are diplomatic alternatives to continuing it and what their net moral costs are. Since beginning a war disrupts diplomatic relations, diplomatic measures that might have been used before the beginning might not be readily available after the war has started. I will not pursue the argument further here, but it seems plausible that the application of most, if not all, of the other necessary conditions of *jus ad bellum*, including just cause, likelihood of success, and proportionality, might change, because of either changed conditions or reasonable beliefs about those conditions, after a war begins.<sup>7</sup>

Alternatively, let's suppose that resorting to war in Afghanistan was a just measure to preempt additional massive terrorist attacks.<sup>8</sup> Many years into the war one might come to doubt that the continuation of the war is just because either it is no longer necessary or the prospects of securing the just goal have dimmed and the moral costs of its continued pursuit have become excessive.<sup>9</sup> In this latter case, the question of how to pursue some justice without full justice, how—short of a decisive victory—to end a war in pursuit of a just cause, is important.

These arguments in support of the independence thesis might be challenged by downplaying the importance of the considerations of necessity and proportionality to which I appeal.<sup>10</sup> After all, the most influential account of just war theory in recent decades lays all—or nearly all—the justification for war on a particular account of just cause. “Aggression is the name we give to the crime of war. . . . The wrong the aggressor commits is to force men and women to risk their lives for the sake of their rights. . . . They are always justified in fighting; and in most

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various alternatives to war and to the proportionality of the war. See Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy and Public Affairs* 33 (2004): 37–38.

7. See also my “Jus ex Bello.”

8. Walzer takes this view. See *Arguing about War*, 137.

9. Richard W. Miller argues for a settlement in the Afghan war, largely on what seems to be grounds of proportionality and likelihood of success, in “The Ethics of America’s Afghan War,” *Ethics and International Affairs* 25 (2011): 103–32. I reply that the moral grounds of Miller’s argument are not clear. See Darrel Moellendorf, “Jus ex Bello in Afghanistan,” *Ethics and International Affairs* 25 (2011): 155–64.

10. Michael Walzer contends that such considerations “play only marginal and uncertain roles.” See *Arguing about War*, 91. See also his discussion beginning on p. 86.

cases, given the harsh choice, fighting is the morally preferred response.”<sup>11</sup> Walzer supplements this view to allow for cases of preemption, secession, civil war, and genocide. For purposes of the present objection, however, his basal view is important. States always possess a right to go to war to preserve their territorial integrity and political sovereignty, even if on the rare occasion there is a strong moral reason not to exercise the right.

That Walzer’s conception of just cause should also be a sufficient condition for the justified use of military force is, I will argue, implausible. But first notice how such a position would exclude the two previous examples of reassessing the war in Afghanistan that make plausible the independence of *jus ex bello* from *jus ad bellum*. In the first case, if wars of defense against aggression can, within constraints, include preemption of further aggression, then it would be foolish to deny the justice of an appropriately preemptive war on grounds of its failure to be a war of necessity. Absent a judgment of injustice on grounds of *jus ad bellum*, the second judgment that continuing the war is permissible does not constitute a change of the original moral evaluation. And in the second case, once a just war has begun, as long as the just cause for the war exists, there are no grounds for reevaluating its basic justification. Certain means might be criticized, but as long as those means do not become the war’s ends, there is a strong presumptive moral case for the war. Walzer qualifies his claim to “most cases,” so there may be a thread on which to hang the case for changed moral evaluation, but apparently it would be slender indeed.

The case for the independence thesis is built up by distinguishing the judgments regarding initiating and continuing a war. The Walzerian argument against this case proceeds via *modus ponens*.

1. If the cause of resisting aggression is sufficient to justify a war, then (assuming the cause does not change) a war that is just to initiate on grounds of resisting aggression is necessarily just to continue.
2. The cause of resisting aggression is sufficient to justify a war.
3. Therefore, a war that is just to initiate on grounds of resisting aggression is necessarily just to continue.

As I noted above, I doubt the second premise of this argument. I cast doubt on it now not by denying the purely antiaggression conception of just cause, although that too is, I think, doubtful.<sup>12</sup> Rather, I deny that

11. Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic, 2006), 51.

12. The classic critique is David Luban, “Just War and Human Rights,” *Philosophy and Public Affairs* 9 (1980): 160–81. See also Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview, 2002), chap. 5.

just cause alone—regardless of whether it is construed as resisting aggression or in some other way—supplies a sufficient condition for the justification of resorting to war.

Just cause has a certain primacy among the conditions of *jus ad bellum*.<sup>13</sup> Likelihood of success, proportionality, and necessity all make reference to the cause of the war. Nevertheless, satisfying just cause alone cannot plausibly justify resorting to war. Initiating a war establishes the risk that thousands, tens of thousands, even hundreds of thousands of people will die. In contemporary conditions, those who kill and die in wars are not those who decide to go to war. Political leaders who decide to go to war put at risk the lives of both combatants and noncombatants. It is wrong to put people's lives at risk in the pursuit of a justified political goal, if there is a morally licit alternative with lower risks or that has roughly the identical risks but for fewer people. Moreover, it is also wrong to put at risk the lives of people in the pursuit of a cause the successful realization of which is highly doubtful. Respect for human dignity requires proper regard for human life, and wantonly risking human lives fails to show such regard. I do not deny that there is still philosophical work to do in arriving at better and more precise understandings of the criteria of likelihood of success, proportionality, and necessity. But, on the hopeful assumption that we can come to an adequate understanding of these conditions, it cannot be, as Walzer asserts, that in most cases satisfying just cause alone suffices for justifying resort to war. Hence, even assuming that just cause is best understood solely in antiaggression terms (an assumption that I doubt), premise 2 is implausible.

Without the second premise, the argument above is unsound. If the satisfaction of no condition alone is sufficient to justify a war, but several are individually necessary, and if the changed circumstances, or changed reasonable beliefs, after a war begins undermine the satisfaction of at least one necessary condition, then the *ante bellum* judgment of the war's justification does not determine the judgment of the justice of the war after it has begun. This provides a reason to take seriously certain arguments for ending a war (short of decisive victory) that was just when it began. If it is unjust to continue a war, then it is reasonable to consider how to end it. This is, of course, true regardless of whether it was just to initiate. But in a case in which the cause is just, but it is nonetheless unjust to continue the war (a possibility that Walzer seems to think is very improbable), then how to end the war takes on special importance because there is some moral loss associated with giving up on the cause.

13. Jeff McMahan defends the priority of just cause in his "Just Cause for War," *Ethics and International Affairs* 19 (2005): 1–21.

The independence thesis holds that there is no necessary connection between the justice of resorting to war and the justice of continuing one. In contrast, David Rodin maintains that a war that was unjust to begin is necessarily unjust, even though it may also be unjust not to continue to prosecute it. He takes such situations to be dilemmas. He aims to support that view by means of what he claims to be an analogous dilemma. Suppose one were to dangle another person out the window, then come to realize that doing so is wrong, but be unable to lift the person out of the window without help. One may not simply stop dangling the person by letting go. But Rodin claims that the continued dangling is also wrong.<sup>14</sup> The conclusion drawn from the analogy, however, is not convincing because the continued dangling of the person, if it has become part of an activity of rescue, is not wrong. Doing what one can to rescue a person, even if one's efforts alone are insufficient, is commendable. The example looks rather more like a case in which the moral character of a war has changed because the reason for the war—the cause—has become just.

Whether a war should be ended is independent of whether it should have been initiated. How a war should be ended is, of course, not independent of whether it should be ended. We ask how it should be ended only when we have judged that it should be ended. There is a dependence of the doctrine governing how to end a war on the doctrine of whether to end a war, but an independence of the latter on considerations of *jus ad bellum*.

## II

One of the doctrines of *jus ex bello* governs whether it is morally permissible to continue a war or whether it should instead be brought to an end. The argument of the previous section assumes that the criteria relevant to determining this are largely the same as those relevant to judging whether it is permissible to begin a war. The great good of peaceful human interaction and the evil of killing establish a strong but (according to just war theory) defeasible presumption against both starting and continuing wars. And the conditions necessary to defeat the presumption against the one are likely to apply with appropriate modifications to the other.

But perhaps a separate judgment about whether to end a war provides succor to war-makers by permitting them to justify a war after beginning it, when they should not have started it. Concern that just war theorizing might be too permissive of war is not new. Kant spoke of his just war theory predecessors, "always quoted in good faith to justify an

14. See Rodin, "The War Trap."

attack,” as “Job’s comforters.”<sup>15</sup> In the case of *jus ex bello* in particular, the concern is that the account could permit the continuation of a war that was unjust to initiate. And this might be thought contrary to the recent spirit of just war theory, which Walzer rightly describes as a critical theory, “in fact, doubly critical—of war’s occasion and its conduct.”<sup>16</sup> Perhaps a doctrine that could give license to continuing a war that should not have been started is an instance of a kind of “softening of the critical mind,” yielding “a truce between theorists and soldiers,” which Walzer warns against.<sup>17</sup> Or put more strongly, such an account might too easily serve the Masters of War, who “fasten all the triggers / For the others to fire / Then . . . set back and watch / When the death count gets higher.”<sup>18</sup> Accepting a theory that allows that a war that was unjust to initiate could be just to continue might establish incentives to war-makers to initiate initially unjust wars in the hopes of moral permission after the fact. And so there is the worry that adhering to a doctrine that requires independent consideration of whether to continue a war that was unjust to begin might establish a moral hazard in relation to unjust wars.

There are four responses that, I think, effectively rebut the charge that a doctrine that requires independent consideration of whether to continue or end a war provides succor to, or incentives for, the Masters of War. First, judging that a project that was wrong to initiate morally should nonetheless be continued does not change the initial judgment that it was wrong to initiate. Consider the example of promise-making from the previous section. Perhaps I should not have made a promise to help someone. It might have been better for the person to attempt the project alone, even at the cost of failing. But having made the promise, I am under a moral duty to fulfill it, barring sufficiently high moral opportunity costs of doing so. This line of reasoning supports holding people accountable for their promises, but a practice based on it provides no incentive for making promises that one should not make.

Second, generally professional soldiers are not eager to pursue protracted wars, based on changed mandates, especially when such wars are costly to the lives of their troops and the reputation of their armies. Judging that a war should be continued that should not have been started might derive from a changed understanding of the war’s aims, and it could result in extending the conflict. Take the example of the Afghan war. If preemption against additional terrorist attacks provided a just cause for the invasion of Afghanistan, then that end had apparently

15. Immanuel Kant, *Perpetual Peace*, trans. M. Campbell Smith (London: Allen & Unwin, 1917), 131. Available at [http://files.libertyfund.org/files/357/0075\\_Bk.pdf](http://files.libertyfund.org/files/357/0075_Bk.pdf).

16. Walzer, *Arguing about War*, 8.

17. *Ibid.*, 15.

18. Bob Dylan, “Masters of War,” on *The Freewheelin’ Bob Dylan*, Columbia Records, 1963.

been satisfied once the presence of al Qaeda in the country had been effectively neutralized. But if the prospect of a rapid US and NATO withdrawal were to lead to generalized civil war with widespread bloodletting along ethnic lines, prevention of such a horror would supply a different just cause for remaining there.<sup>19</sup> And when a different end supplies a new just cause, new judgments of necessity, prospects for success, and proportionality regarding the new aim are in order. Rather than encouraging the professional soldier to start a war that should not be begun, all of this serves as a cautionary tale about the unforeseen and perhaps unwanted obligations that states assume when beginning a war.<sup>20</sup>

Third, once we consider some of the kinds of cases that might lead to the judgment that a war that should not have been started nonetheless should be continued, the reasons supporting the judgment often seem compelling. A war might have been reasonably opposed initially on grounds of insufficient likelihood of success or disproportionality, but the unpredictable is a regular occurrence in warfare. Unpredictable events can change calculations of likelihood of success and proportionality. Should these calculations change in ways that favor attaining the just cause of the war, it would seem strangely anachronistic to maintain that pursuit of the just cause should not continue because it should not have been initiated. Or perhaps the initial cause was unjust, but the changed cause is the prevention of a humanitarian disaster. In such cases, the injustice of the initial war would be compounded by a failure to avert the humanitarian disaster.

Finally, it should be emphasized that the thesis that whether a war should be ended is independent of whether it should have been initiated cuts both ways. For that it was just to begin a war is also no justification of the continued prosecution of that war. In the midst of a conflict with new information in hand, we must reassess the morality of continuing a war that was just to begin, and as in the *jus ad bellum* judgment a strong presumption favoring peace is in place. Following Walzer, this allows for just war theory to be triply critical.

### III

I call the *ante bellum* judged total of morally permissible costs that a belligerent party may bring about or contribute to in its pursuit of a just cause that party's *proportionality budget*. For present purposes, I limit the

19. Worries about this scenario for Afghanistan are vividly presented in Dexter Filkins's report "After America: Will Civil War Hit Afghanistan When the US Leaves," *New Yorker*, July 9, 2012, [http://www.newyorker.com/reporting/2012/07/09/120709fa\\_fact\\_filkins](http://www.newyorker.com/reporting/2012/07/09/120709fa_fact_filkins).

20. Rodin, "The War Trap," argues that there are several such cautionary tales that should discourage starting a war.

costs to those covered by proportionality in the wide sense, as Jeff McMahan understands it, namely, the harms or wrongs imposed only on those who are not morally liable to attack.<sup>21</sup> For the sake of simplicity, I'll take the moral costs covered by the proportionality budget to be the killing of civilians. The proportionality budget is the highest total permissible civilian killings in pursuit of a just cause. Although a warring party does not typically work out a proportionality budget, the idea is implicit in the concept of proportionality in just war theory, the concept which serves to constrain permissible moral costs in the pursuit of a just cause. Exceeding the proportionality budget would render the pursuit of the war wrong, even if it achieved its just cause because the excessive killing of civilians would outweigh the value of the self- or other-defense, which would be accomplished by realizing the just cause.

The concept of proportionality assumes a limit on permissible moral costs in the pursuit of a just cause. Conceptions of proportionality may vary depending on how they count the relevant costs, which costs they take to be relevant, and how they understand the wrong of imposing the relevant costs.<sup>22</sup> One puzzle related to the independence thesis concerns the proper conception of proportionality for *jus ex bello*. Should a conception of proportionality permit revisions to a morally justified proportionality budget after the war has begun, in light of differences between actual and expected moral costs? Suppose that the proportionality budget is correct—a party on the brink of going to war has correctly assessed the maximal moral costs that achieving the just cause is worth. Should that budget be revised downward in the unusual event that a war is going unexpectedly well? Or should it be revised upward in the more typical case of war going worse than predicted? The latter question is the focus of my concern in this section. Put differently, as the actual moral costs of the pursuit of a just cause for a war approach the limit of the correctly judged *ante bellum* proportionality budget, could it be morally permissible for the party pursuing the just cause to exceed that budget to achieve the war aim?

David Rodin seems to have been the first to ask the question clearly and to offer an answer. He offers the example of a war to liberate territory that *ante bellum* was judged to be proportional to one thousand people killed. It has gone worse than expected, and eight hundred people have been killed. Midway through, it is determined that the territory can be reclaimed at the cost “500 additional lives.” Rodin assesses the matter as follows: “A casualty assessment of 1300 would have rendered the cam-

21. See Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 20–21.

22. The distinction between a concept of X and a conception of X (in the present discussion X = proportionality) derives from John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 9.

paign disproportionate prior to the war. But at this juncture the 800 dead are, to use an accounting metaphor, a 'sunk cost'. If it is proportionate to initiate a campaign of 1000 casualties to recover the land, then it seems [*sic*] paradoxical to prohibit the continuation of a campaign that would recover the same land with 500 additional casualties."<sup>23</sup> In my discussion of this example, I assume, following Rodin, that the *ante bellum* judgment about the proportionality is correct. Rodin advocates adopting "the accounting methodology of discounting 'sunk costs' and effectively treating all new information about forward looking campaign costs as a new opportunity to recalculate proportionality."<sup>24</sup>

I see two problems with adopting a purely forward-looking conception of proportionality, which would be entailed by fully discounting sunk costs.<sup>25</sup> First, doing so seems inconsistent with the concept of proportionality, which requires that there is in principle some limit to the costs that can be imposed in the pursuit of the just cause. Second a forward-looking conception, even if consistent with the concept of proportionality, would evacuate proportionality of much of its important critical force, for it renders incomprehensible the claim that a war is disproportionate because of its cumulative costs. Before defending these two criticisms, however, I explain the presumptive rationality of discounting sunk costs in at least some instances of prudential reasoning.

Discounting sunk costs plays a familiar role in prudential reasoning when the aim is to maximize benefits. It can be rational to continue a project, even though it is overbudget, because the sunk costs constitute losses that might be outweighed by dividends reaped from the completed project. If, despite the cost overruns, the benefits of the completed project minus the total costs (the net benefits) would outweigh the sunk costs, then it is rational to continue the project. Let  $t$  be some time after the beginning of the project at which the deliberation about continuing it is occurring. Let  $C_t$  be the sum of the sunk costs from the beginning to time  $t$ ,  $C_c$  be the sum of the projected costs incurred from  $t$  to the completion of the project, and  $B$  be the sum of all of the benefits that accrue upon completion of the project. We assume that all  $C$ 's are negative numbers. As long as  $B + C_t + C_c > C_t$ , then it is rational to pursue the project, if the aim is to minimize losses. For discussion purposes, I call that formula *the sunk costs formula*. The completion of a project can be rational even if total costs exceed total benefits, even if the left-hand number of the sunk costs formula is negative, since completion is sometimes a means of minimizing net losses. If the sunk costs are fully discounted, then the sunk costs formula is  $B + C_c > 0$ . In this case,

23. Rodin, "Two Emerging Issues," 55–56.

24. *Ibid.*, 57.

25. Fabre is also critical of this sort of cost inflation in "War Exit."

maximizing benefits involves pursuing the completion of the project just so long as the benefits of completion exceed the remaining costs.

Applying a conception of proportionality that incorporates discounting sunk costs to Rodin's example above yields a surprising result. At  $t$  (after eight hundred deaths) continuing the war would be permissible up to an additional 999 civilians killed. We see this by applying to the sunk costs formula:  $1,000 + -800 + -999 > -800$ . This confirms Rodin's observation that a conception of proportionality that takes past moral costs as fully discounted sunk costs would have "a very permissive effect, allowing parties to extend a campaign to levels of destruction that would never be permitted prior to the conflict commencing."<sup>26</sup> In light of the potential for the inflation of the proportionality budget, Rodin suggests reigning in the permissive effects by a *jus ad bellum* contingency that requires taking notice of the possibility of later revisions permitting moral cost increases far beyond what would have been initially allowed.<sup>27</sup> Such a contingency is supposed to caution against going to war in the first place. But if one accepts the permissibility of fully discounting sunk costs, the normative force of a contingency of this kind is dubious. For notice that the contingency simply is a caution against doing something permissible now on the grounds that one could be permitted to continue to do it later for reasons that are not currently applicable.

The problems with the forward-looking proposal are deeper than the contingency fix suggests. The two problems stated above are particularly important. The first can be appreciated by noticing that there is no principled stopping point to cost inflation if we fully discount sunk costs. For in principle the sunk costs formula can be reapplied throughout the duration of a project. Suppose a project is initially correctly judged to yield benefits of €1,000,000. Midway through the project, at  $t$ , due to unforeseeable problems €1,000,000 has been spent on the project. But it is reasonable to believe that the project can be completed at the cost of €500,000. Net losses would be minimized by continuing, even though the project will cost 50 percent more than the benefits it will yield. Now some time later, at  $t + 1$ , the €500,000 has been spent; there have been more unforeseeable problems. To stop the project would be to assume costs of €1,500,000. But it is now reasonable to believe that the project can be completed at the cost of €300,000. With the net losses of completion then being €800,000, it is rational to continue the project. This sad story of unforeseeable costs can in principle be repeated ad infinitum. Now if the project is a war in pursuit of a just cause, and we let the numbers count as civilians killed rather than euros spent, we see the possibility of never reaching a point at which the war should be ended

26. Rodin, "Two Emerging Issues," 57.

27. *Ibid.*, 58.

on grounds of disproportionality, even though the costs continue to increase. As Rodin notes, the sunk costs conception of proportionality “essentially hands a blank cheque to combatants to continue a war on revised assessment of its future costliness.”<sup>28</sup>

It is not my purpose to take issue with the rationality of fully discounting sunk costs in the financing of projects. Perhaps a project can be continually refinanced (at least until the bubble bursts). My point is about proportionality in just war theory. Reasoning that permits discounting past killings is incompatible with the role that the concept of proportionality is supposed to play in relation to just cause. No good attainable by human action, including a just cause realized, is so valuable as to outweigh infinite disvalue. The concept of proportionality assumes this. It assumes that there is some limit on moral costs beyond which the continued pursuit of a just cause is not justified. A conception of proportionality that would in principle allow infinite human killing is inconsistent with this. Such a conception is fundamentally flawed; indeed, it would seem not to be a conception of proportionality at all.

Jeff McMahan defends a forward-looking conception of proportionality by employing the familiar Trolley Problem.<sup>29</sup> We are to imagine a trolley hurtling down a track in the direction of five people whom it will surely kill unless diverted. A bystander could divert the trolley to another track by a switch where it would kill only one person. The bystander’s choice then is to kill one person or allow five to die. Most people agree that the bystander should kill the one to save the five. But in recognition of a moral asymmetry between killing and letting die, those who so agree would probably not be indifferent if in the scenario there were five people on each track. So, let’s assume that there is some limit of less than five people above which the switch should not be flipped to save the five. Suppose, for the sake of discussion, that it is three people. The proportionality budget for saving five people then is to kill no more than three. Now imagine that on the first attempt the switch unexpectedly malfunctions and fails to divert the trolley but causes a small explosion that kills three innocent people in the area. The bystander can repair the malfunction and flip the switch a second time and still divert the trolley, thereby killing one more person. McMahan observes that when looking forward the fact that three people have already died is irrelevant. Looking only forward, the switch should be flipped. But that is to assume that we should fully discount sunk costs, not to defend it.

The trolley example suffers from a familiar problem. We need only imagine additional iterations. At the second flip of the switch there is another accident, killing three more people but not saving the five, and

28. *Ibid.*, 59.

29. Jeff McMahan, “Proportionality and Time,” in this issue.

so on. If for each new flip of the switch less than four people are killed, then there is no principled stopping point to the killing, as long as we are looking only forward. An infinite number of diversions and killings can be justified to save the five unfortunate people on the track. Once we begin looking only forward, there is no principled place to stop.

Now imagine that after the initial failed attempt to save the five people, which resulted in the inadvertent killing of three people, the first bystander, having reached the limit of her proportionality budget, stops her effort of diverting the trolley on grounds of proportionality, but a second bystander also has the opportunity to repair the track and to save the five people by diverting the train to kill one person. Do the accumulated costs of the first bystander count against the proportionality budget of the second, or does his proportionality budget start anew?

There is no simple answer to this question. It depends on how we understand the wrong of killing for purposes of proportionality judgments. One possibility is that the difference between letting a person die and killing him is that there is more impersonal disvalue produced by the latter and that proportionality judgments compare aggregate impersonal disvalue. According to that view, the second bystander would be contributing to a project producing disproportionate impersonal disvalue by flipping the switch that killed a fourth person. Another possibility is that the relevant moral consideration with respect to killing is what one person owes another, not how much impersonal disvalue an action yields. Without an account of what we owe others that reconciles a person's duties to aid with her duties not to kill, it is not possible to say whether a new proportionality budget should be given to a new potential switch flipper. The point to note, however, is that according to this second view there may be agent relative reasons that would excuse the second bystander's killing in order to aid but not an additional killing by the first bystander. What it is reasonable for a person to do might be insulated from what others have done just as, according to some deontological accounts, what someone should do does not depend on what others will do in response. Hence, the second bystander might have a reason to flip the switch, even though it would be wrong for the first bystander to do so.

Although the terminology *proportionality* seems to suggest something along the lines of the first view in the previous paragraph, it is not obvious that that is the correct view. For our present purposes we need only observe that, even if it is the case that the second bystander is morally licensed to flip the switch, that does not entail that the first bystander is as well. Hence, it might be the case that a later warring party may do what an earlier could not do without exceeding its proportionality budget. If it is the case that one party must end its pursuit of a just cause on proportionality grounds, it does not follow that a second party

may not take up the cause. We need not settle these fundamental matters of proportionality to make the modest point that even if one warring party is required to stop a war on proportionality grounds it might not follow that another may not take up the cause.

The second problem with a forward-looking-only conception of proportionality is that it cannot make sense of any criticism of the disproportionality of a war on grounds of its cumulative costs. But it seems a perfectly intelligent, even reasonable, question to ask, "How many deaths will it take till they know that too many people have died?"<sup>30</sup> Asked in reference to a particular war, rather than about war in general, it is a question about the cumulative costs of the war, not about future costs. To constrain the question of proportionality only to future costs is to render questions such as Dylan's incomprehensible. A central question in the morality of continuing the war in, and occupation of, Afghanistan has been whether the realization of the cause is worth the total moral costs.<sup>31</sup> That seems like a meaningful moral question. And the criticism of the war and occupation on grounds of its total costs seems important to consider. If we were to employ a conception of proportionality that looks only forward, any such criticism would be fundamentally confused. The critics of the war and occupation would not be stating a falsehood that the cumulative costs are not justified by the end; rather, they would be making an unintelligible claim. Such a conception of proportionality is unable to make sense of an important part of the current practice of arguing about war. It, therefore, does a grave disservice to our moral understanding.

The argument of this section rejects a purely forward-looking conception of proportionality based on fully discounting sunk costs. A correct *ante bellum* proportionality budget should not be increased because a war is going more poorly than reasonably expected. This conclusion would seem to be put under pressure if the value of the cause of the war were exceedingly high and the magnitude of the marginal costs beyond the original proportionality budget were very low.<sup>32</sup> However, cases like that, which might seem to raise doubts, do not in fact target the *jus ex bello* conception of proportionality that requires maintaining the original proportionality budget. Rather, it is the calculation of the *ante bellum* proportionality budget that is called into question. If realizing the just cause is exceedingly valuable, then perhaps costs should be considered

30. Bob Dylan, "Blowin' in the Wind," on *Freewheelin' Bob Dylan*.

31. See, e.g., Miller, "Ethics of America's Afghan War"; Jeff McMahan, "Proportionality in the Afghan War," *Ethics and International Affairs* 25 (2011): 143–54; and Moellendorf, "Jus ex Bello in Afghanistan."

32. I am grateful to Jeff McMahan for pressing me to clarify my view on this kind of case.

proportional to it that are higher than the *ante bellum* budget calculated. The mistake would be with the *ante bellum* proportionality budget. The present discussion has assumed that the original proportionality budget is correct. The present criticism then is not directed to the *jus ex bello* conception of proportionality based on that budget. Instead it resists the assumption of the discussion.

#### IV

In the previous section I argued against a purely forward-looking conception of responsibility when considering whether it would be proportional to continue a war. In this section I defend an exception to that view when the just cause for war changes. Consider again the case of Afghanistan. Suppose for a moment that preventing postinvasion widespread civil war in Afghanistan provides a just cause for a continued US and NATO military presence there. Any plausible interpretation of the initial *jus ad bellum* cause for the war would be different from this one. Since we are supposing this changed cause to be just, reconsidering other criteria, such as proportionality, is now crucial. The argument against only looking forward does not seem compelling in such cases. This is due to the different just cause, which seems to change the identity of the war.

We are supposing that the war is now one to prevent civil war rather than one to preempt further terrorists attacks or to change the Afghani regime. In that case, counting all of the past moral costs against the proportionality budget for the new just cause would be rather like factoring the costs of the war in Iraq into the judgment of whether to continue the war in Afghanistan. The costs of another war are not to be counted against the proportionality budget of this war, even if perhaps they say something about the larger global role of the country making the wars.

In passing I mentioned two plausible initial just causes for the US-led invasion of Afghanistan, preemption of further terrorist attacks and regime change in the direction of greater justice. These, of course, are not necessarily fully distinct causes, since achieving the former could require achieving the latter. But the important point for present purposes is that both are distinct from a war to prevent humanitarian disaster caused by civil war.

The point made in this section could be challenged by claiming that the war in Afghanistan to prevent a bloody civil war is not truly distinct from terrorist preemption or regime change. The reasons might appeal to the geographical and temporal continuity of the fighting. The fighting to prevent a civil war is occurring in the same area as the fighting to preempt further terrorist attacks, and there has not been a

significant temporal disruption in which the one stopped and the other started. However, considerations of temporal and geographical continuity are not determinative of the moral identity of the war over time. More important is the cause for the war. Judgments of proportionality, prospects for success, and necessity are all relative to the just cause of the war. Once the cause changes, these judgments must also change. Despite the geographical and temporal continuity in Afghanistan, there is an important moral sense in which a war to prevent civil war is distinct from a war of terrorism preemption. Hence, what might have been proportional for one cause could be disproportional to another, and while belligerence might have been necessary to pursue one cause it might not be to pursue the other.

## V

Only if we judge that it is appropriate to end a war do the means for doing so become important. The doctrine of how to end a war is in that sense dependent on the doctrine of whether to end a war. The matter is, however, more complicated than that formulation might suggest. Whether to stop fighting might also be informed by an evaluation of the means (and their consequences) available for doing so. If the only available means of peace is reasonably believed to produce a circumstance that includes widespread and grave violations of human rights among civilians by other parties—for example, if troop withdrawals make it likely that ethnic cleansing will occur—this would necessarily inform the decision of whether to end the war.

Concerns about how to end a war are about the means to use, assuming that the end of terminating the conflict has been settled on. Insofar as this doctrine of *jus ex bello* is about means, it bears a certain analogy to *jus in bello*. But although the criteria of *jus in bello* function as constraints on ending wars, just as they do on prosecuting wars, they do not comprise the doctrine that specifically governs how leaders plan for ending a war. That question has received almost no attention in recent just war theory.<sup>33</sup>

One part of the doctrine of how to end a war is the principle of all due haste. Proceeding with all due haste to end to an injustice is morally important. Ending wars that should be ended should not be delayed unnecessarily. But what counts as unnecessary delay has to be judged in light of the moral risks of ending a war. Moral judgments about ending a

33. One exception is a useful unpublished paper by Seth Lazar, "Endings and Aftermath in the Ethics of War" (CSSJ Working Papers Series no. SJ016, Centre for the Study of Social Justice, University of Oxford, November 2010), [http://social-justice.politics.ox.ac.uk/materials/SJ016-Lazar\\_Endings&Aftermath\\_War.pdf](http://social-justice.politics.ox.ac.uk/materials/SJ016-Lazar_Endings&Aftermath_War.pdf).

war are not complete once it has been correctly determined that a war should be ended. There can be just and unjust ways to end a war that it would be unjust to continue. Sometimes there will be trade-offs between the injustices that would be perpetuated by delaying the ending of a war and the moral opportunity costs, or the increase in postwar injustices, that would occur due to ending it recklessly. It does not follow from the claim that a war should be ended that the best means of ending it are the quickest, even if it is the case that to delay unnecessarily the end of an unjust war is to perpetuate an injustice.

The principle of all due haste may be qualified by other morally important principles. One of these is the principle of moral costs minimization. A war should be ended in a manner that minimizes moral costs that arise in the process of ending, especially the moral costs to civilians, the institutions of a just and peaceful social life, and the country's natural resources and vital infrastructure. The special emphasis on the costs to civilians recalls the *jus in bello* constraints that seek to protect civilians. But as a part of *jus ex bello* this principle is not directed toward the activities of combatants in particular (which is covered by *jus in bello*) but to the plan of the military drawdown and withdrawal. Tactics that minimize exposing civilians to harm from the other parties should be employed, and proper concern for vulnerable civilian populations should govern the process.<sup>34</sup> The focus on protecting the institutions of a just and peaceful social life assumes the general view of just war theory that the end of war is a more just peace. Natural resources and vital infrastructure are especially important for the role that they will play in the well-being of the citizenry after the war.

Moral costs have a particular significance in those cases in which the war that should be ended is one in pursuit of a just cause and the context is something between decisive victory and surrender. In these cases, by hypothesis, peace will bring about something less than the justice that was pursued by belligerent means. A principle of injustice mitigation requires that, in winding down the war, the just cause should be realized as much as is possible within the moral constraints of the first doctrine of *jus ex bello* and the requirements of *jus in bello*. The reason for this principle derives from the just cause itself. The justice of the cause supports doing what can be done to serve the cause partially, assuming that it cannot be achieved entirely by peaceful means (and its successful pursuit by belligerent means is unjust).

The foregoing considerations support three principles as part of the *jus ex bello* doctrine governing how to end a war. Two apply generally, all due haste and moral cost minimization. One applies in the cases in

34. I would like to thank an anonymous reviewer at *Ethics* for helping me to clarify this point.

which just cause exists, injustice mitigation. Seth Lazar is one of the few contemporary philosophers to write about how to end a war. Of the principles of *jus ex bello* that he discusses, two seem to me to be relevant to the doctrine of how to end a war and should be added to the three that I have defended.<sup>35</sup>

The first principle prohibits seeking military victories in order to ground postwar claims in peace negotiations. Lazar maintains that when seeking peace “belligerents must not seek to ground any new entitlements in the war itself.”<sup>36</sup> This principle is contrary to some classical thinking about just war.<sup>37</sup> But there are compelling reasons to affirm it. Claims of justice that supply the cause of a war precede the war, and although they might depend on the war for their realization, they do not depend on gains made during the war for their moral justification. Other claims of justice constrain the course and conduct of the war but are not justified by war gains. It would have been unjust to initiate a war in the pursuit of a gain that could not have provided a just cause for a war. So, to seek to maintain a gain, which does not have an independent justification, by means of war is to seek to maintain that for which it would have been unjust to prosecute a war. If a gain is not a claim that is part of a just cause for a war, then war alone cannot justify the possession of it. To preserve a gain without a justification independent of the victory is an act of conquest. In winding down a war belligerents should minimize costs and mitigate injustices rather than engage in conquest.

The second principle requires good faith in the negotiations to secure a peace.<sup>38</sup> The extent to which fraud is morally permissible in war is disputed. Thomas Hobbes’s declaration that “Force, and fraud, are in war the two cardinal virtues” is well known.<sup>39</sup> But, Hugo Grotius objects

35. I am not convinced that Lazar’s other principles are part of an independent account of *jus ex bello*.

36. *Ibid.*, 19. I am not sure how far my agreement with Lazar extends. On p. 20 he asserts that “all belligerents, however justly they fought, must relinquish what they have captured through war—territory and goods, as well as prisoners of war.” That seems right to me with regard to prisoners of war but wrong with respect to territory, goods, and other matters if there were *ante bellum* justified claims that supported a side in the possession of these goods.

37. For example, Hugo Grotius allows just possession of the spoils of a just war, including territory, in *The Rights of War and Peace*, ed. and trans. Richard Tuck (Indianapolis: Liberty Fund, 2005), vol. 3, chap. 6, and including sovereignty in chap. 8. (Available at [http://files.libertyfund.org/files/1427/Grotius\\_1032-03\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/1427/Grotius_1032-03_EBk_v6.0.pdf).) But interpreting Grotius is complicated because he makes a general qualification of his views in chap. 10, by distinguishing between right and humanity or virtue. And he limits justified possession of war gains only to debts owed in chap. 13.

38. Lazar, “Endings and Aftermath,” 15–17.

39. Thomas Hobbes, *The Leviathan*, in *The English Works of Thomas Hobbes*, ed. William Molesworth (London: Bohn, 1839–45), vol. 3, chap. 13, p. 73, [http://files.libertyfund.org/files/585/Hobbes\\_0051-03\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/585/Hobbes_0051-03_EBk_v6.0.pdf).

to making lying promises even to enemies in wartime. “For every Promise, as I said before, confers a new and special Right to the Person promised: And this is in Force, even among Enemies, notwithstanding their open Hostility, and that not only in express Promises, but also in tacit ones, as when an Interview is demanded, of which we shall treat more here after, when we come to speak of publick Faith to be preserved amongst Enemies.”<sup>40</sup> And Samuel Pufendorf echoes that view.<sup>41</sup>

Whatever the correct moral account of fraud in wartime may be, negotiating a peace begins a process of cooperation, to which bad faith is certainly poison. Negotiating in bad faith undermines the basis of cooperation, which involves relying on the word of other parties that they will perform as they pledge. And there is little hope for peace if parties do not trust one another sufficiently to cooperate in a peace process. Hence, negotiating in bad faith threatens to derail the nascent peace process. Grotius notes that once the right of a belligerent to good faith negotiations is denied, “all Hopes of concluding a War, but by a compleat Victory, would be lost.”<sup>42</sup>

In a war in pursuit of a just cause there may be a temptation to seek an advantage by negotiating a peace in bad faith. The thought might be that this could either yield a decisive victory or minimize the injustice that will be maintained if victory is not secured. In the latter case, negotiating in bad faith would make the eventual peace negotiations extremely difficult, if not hopeless. But what of the case of negotiating in bad faith to secure a victory for a just cause that otherwise would lack sufficient likelihood of success to continue? At the limit, where the cause is especially valuable (e.g., preventing genocide), the victory is as certain as can be in practical affairs, and the continued fighting is within the proportionality budget, the principle requiring good faith in negotiations may be defeasible.

A lesser-evil argument that the costs (to the innocents who would be defended if the just cause were realized) of keeping faith are higher than the costs of breaking faith could in principle defeat the requirement of good faith in negotiations. But in the lesser-evil argument just described, the good of defense constituted by realizing the just cause must be

40. Grotius, *Rights of War and Peace*, vol. 3, chap. 1, sec. 18, p. 19. See also “For the Obligation to speak Truth arises from a Cause, prior to War, and perhaps may be in some Measure annihilated by War, but a Promise of itself confers new Right” (vol. 3, chap. 19, sec. 1, par. 3, p. 139).

41. “One has equal right to use fraud and deceit against an enemy, provided one does not violate one’s pledged faith. Hence one may deceive an enemy by false or fictitious stories, but never by promises or agreements” (Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully, trans. Michael Silverthorne [Cambridge: Cambridge University Press, 1991], 169).

42. Grotius, *Rights of War and Peace*, vol. 3, chap. 19, sec. 7, p. 142.

weighed against the value of a strong war convention based on acceptance of the principle of good faith negotiating. If warring parties cannot reasonably expect good faith in negotiations with their enemies, peace by means of negotiations is made very difficult. Although there might often be some good achieved by negotiating in bad faith, that good comes at the cost of exposing countless innocent persons in the future to the moral costs of prolonged war due to an erosion of trust in peace negotiations. There is then an important moral reason in favor of a convention requiring good faith in peace negotiations. Except in extraordinary circumstances, it is better for belligerents to act on the principle of injustice mitigation before the peace process than to seek to advance a just cause by means of bad faith in peace negotiations.<sup>43</sup>

Five principles then seem to me to be important parts of a doctrine of how to end a war. They require all due haste in ending the war, minimizing the moral costs of the war, mitigating *ante bellum* injustices, abjuring war-based postwar entitlements, and negotiating in good faith. I would be surprised if these principles were all there is to the moral doctrine of how to end a war. But I hope this brief discussion of them provides some impetus for others to pursue further reflection on the underdeveloped doctrine of *jus ex bello* concerning how to end a war.

## VI

Once a war has begun, regardless of whether it satisfied the criteria of *jus ad bellum*, it is appropriate to consider the justice of continuing it. A war that was just to begin may become unjust and war that was unjust to begin may become just to continue. Even if the criteria for constraining the continued prosecution of a war are approximately the same as the *jus ad bellum* criteria for initiating a war, their application may change with changed circumstances. This claim provides the foundation for the independence of the doctrine of whether to end a war. But that doctrine does not exhaust the moral considerations that govern ending a war. Important considerations of the means remain. Principles governing these comprise the doctrine of how to end a war. These principles include, at least, all due haste, moral cost minimization, injustice mitigation, no war-based entitlements, and good faith in negotiations. Reflections on whether and how to end wars comprise two basic doctrines of *jus ex bello*.

43. A defense of the principle of good faith as a valuable convention is, I think, consistent with Daniel Statman's claim in "Ending a War Short of Victory," in this issue, that principles of *jus ex bello* are best justified by a kind of contractualism. I have not endorsed that view generally, but it seems correct in this case.