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# War Exit\*

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## Abstract

This paper argues that we must sever the ethics of war termination from the ethics of war initiation: a belligerent who embarks on a just war at time  $t_1$  might be under a duty to sue for peace at  $t_2$  before it has achieved its just war aims; conversely, a belligerent who embarks on an unjust war at  $t_1$  might acquire a justification for continuing at  $t_2$ . In the course of making that argument, the paper evaluates the various ways in which belligerents end their wars.

## I. INTRODUCTION

One of the most often heard criticisms levelled at belligerents in policy circles and the press is that they should have ended the war earlier, or later, than they did. Thus, it is sometimes said of the US that they should have withdrawn their troops from Vietnam as soon as they realised in the course of 1968 that they would never succeed in overthrowing the Communists, instead of waiting until 1973. Likewise, the American administration was criticised by many for not withdrawing US troops from Iraq as soon as Saddam Hussein's regime had collapsed, and yet was urged by others to maintain its military presence until prospects for lasting peace and order were more secure. By the end of 2014, American and British troops will have left Afghanistan, to the delight of some and the consternation of others.

While there is a voluminous, sophisticated and longstanding body of work on the ethics of the resort to and conduct in war (*jus ad bellum* and *jus in bello* respectively), indeed while the normative issues raised by post-conflict settlements (or *jus post bellum*) have attracted considerable attention of late, there is hardly any work on the transition from war to peace, and more specifically on the ethics of war exit.<sup>1</sup> This paper makes a stab at filling that gap. To be clear: my point is not that we

need to add yet another, substantial set of principles to the other *jura*: those labels as a convenient way to demarcate various phases in the initiation, conduct and termination of a war, but do not have deep conceptual or normative significance (in my view at least). Rather, my point is that the ethical issues raised by exiting a war warrant scrutiny, at the bar of the principles which govern the resort to, and conduct in, war.

I should clarify what I mean by ‘war exit’. Strictly speaking, a war is not legally ended until a peace treaty has been signed. In fact, most contemporary wars do not end ‘cleanly’ with formalised peace treaties, pitting as they do belligerents who resort to asymmetrical tactics and are willing to lock themselves into a long, attritional conflict. In this paper, however, I take war exit to mean the cessation of hostilities – though for stylistic convenience I shall sometimes use the phrase ‘to end the war’.<sup>2</sup>

One might think that the normative issues raised by the cessation of hostilities are not significantly different from those raised by their beginning. For the claim that a belligerent is morally forbidden to go to war at time  $t_1$  might seem to imply that it must end its (*ex hypothesi*) unjust war at time  $t_2$ . Likewise, the claim that a belligerent is morally permitted to go to war at  $t_1$  might seem to imply that it may continue to prosecute its (*ex hypothesi*) just war at  $t_2$  if it has not achieved victory yet. If the war is just, if the victory is noble, then of course (it might seem) just belligerents may end it by continuing to fight until they are victorious. I disagree. My aim, in this paper, is to defend and explore in some depth the view that the question of whether belligerents may, or indeed must, end their war at time  $t_2$  cannot be settled solely by a verdict on the justness or unjustness of their war at  $t_1$ . To this end, I argue in section II that a belligerent whose war is just at  $t_1$  is nevertheless sometimes under a duty to end it at  $t_2$ , even though it has not yet achieved its ends.

In section III, I argue, conversely, that a belligerent whose war is unjust at  $t_1$  nevertheless may sometimes continue to fight at  $t_2$ .

Two preliminary remarks before I begin. First, I assume throughout that that a war is just if it meets the following five conditions: it has a just cause, where a just cause consists in the violation, backed by the threat of lethal force, of some party's fundamental human rights (that is to say, their rights to the freedoms and resources necessary for a minimally decent life); it stands a reasonable chance of succeeding by military means which do not breach the *jus in bello* requirements of proportionality and discrimination; it is a necessary means to pursue the just cause whilst minimizing casualties; it is a proportionate response to the injustice which the belligerent has suffered; and neither its occurrence nor the way it is fought unnecessarily threaten, once it is over, the establishment of a durable and all-things-considered justified peace.

Second, I set aside the normative issues raised by individual soldiers' decision to stop fighting, whether those decisions are reached in a unstructured way by individual soldiers acting on their own initiative or by military leaders who no longer trust in their political masters' judgment. Instead, I focus on wholesale war exits and ask whether political leaders must or may cease hostilities on behalf of their community.

## II. ENDING JUST WARS

Suppose, then, that A is at war against B. On what grounds, and when, must A either surrender or approach B with a view to ceasing hostilities? It might seem obvious at first that whilst A may continue to fight until it has achieved its war aim, it must stop as soon as it has done so since it seemingly no longer has a justification for

fighting. On that view, thus, assuming that the defeat of Nazism was a major war aim of the Allies, the latter were under a duty to seek an armistice with Germany only once and as soon as the latter's regime was vanquished, and precisely on those grounds. Conversely, suppose that A's war is unjust – and in particular, lacks a just cause. A, it seems, may not continue to fight. On that view, Germany's Nazi regime should have ended its wars of aggression as soon as it started them.

The thought here is that the moral status of the war has some bearing on the moral status of its ending, such that the fact that A lacks a just cause for going to war against B puts its under a *prima facie* duty to end its war here and now, whilst the fact that it has a just cause for starting the war gives it a *prima facie* permission not to end it here and now. As I shall argue, however, the unjust belligerent's duty to surrender or seek an armistice, and the just belligerent's permission not to do the latter, are only *prima facie*.<sup>3</sup>

Remember that a war is just if and only if it satisfies the following five principles: it has a just cause, where a just cause consists in the violation, backed by the threat of lethal force, of some party's fundamental human rights (that is to say, their rights to the freedoms and resources necessary for a minimally decent life); it stands a reasonable chance of succeeding by military means which do not breach the *jus in bello* requirements of proportionality and discrimination; it is the only way to pursue the just cause whilst minimizing casualties; it is a proportionate response to the injustice which the belligerent has suffered; and neither its occurrence nor the way it is fought unnecessarily threaten, once it is over, the establishment of a durable and all-things-considered justified peace.

With those principles in hand, we must distinguish between the following three cases:

(a) At  $t$ , A's war meets all five conditions and is therefore just.

(b) At  $t$ , A's war has a just cause, but fails to meet one or more of the remaining four conditions, and is therefore unjust.

(c) At  $t$ , A's war lacks a just cause, and is therefore unjust.

*A. Reasonable chance of success.*

Let us turn to (a) – leaving (b) and (c) until Section III. Suppose that A's war meets all requirements, and in particular has a reasonable chance of success, at  $t$ . Suppose further that (e.g.) new weapons technology becomes available to B, such that from A's point of view, the war no longer satisfies the requirement at  $t$ . On some views, the war *becomes* unjust, and A is morally required to end it.<sup>4</sup> For war kills, and a war which has no chance of successfully pursuing its just cause is one where the deaths which it occasions seem utterly pointless – which makes it an unjust war.

And yet, it is not clear that A is under a duty to desist, for continuing to fight might enable it to gain something, though less than what it is entitled to. Whether the prospect of those gains warrants killing, and thus a refusal by A to submit, depends on whether A would have had a just cause for going to war against B for such prospects in the first instance. Suppose that B mounts a whole-scale and unwarranted invasion of A's territory at  $t$  with a view to annexe A – a just cause if there is one.<sup>5</sup> Suppose further that, at  $t$ , A's defensive war meets all five *ad bellum* condition, but that circumstances change in such a way that, at  $t_2$ , A will only be able to recover part, though not all, of its territory: A will have to settle for the loss of its territory, 50kms inland, alongside its border with B, which represents (say) 10% of its territory. If A would have had a just cause for going to war against B had B's forces only sought to capture 90% of A's territory, then the mere fact that A no

longer stands a reasonable chance of expelling the enemy from the whole territory does not imply that it is under a duty to stop, given that it could still gain 90% by continuing. If, on the other hand, A would make only very minimal gains by continuing to fight - so minimal in fact that it would not have had a just cause for going to war in defence of those gains to begin with - then it is under a *prima facie* duty to stop. In other words, much depends on what we mean by 'success'. It need not be success in obtaining redress for the precise wrongdoing which provided its victims with a just cause for going to war at *t*: it can be success in obtaining redress for whatever wrongdoing B commits in the course of its war which, had it been committed at *t*, would have been serious enough so as to provide A with a just cause for initiating the war.

This, incidentally, raises an interesting question. Some belligerents - particularly insurgent groups or national liberation movements - know that they will not successfully prosecute their just cause if they take up arms, yet do so as a means to improve their bargaining position in future negotiations. Are they justified in so acting? Only if that which they seek to bargain for would itself provide them with a just cause for war in the first instance. By that token they are under a (*prima facie*) obligation to end their war if and when the enemy offers them those particular concessions (subject to no additional just cause emerging.) Note that the justificatory bar for continuing with the war is high: for it requires of belligerents that they should desist unless they would, by continuing, obtain gains which are by themselves a just cause. At the same time, the acquisition of a new grievance which would not by itself have provided them with a just cause might strengthen the case for continuing to fight when the prospects of achieving the just cause, though worse than at time *t*, are nevertheless higher than zero.<sup>6</sup>

*B. Proportionality*

So much for the success requirement. Consider now the proportionality requirement, whereby a war is just only if the goods it brings about outweighs the bads it occasions.<sup>7</sup> Deaths – of combatants from A’s side, and non-combatants from both sides<sup>8</sup> – are one such bad, and the requirement of proportionality thus acts as a fundamental moral constraint on killing. Suppose that at  $t$ , A would be able to repel B’s invasion of its territory at the proportionate and morally acceptable cost of 15,000 casualties – beyond which the requirement would not be met. But A’s self-defensive campaign goes badly, so that 10,000 lives are lost for negligible gains. At  $t$ , further estimates yield the conclusion that an additional 8,000 lives would be lost, though victory would be achieved, if A’s leaders decided to go on. Given that they will breach proportionality if they go on, must they desist? I can think of two arguments to the effect that they may continue, neither one of which strikes me as particularly convincing. First, some might argue that the loss of lives itself provides A with a justification for continuing. One such justification takes a punitive form, such that A has a justification for killing soldiers<sub>B</sub> punitively for their wrongful killing of A’s members. However, there are very good reasons for resisting punitive killings, not just in one-to-one domestic contexts, but in war contexts too. As I and others have argued elsewhere, combatants lose their right not to be grievously harmed in virtue of unjustifiably subjecting third parties to a wrongful threat of grievous harm and provided that killing them would block that threat. Killing, thus, is not justified as a backward-looking retribution for past wrongdoings. Accordingly, A would not be justified, on those grounds, in continuing with its war.<sup>9</sup>

On another construal, proposed by McMahan in his ‘Proportionality and Time’, the claim that lost lives provide A with a justification for continuing with the war takes a ‘redemptive’ form: to the extent that prosecuting the just cause at least

partially redeems those lives, so that they have not been sacrificed in vain, then A is justified (subject to war's other requirements of course) in fighting. Notwithstanding its strong intuitive pull, however, the redemption thesis faces the following dilemma. Either it holds that redemption alone furnishes A with a new just cause, in which case it is tantamount to claiming that soldiers<sub>A</sub> are justified in killing soldiers<sub>B</sub> even though, *ex hypothesi*, their acts of killing is not construed as forestalling a lethal threat to the dead; or it claims that soldiers<sub>A</sub> would be justified in killing soldiers<sub>B</sub> because, and only if, they would thereby and at the same time prosecute their just cause, in which case the original just cause alone provides soldiers<sub>A</sub> with a justification for killing soldiers. In the former case, the redemption thesis succeeds at the hugely high cost of widening the basis for liability to being killed beyond causal and moral responsibility for an ongoing lethal threat; this in turn opens the door to justifying punitive or exemplary killing; in the latter case, redemption does no justificatory work at all.<sup>10</sup>

The other argument in favor of the claim that A may continue its war at  $t_2$  even though it would breach the proportionality requirement holds that the 10,000 lost lives ought to be regarded as sunk costs. Given that the 8,000 lives which A's victory would cost at  $t_2$  are well within the upper limit of 15,000 lives for that very same end, it would seem odd to require of A that it relinquish its just cause – even though the extra 3,000 lives which will be lost would have been deemed an unacceptable cost at  $t_1$ . There are two problems with this claim. Let us first consider the fate of the 10,000 agents who die between  $t_1$  and  $t_2$ . At  $t_1$ , those deaths are regarded as a bad to be weighed relative to the good the war would bring if A initiated it, and thus count as a reason against going to war – albeit not a sufficiently decisive one. At  $t_2$ , those deaths simply do not count as a bad any more to be weighed relative to the good the war would bring if A continued it. The worry is that, on this

view, proportionality would lose most of its bite as a constraint against killing. For it would become permissible for any belligerent to inflict however many losses it thinks are required to win its war, so long as it would be in a position plausibly to declare, at  $t_2$ , that *from now on*, it will manage to achieve victory at a cost, calculated between  $t_2$  and victory, which is lesser than the upper limit set at  $t_1$ . On that view, only notionally does that limit operate as an appropriately constraining restriction on permissible war killings.

Second, the sunk costs view has a similarly troubling implication with respect to the fate of the additional 3,000 agents who will die if A continues with its war. At  $t_1$ , they are protected, since their deaths would exceed the upper limit of 15,000 lives. At  $t_2$ , however, they lose such protection, since it now becomes permissible for A to continue. But then it appears that no one is protected from death above that upper limit, so long as, at the point at which the decision to continue with the war is made, their death together with that of those who will also die does not exceed it. On that account too, that upper limit does not constitute constraining enough a restriction.<sup>11</sup>

### *C. Justified<sub>arc</sub> peace*

Consider now the requirement that the resort to war, and the way in which the war is fought, should not jeopardise chances for a durable and all-things-considered-justified lasting peace. At  $t_1$ , A has good, objective, reasons to know that resorting to war will not breach the requirement; at  $t_2$ , however, it emerges that continuing to fight would jeopardise peace after war. Whether A must stop depends on what its members would have to sacrifice for the sake of peace. The requirement is not that peace be secured no matter what; rather, the requirement is that an all-things-justified peace be secured. Not, note, a *just* peace, but an all-things-justified peace

(justified<sub>ATC</sub> peace). The distinction between those two kinds of peace is important. A just peace is one in which the wronged party obtains redress for the rights-violations and (justified) rights-infringements to which it was subject. Sometimes, however, the pursuit of a just peace will lead to an escalation in violence and render any kind of peace increasingly difficult to achieve. A justified<sub>ATC</sub> peace is one in which the wronged party receives less than what it is owed for the sake of peace and can be reasonably expected to consent to such terms. Though such a peace is unjust, in that some rights-violations are allowed to continue, or remain uncompensated for or unpunished or both, it is justified as the lesser of two evils. At the same time, a justified<sub>ATC</sub> peace is not the same as the mere cessation of violence, for there are burdens which a wronged party cannot be held under a duty to incur even for the sake of peace narrowly understood as the absence of war. I submit, thus, that a just belligerent is not under a duty to end its war if its members would be subjected after the war to the most grievous of rights-violations (mass killings, mass rape, mass starvation, mass enslavement, wholesale subjection to a ruthless dictatorship, and so on). Such a peace – if we could even call it that - would not be justified<sub>ATC</sub>. But if ending the war now would bring about a state of affairs in which (a) A would enjoy those rights though nevertheless lose part of its territory *and* (b) A's enemy would lay down their arms durably, then *prima facie* A ought not to continue to fight.

#### *D. Discrimination and in bello proportionality*

To recapitulate, we have seen that the *ad bellum* requirements of proportionality, reasonable chance of success and justified<sub>ATC</sub> peace sometimes yield the conclusion that a belligerent must prematurely end a war which it was all-things considered justified to wage in the first instance. So do the *in bello* requirements of discrimination and proportionality, which insist respectively that soldiers not target

civilians indiscriminately and that they not carry out military missions the benefits of which are not worth the harms they cause. Suppose, for example, that A justly starts a war at  $t_i$  and relies on conventional weapons which its forces use against military targets. Suppose further that A has good, objective reasons to know that using those weapons will not breach the proportionality requirement. Under those conditions, A's decision to wage war meets the *ad bellum* requirement of proportionality as well as the *in bello* requirement of discrimination between military and civilian targets. Suppose now that those weapons become unavailable or wholly ineffective, and that A cannot win its war unless its forces deliberately target civilian populations. In so far as A would breach the principle of discrimination, it is under a *prima facie* obligation to stop fighting under those circumstances.

*E. How to end an initially unjust war: suing for peace, or surrendering?*

So far, I have claimed that A is sometimes under a *prima facie* obligation to exit a war which it cannot win justly – where winning means obtaining full redress for the wrongdoings to which it was subject without breaching other requirements of the just war. A further and crucially important question is that of the means by which it must do so. Broadly speaking, A can either sue for peace or surrender. Whether it should do the latter partly depends on its military situation. Suppose that A, though unable to win the war, is nevertheless in a stronger position than B: it has more soldiers and military equipment at its disposal, or it has the capacity to inflict far heavier losses on B than the latter is able to inflict, or there is greater support for the war on its home front than on B's, etc. To insist that A, who *ex hypothesi* is a just belligerent, ought to surrender to B under those circumstances – in other words, to admit defeat – seems *prima facie* unfair. Rather, A may offer terms for a justified<sup>ATC</sup> peace – terms in other words which on the one hand protect the very basic,

fundamental human rights of its members (as well as of innocent third parties) and on the other hand are propitious to a durable and justified<sup>ATC</sup> peace. Moreover, in some cases, A *must* sue for peace, as a means to secure better terms (better, that is, at the bar of its members' and third parties' fundamental human rights) than it would otherwise. If B refuses those terms and continues to fight, and thereby continues to subject A's members to the violation, backed by lethal force, of their rights, then A may continue until B desists so long as its superior military strength means that it has a reasonable chance of achieving this particular, limited objective.

Suppose now that A is losing the war from a strictly military point of view, and that B demands a surrender. At this juncture, some commentators are likely to draw a distinction between conditional and unconditional surrender and claim that A is not under a duty to accept the latter, on the grounds that a demand for unconditional surrender is wrongful. I shall address the morality of unconditional surrender and distance myself from the view just sketched in section III. Meanwhile, let us suppose that B does not insist on unconditional surrender. Even so, to surrender, even with conditions attached, is a concession of defeat. In so doing, A would in effect weaken its bargaining position vis-à-vis B, which might in turn undermine its ability to obtain some form of compensation for the wrongdoing which it suffered at the latter's hands, or more widely undermine its geostrategic status on the world stage. Is A nevertheless under a duty to do so?

Those considerations are routinely invoked by civilian and military leaders in support of their decision to continue a war which they know they will not win – of which the policy conducted by the Nixon Administration in Vietnam between 1968 and 1973 is a case in point. The view that A may continue to fight as a means to avoid those costs is far less innocuous than it sounds: it implies that avoiding termination costs provides just belligerents with a justification for deliberately

killing enemy combatants and (more often than not) foreseeably killing enemy civilians.<sup>12</sup> I shall return (very) briefly to the problem of collateral damage at the close of this section. For now, let us focus on the killing of enemy combatants. Remember that on my account, a war is just only if it is a response to violations of some party's fundamental rights to the freedoms and resources which they need in order to lead a minimally decent life. Furthermore, and to reiterate an earlier point, combatants are liable to being killed only if they unjustifiably subject those parties to those rights-violations – that is to say, only if they bear a significant degree of contributory responsibility for those rights-violations. By implication, then, A is justified in killing combatants<sub>B</sub> as a means to avoid termination costs only if being subject to those costs would wrongfully undermine the fundamental rights of those on whose behalf it fights, *and* if combatants<sub>B</sub> bear a significant degree of contributory responsibility for the latter harm. On the first count, it does not follow from the fact that A cannot win its war anyway that termination costs *themselves* will undermine citizens<sub>A</sub>' prospects for a minimally decent life. True, A might not be able to get the compensation it deserves; true, it might suffer a loss of international status. But that alone does not mean that the fundamental rights of A's members would be undermined as a result.

Moreover, on the second count, even if the fundamental rights of A's members would be undermined if the war is stopped, it remains to be seen whether A is justified in killing combatants<sub>B</sub> as a means to avoid paying termination costs. Suppose that A were to stop fighting. B's leaders, and not its soldiers, would impose on it the costs of termination, via peace negotiations. On what grounds, then, may A decide to continue the war and in so doing kill combatants<sub>B</sub>? I can think of two relatively plausible arguments to that effect.

First, one might want to say that killing enemy combatants for the sake of preserving one's status on the world stage is permissible even if those combatants themselves are not responsible for the fact that one would have to incur early termination costs. We need to distinguish between two variants of this move. On the first variant, the deliberate killing of those nonliable combatants is permissible. On the second variant, their foreseen though nonintentional killing is permissible. I argue elsewhere<sup>13</sup> that one may deliberately kill innocent non-combatants only if their death averts genocide, mass enslavement or (wrongfully caused) starvation. One might think that this particular argument does not apply to combatants precisely because the latter belong to armed forces. In this case, however, combatants are not causally responsible for A's termination costs. Accordingly, they should be treated in the same way as innocent enemy non-combatants. If that is correct, killing them is permissible only as a means to avert the aforementioned evils – of which losing one's status on the world stage is not one, unless (which I suspect is in fact unlikely) the loss for A of its international status or its diminishing negotiating strength are overwhelmingly likely to lead to mass starvation, genocide, or mass enslavement within its borders.

The second argument appeals to combatants<sub>B</sub>' *initial* wrongdoing – to wit, the wrongdoing they committed by participating in their community's unjust war against A. By so acting – the argument goes – combatants<sub>B</sub> have made themselves liable to being killed by A, not in self-defense (since they are not at present imposing on A the harms attendant on early termination) but, rather, in self-preservation.<sup>14</sup> Moreover, by participating now in that war, not only are they contributing to the violation of citizens<sub>A</sub>' fundamental rights: they are also contributing to force A into having to choose between incurring the costs of an early termination and continuing to fight at the expense of the lives and limbs of innocent persons. And yet they, and

not citizens<sub>A</sub>, should bear the costs of exiting a war which they should not have started in the first instance.<sup>15</sup> In refusing to do so, they are making themselves liable to being killed by A.

To recapitulate, *if* the costs of terminating the war are such as to impair citizens<sub>A</sub>' prospects for a minimally decent life, and if, under the circumstances, combatants<sub>B</sub> either are liable to being killed as a means for A not to incur those costs or may be killed as the lesser of two evils, then A is not under a duty to surrender to B. Failing those two conditions, however, A must do so.

*F. To whom is the duty owed?*

I have argued that a just belligerent is sometimes under a duty to end its war even though it has not successfully prosecuted its just cause. If the justification for the duty lies in the fact that it cannot continue with the war other than by killing enemy soldiers who ought not to be killed, then the duty itself is owed to those soldiers. In some cases, however, A's duty to exit the war is owed, not to those of soldiers and indeed citizens of B's who only marginally contributed to A's predicament in the first instance but, rather, to their own forces and civilians, as well as to innocent civilians<sub>B</sub> who would get caught in the cross-fire if the war were to continue. Those duties will often conflict. *Vis-à-vis* their fellow citizens, A's leadership is under a duty to choose the course of action which will minimize the harms they are incurring as a result of B's wrongdoing. However, its duty so to act is constrained by its duty to spare enemy civilians if it can. The degree to which it should confer greater weight on the latter than on the lives of its own members depends on the normative importance of special relationships relative to obligations to distant strangers. Exploring this issue is beyond the scope of this paper. Suffice it to say, to conclude

this section, that the fact that A's war is just *ad bellum* does not entail that A may continue to fight that war until victory is secure.

### III. ENDING UNJUST WARS

Suppose now that A is waging an unjust war. It might seem that leaders must sue for peace forthwith. However, if circumstances can change in such a way as to turn A's just war into an unjust one, such that A is under a duty to cease hostilities at the cost of fulfilling its just ends, it stands to reason that they can also change in such a way as to turn its unjust war into a just war and relieve A from its duty to stop fighting. Suppose for the sake of argument that the US-led coalition lacked a justification for invading Iraq in 2003. It nevertheless seems plausible that it acquired a just cause for continuing to fight – this time, insurgents – which just cause consisted in consolidating the new Iraqi regime in the face of armed rebellion by some factions within the Iraqi population.<sup>16</sup> It might also be that even if it was not necessary to go to war at  $t_1$ , diplomatic routes have now all been closed as a result of the war, so that the latter has become at  $t_2$  a necessary means to A's justified ends. Likewise, even if it stood no chance of succeeding when it was first started, it might now stand a very good chance (thanks to unforeseeable progress in the development of certain (morally acceptable) military technologies, etc.) And so on.

#### *A. Ending a continually unjust war: conditional v. unconditional surrender.*

Later on, I shall refine the view that a wrongdoer at time  $t_1$  might acquire a justification for using lethal force at  $t_2$ . For now, let us assume that A's war is unjust at  $t_1$  and moreover remains unjust at  $t_2$ . Is A under a duty to surrender to B? According to some war ethicists, B may not impose on A an *unconditional* surrender – for (those ethicists say) it is wrong, no matter what, to beat your enemy into

abandoning its prerogative to protect its innocent members from wrongful harm which your own troops might inflict on them, such as indiscriminate rape or vengeful killing. If, then, B were to continue to fight its (just) war against A with a view to obtaining an unconditional surrender, they would act wrongly.<sup>17</sup> Presumably, then, A would not be under a duty to stop fighting and accede to B's demand.

But this is not quite right. The often-discussed case of the Allies' demand for unconditional surrender on the part of Germany during WWII suggests why that is so. The demand had two parts: a 'no-negotiation rule', which stipulated that they would not engage in any negotiation over peace terms with the German authorities but rather would issue the latter with instructions for a mass and orderly capitulation; and a 'no-recognition rule' whereby the Nazi regime would cease to exist as soon as the ceasefire came into force and no local, indigenous entity would take its place. If the enemy community is liable to being occupied militarily, or if there are lesser evil arguments in favor of military occupation, the no-recognition rule is not excessively demanding. As to the no-negotiation rule, it issued in this particular case from the Allies' refusal to regard their German counterparts as anything but criminals and to consider the possibility of having to offer them concessions. In general, of course, the pursuit of a durable, justified<sub>ATC</sub> peace might necessitate such concessions, in which case the imposition of a no-negotiation rule would be impermissible. However, such a rule (or a demand for unconditional surrender) is illegitimate only if a refusal to negotiate terms is conducive to, and *a fortiori* a means towards, the commission of grievous rights-violations or, more widely, of acts which would jeopardize a justified<sub>ATC</sub> peace. Whether this is so depends on the facts of the case. To the extent that the victorious and just belligerent imposes (without negotiation) terms for precisely such a peace, the

refusal to negotiate with a regime which has lost its claim to speak on behalf of its community, or with representatives of a community which itself has temporarily lost its claim to sovereignty, is not itself morally impermissible.

The foregoing remarks suggest that we must distinguish between two senses in which a surrender is unconditional. In the sense used by the aforementioned critics, a surrender is unconditional in that it cannot but commit its addressee to refusing to defend the fundamental human rights of its members. Yet it is implausible to suppose that the word ‘unconditional’ cannot be taken to mean ‘unconditional within the constraints of morality.’<sup>18</sup> In a more plausible sense, thus, a surrender is unconditional in that the victorious belligerent refuses to negotiate with its enemy – which is compatible with a commitment to respecting and promoting the fundamental rights of the latter’s population. As I have just shown, to demand an unconditional surrender in the second sense is not necessarily wrongful.

Suppose that I am wrong – that when B imposes on A an unconditional surrender, it by definition imposes it on A to waive their compatriots’ rights. B clearly acts wrongly. Some might think that, by the same token, A is clearly *not* under a duty to subject itself to it. For in agreeing not to make the respect of their compatriots’ fundamental human rights a condition of their ceasing to fight, they would waive those rights on behalf of their compatriots: yet, that is not something which they have any authority to do. Given that they lack that authority, they cannot be held under a duty so to act.

Again, however, this would be too quick. The surely correct point that A’s leaders lack the authority to alienate their compatriots’ rights to, e.g., not to be raped, killed arbitrarily, summarily detained, and so on is entirely compatible with the claim that, *under some circumstances*, A must nevertheless surrender to B. Suppose that B will not stop the war unless A surrenders unconditionally, and that B’s post-

conflict (unilaterally imposed) terms do not include systematic violations of citizens<sub>A</sub>' fundamental rights. By continuing with the war, A's leaders would expose their own forces and compatriots, as well as (possibly) innocent civilians in B who might be casualties of A's missions, to the harms attendant on a prolonged war which they could not hope to win. It seems that under such circumstances A's leaders might be under a duty to offer their community's surrender to B, even though they could not be deemed to have waived their compatriots' fundamental rights in so doing, and even though B would act wrongly by proceeding in this way. Put differently, A is under a duty to stop fighting given that its acceptance of B's 'no condition' demand will not subject its members to those harms. But were B's terms to fail to respect citizens<sub>A</sub>' fundamental rights, A would not be under a duty to accept them, since it could not be deemed to have waived those rights. Likewise, if B's 'no condition' demand for surrender is meant to provide B with a pretext for committing grievous rights-violations against citizens<sub>A</sub>, then A not only is not under a duty to accept that demand: it may refuse to surrender altogether.

*B. Acquiring justifications for continuing with an initially unjust war*

My opening move, at the outset of this section, was to note that a wrongdoer can sometimes acquire a justification for continuing with a course of action which it should not have started. Let us assume, then, that A's war is unjust at  $t_1$  but that A acquires a justification for continuing to fight at  $t_2$ . We must distinguish between (i) cases where A's war lacks a just cause at  $t_1$  and acquires one at  $t_2$ , and (ii) cases where it fails to meet some other requirement at  $t_1$  but does so at  $t_2$ .

(i)

Suppose, then, that A lacks a just cause at  $t$ . Here, we must draw yet a further distinction, between instances where the cause for which A fought was initially unjust but became just, and instances where A acquires a further, additional just cause alongside its ongoing unjust one. Suppose – to illustrate the first kind of instance – that A goes to war against B at  $t$  with a view to overthrowing B's leadership, which is deemed to pose a threat to A's interests, and to replacing it with a more cooperative and stable regime. Suppose further that B's policies, whilst inimical to A, fall short of violating the fundamental human rights of A's members or indeed of anyone else, and that A thus lacks a just cause for resorting to force. Although A's army succeeds in overthrowing B's regime, the resulting power vacuum affords various factions an opportunity to try and seize power violently – so much so that the country slides into a civil war. Intuitively at least, it seems that subject to the plausibly presumed consent of the civil war's victims, A has a justification for continuing the war at  $t_2$  – this time against those various factions –, which implies that their unjust cause at  $t$  (using lethal force to bring about regime change in B) has become just at  $t_2$ .

Often, however, a belligerent acquires a wholly *new* just cause for continuing with the war. For example, suppose that A unjustly aggresses B at  $t$ , that the latter repels the invasion and that A's regime no longer poses a threat to its interests. However, B takes advantage of its troops' military momentum to invade A with a view to occupying it. Given that there is no justification for B's occupation of A's territory, A may continue to fight its war against B.<sup>19</sup> Or suppose that, in fighting A, combatants<sub>B</sub> commit grievous rights-violations against innocent members of A. Thus, in the very first days of April 1945, some German military leaders recognized that the war was lost but nevertheless persisted in fighting in Eastern Prussia, so as to enable as many civilians as possible to flee from the East to the West and to

ensure that as many soldiers as possible could surrender to American and British troops rather than the Red Army – on the grounds that the latter were more likely than the former to kill, rape and torture prisoners of war and civilians. In the light of the exactions committed by Soviet soldiers in their campaign in Eastern Prussia, including mass summary executions of German prisoners of war and mass rapes of women, it seems that they had a *prima facie* justification for so acting.<sup>20</sup>

However, before concluding that A's initial unjust cause does not necessarily bar it from continuing with the war, we must pay greater attention than I have done so far to the features of the process whereby A acquires a new just cause, or sees its initially unjust cause turn into a just one. In particular, it matters whether A is placed in that position as a result of its own wrongdoings, or for extraneous reasons. In illustration of the latter case, suppose that in the course of A's unjust war against B, a natural disaster occurs in a part of B's territory whose minority population has hitherto proved rather hostile to B's majority and authoritarian regime. B's regime takes advantage of the resulting chaos to move some of its armed forces in the area and to mount a murderously violent campaign of repression. If this is the kind of wrongdoings which would have provided A with a just cause for starting a war of intervention against B at *t*, then it seems that A has a strong justification for not ending its otherwise unjust war with B and for sending some of its own troops to help the latter's victims.

Suppose now that A acquires a just cause as a result of its own wrongdoings: this time, B's regime takes advantage of the chaos created by A's wrongful war to murder its opponents. Or suppose that factions within B take advantage of the collapse of B's institutions to try and seize power violently and illegitimately. In order to assess whether A may continue, we must distinguish between cases where those who would benefit from the continuation of the war either are responsible for the

initial wrongdoing or can be justifiably presumed to have consented to it, and cases where they fall in neither category. In the former cases, A has two options. In continuing with the war, it would protect from harm agents who bear some degree of responsibility for the deaths wrongfully caused before  $t_2$  and would do so at the expense of individuals who would die from  $t_2$  onwards and are innocent of that initial wrongdoing. In exiting now, by contrast, it would protect those very same individuals from harm though would thereby expose initial wrongdoers to the harms of military defeat. Given the choice (and other things roughly equal such as numbers of individuals killed or spared on both sides) it should opt for the exit option, for those wrongdoers surely have a lesser claim to protection than the innocent. Contrastingly, in cases where A's decision to continue with the war would benefit neither agents responsible for wrongdoings nor individuals on whose behalf the war was fought and who could justifiably be presumed to consent to it, then the new cause – to wit, the protection of those individuals – does indeed provide A with a justification for not exiting just yet. (For the sake of simplicity and to spare readers from further distinctions I prescind from addressing cases where the group of beneficiaries includes both kinds of agents.)

To be sure, for A to continue to fight might give potential other wrongdoers an incentive to start an unjust war since they would know that they might subsequently acquire a justification for continuing what they unjustly initiated.<sup>21</sup> In mitigation, however, the fact that, as Rodin argues in 'War Trap', A's leaders should nevertheless still be regarded as liable to punishment and other forms of sanctions for having started an unjust war at  $t_1$  might well give A's emulators potential pause for thought. Moreover, even if A's decision gives other wrongdoers strong enough an incentive to act unjustly, it does not follow that A may not so act. A faces the following dilemma. In desisting here and now, it would fail to assist members in B who may well have a very strong interest in, indeed a rectificatory claim to, its

intervention; but in continuing with its war, A would contribute to the wrongful killing of innocent people by those other wrongdoers. The question then is whether an indirect contribution to future acts of killing is morally worse than a direct failure to help victims here and now – particularly victims whose predicament one has caused in the immediate past. In answering that question, one must take into account (*inter alia*) the number of lives saved versus the number of lives lost, the degree and strength of one's responsibility for one's victims, and the timeframe within which other wrongdoers might act following one's decision to continue to with the war. But unless one endorses the highly implausible view<sup>22</sup> that it is *always* morally forbidden to act in such a way as to provide third parties with an incentive to commit a wrongdoing, it remains the case that A sometimes has a justification for continuing a war which it started unjustly.

The latter claim, it must be said, yields the unfortunate worry that in so acting A might end up achieving its initially unjust cause. Suppose that although A has acquired a justification for pursuing its advance through B's territory, for example to destroy military installations which B will use impermissibly to target civilians<sub>A</sub>, it has not acquired a justification for doing that which it intended to do in the first instance, namely overthrowing B's regime. Suppose further that, as a result of the continuing war, B's regime collapses. In pursuit of its new just cause, A's forces will kill agents who have not acted in such a way as to lose their right not to be killed, such as innocent civilians in B who are caught into the cross-fire. They will also kill members of B's armed forces who are not themselves committing the rights-violations which provide A with its new justification for continuing to fight. The difficulty consists in deciding what matters more morally speaking: that A should be able successfully to prosecute its newly acquired just cause, at the risk of also successfully prosecuting its initial unjust one, or that they should not be able

successfully to prosecute their initial unjust cause as would happen if they were to sue for peace, but at the risk of not obtaining redress for their just grievance. Whether A's leaders ought to continue the war or to end it depends on one's assessment of what is the lesser of those two evils in the particular circumstances of the case.

More needs to be said about the ways in which the acquisition of a just cause bears on an initially unjust war. One might think, in particular, that when the new, just cause is wholly unrelated to the initial unjust war, a *new* war itself begins, which implies that the proportionality counter is set back to zero and the lives lost in the initial war should be wholly discounted.<sup>23</sup> I am sympathetic to that view, which, precisely because we are faced with a new war, is consistent with my earlier claim that lost lives ought not systematically to be seen as sunk costs, and which raises the fascinating question of (as it were) war's diachronic identity. However, I will leave that issue aside, and revisit the issue of termination costs. In section II, I argued that avoiding those costs provides a just belligerent with a just cause for continuing a war which it knows it cannot win only if those costs are so high as to undermine its members' prospects for a minimally decent life. I further observed that enemy, unjust combatants, in this case, may under some circumstances be liable to being killed as a means to avoiding those costs. The question here is whether the costs of suing for peace – such as loss of prestige, loss of status on the international stage, impairment to one's ability to implement one's foreign policy, and so on – can sometimes tip the balance in favor of continuing an initially unjust war. They do so only if they themselves were imposed on an unjust belligerent unjustly by its (*ad bellum* just) enemy, and only if the latter's combatants can be held liable for imposing them or may be killed as a means to avert a grievous evil. In other cases, of which the following two are interesting examples, A may not invoke termination costs as a

justification for not suing for peace. In the first case, the prospects for a minimally decent life of some of citizens<sub>A</sub> would be undermined were A to end its war now simply because war and its economy provide opportunities, jobs and income to vast segments of the population. The example might seem far-fetched; yet, one of the reasons why some conflicts, most notably civil conflicts whose opposing factions are enmeshed in lucrative criminal activities, are seemingly intractable is precisely that war, notwithstanding the destruction it causes, has become an indispensable source of revenues to many of those its actors.<sup>24</sup> But in so far as A's war is *ex hypothesi* unjust, to prolong it at the cost of the lives of B's members (be it combatants<sub>B</sub> or citizens<sub>B</sub> killed as collateral damage) is wrongful: instead, the costs of ensuring that A's members do not suffer from the aforementioned harms should be borne by wrongdoers within A who started the (unjust) war in the first instance.

The second kind of case I have in mind is this. Suppose that A goes to war against B without a just cause, realizes that it will not be able to win its war, but also has very good reasons to believe that, if it were to stop now, its powerful neighbor C would take advantage of its weakened loss of status to mount an wrongful aggression. To say that A has a justification for continuing its *ad bellum* unjust war against B as a means to thwart C's future aggression is to imply that its forces are morally justified in deliberately killing combatants<sub>B</sub> even though they are innocent of C's wrongdoing. But in this case A would treat those innocent individuals as a means only to its ends, and thus act wrongly: instead, A should sue for peace against B and repel C's invasion when the latter occurs – which is to say that it should target C's wrongdoers, and not B's innocent, in defense of its own members.

This conclusion is subject to the following *caveat*. Suppose that C's aggression of A, following the latter's loss of status on the international stage, would overwhelmingly likely result in the mass enslavement, genocide or starvation of A's

population by C's forces. Suppose further that the majority of A's population is not responsible for A's unjust war against B. In this case, A has a choice between suing for peace with B and allowing those grievous wrongdoings to occur, and blocking those wrongdoings by continuing its war with B in the course of which it will kill a few thousands of the latter's members. Now, according to the doctrine of acts and omissions, *ceteris paribus* it is morally worse to harm than to allow harm to happen – to kill than to let die. Assuming for the sake of argument that the doctrine of acts and omissions is sound, one need not hold A under a duty to sue for peace in this case. This is because in *this* case, precisely, things are not roughly equal: the choice which A faces is between letting vast numbers of individuals suffer the most grievous rights-violations imaginable, and killing considerably fewer other agents. It seems to me, at least impressionistically at this stage, that despite the fact that A's leaders and some of its citizens are responsible for the predicament in which A's population would find itself were C to attack, they are morally permitted not to end their war against B, as means to avert a much greater evil. This of course is entirely compatible with the further claim that A would owe additional compensation to B for so acting.

(ii)

In the foregoing paragraphs, we have examined cases where A's war is unjust because it lacks a just cause, and seen that A is (sometimes) nevertheless justified in continuing with the war. Suppose now that A has a just cause but breaches some other requirement. Here too, we must draw two further distinctions: (1) between cases where A's moral situation changes as a result of factors which are beyond its control, and cases where A comes to meet at  $t_2$  the requirement which it was breaching at  $t_1$  thanks to its own wrongdoing(s); (2) within the latter, between cases

where those who would benefit from the continuation of the war either are responsible for the initial wrongdoing or can be justifiably presumed to have consented to it, and cases where they fall in neither category.

Suppose, thus, that A's war at  $t_i$  is unjust because it is not a necessary means to prosecute the just cause but that (as per an earlier example) B's regime takes advantage of the chaos created by a natural disaster to mount a campaign of repression against one of its minority. Suppose further that the campaign will stop only if A continues to fight. In that case, A clearly does have some justification for not ending the war. Or, at any rate, it is not under a duty to exit to those of B's members (leaders, politicians, military, etc.) who are responsible for wrongfully repressing minority members. *If* A is under a duty to exit, then it owes it to its own forces and members, as well as to B's innocent civilians: similar considerations as were reviewed at the close of section II (in discussion of cases where A's war was just from the start) apply here.

To illustrate the second kind of cases, consider the requirement that war should be the only way to pursue the just cause whilst minimizing casualties. Usually, opportunities for negotiation are destroyed as a result of one party losing all faith in the other's goodwill. Such loss of faith typically occurs when the latter party is guilty of outrageous conduct (massacres, widespread gang rapes, etc.). But it can also occur when that party starts a war even though it was not a necessary means successfully to pursue one's just cause. Suppose thus that A, in this instance, has a just cause but starts the war even though diplomatic channels were available, or is unable to prevent its forces from routinely breaching the principle of non-combatant immunity. If A or those on whose behalf and at whose behest it fights would benefit from the continuation of the war, then it ought to end it, given that it is responsible for the fact that B justifiably refuses to trust A's leadership. But if the

beneficiaries of that war are wholly innocent of the breach of last resort, then A does have a justification for continuing.

At first sight, the conclusion reached here is uninterestingly similar to that reached in those cases where A's war lacked a just cause at  $t$ . There is a difference however, for in the instances under consideration here, *ex hypothesi* B has wronged A (since the latter is deemed to have a just cause.) That difference is morally relevant in the following way. In both sets of cases, A will need to prosecute its war without breaching the requirement of proportionality, and the harms accruing to B's members as a result of A's decision to continue to fight will have to be set against the goods brought about by the ongoing war. It stands to reason, however, that those harms ought to figure more heavily in cases where B did not provide A with a just cause at  $t$  than in those cases where it did – put differently, that on proportionality grounds the justificatory bar for continuing with the war in the former is higher than in the latter.

#### IV. CONCLUSION

To conclude, I have argued that we must to some extent sever the ethics of war termination from the ethics of war initiation: a belligerent who embarks on a just war (from its point of view) at time  $t$  might be a duty to sue for peace at  $t_2$  before it has achieved its *ex hypothesi* just war aims; conversely, a belligerent who embarks on an unjust war at  $t$  might acquire a justification for continuing at  $t_2$ . Moreover, when assessing whether a belligerent must exit or continue with its war, we must pay attention to the various ways in which it might do so, and to the goods and bads which a particular exit strategy would bring about relative to other strategies.

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<sup>1</sup> With the following notable exceptions: D. Moellendorf, 'Jus ex Bello', *Journal of Political Philosophy* 16 (2008): 123-136; D. Rodin, 'Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression', in C. Stahn and J. K. Kleffner (ed.), *Jus Post Bellum - Towards a Law of Transition from Conflict to Peace* (The Hague: T.M.C. Asser Press, 2008); D. McCready, 'Ending the War Right: Jus Post Bellum and the Just War Tradition', *Journal of Military Ethics* 8 (2009): 66-78.

<sup>2</sup> See L. May, *After War Ends - A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012), esp. 2-3 for a thoughtful discussion of the difficulties inherent in establishing when a war has ended. For a concise discussion of the law on war termination, see Y. Dinstein, *War, aggression and self-defence*, 3rd ed. ed. (Cambridge: Cambridge University Press, 2001), 33-35.

<sup>3</sup> The point is made effectively by Darrell Moellendorf and David Rodin in their groundbreaking articles on war termination. See Moellendorf, 'Jus ex Bello', and 'Two Doctrines of *Jus Ex Bello*', this volume; Rodin, 'Two Emerging Issues of *Jus Post Bellum*'. I broadly agree with most of their conclusions, which they reaffirm in their respective contributions to this special issue, though proceed somewhat differently.

<sup>4</sup> See Moellendorf, 'Jus Ex Bello'.

<sup>5</sup> In the remainder of this paper and unless otherwise specified, I shall assume for ease of exposition that A's war against B is a war of self-defense. *Mutatis mutandis*, what I say here applies to other wars, notably wars of humanitarian intervention.

<sup>6</sup> I am grateful to Seth Lazar for this last suggestion.

<sup>7</sup> This is a simplified way to put it. See, e.g., T. Hurka, 'Proportionality in War', *Philosophy and Public Affairs*, 33 (2005): 34-66.

<sup>8</sup> I assume here that soldiers<sub>B</sub>, who *ex hypothesi* fight an unjust war against A, have lost their right not to be killed for so long as they continue to provide A with a just cause for war. Under those circumstances, their death is not a bad to set against the goods brought about by the war.

<sup>9</sup> For the account of justified killing in war on which I rely here, see, e.g., my *Cosmopolitan War* (Oxford: Oxford University Press, 2012), s.2.4; J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); D. Rodin, *War and Self-Defence* (Oxford: Oxford University Press, 2002). For a devastating critique of the view that punishment is a just cause for war, see D. Luban, 'War as Punishment', *Philosophy and Public Affairs* 39 (2011): 299-330.

<sup>10</sup> See J. McMahan, 'Proportionality and Time', *Ethics*, this issue. An anonymous referee for *Ethics* suggested that redemption might play a partial justificatory role, by allowing A to include in its proportionality calculus the value of ensuring that its deceased soldiers did not die in vain – which in turns might license A to continue with the war. However, the requirement of proportionality is not a *justification* for waging or continuing war: rather, it is one of its constraining conditions.

<sup>11</sup> For a defense of the sunk costs view, see J. McMahan, 'Proportionality and Time'. I agree with him that if war leaders discover after initiating the war that they had unavoidably been mistaken in assessing the evidence in favor of starting it, they are

not blameworthy for initiating the war. But this claim is compatible with the claim that they are not justified in continuing with it under the circumstances – which claim I defend in the main text. For worries about sunk costs, see, e.g., See Rodin, 'Two Emerging Issues of *Jus Post Bellum*', pp. 55-56 and 'Ending War', *Ethics and International Affairs* 25 (2011): 359-367; F. M. Kamm, *The Moral Target – Aiming at Right Conduct in War and Other Conflicts* (Oxford University Press, Oxford University Press, 2012), ch. 1, esp. 16-17. It could be, of course, that worries about sunk costs lead to an unacceptably restrictive view of the permissibility of continuing to fight. On that Rodin argues in 'Ending Wars' that A may (sometimes) continue to fight as the lesser of two evils.

<sup>12</sup> This view is defended by Rodin in his 'Two Emerging Issues of *Jus Post Bellum*'. For the Vietnam case, see, e.g., M. Atwood Lawrence, *The Vietnam War – A Concise International History* (Oxford: Oxford University Press, 2008), esp. ch. 7. I believe that this particular war was unjust, but we may assume for the sake of argument in this subsection that it was in fact just.

<sup>13</sup> See *Cosmopolitan War*, s. 7.1.

<sup>14</sup> For the distinction between self-defensive and self-preserving killing, see J. McMahan, 'Self-Defense and the Problem of the Innocent Attacker', *Ethics* 104 (1994): 252-290, esp. at 256-258. The line of argument I tentatively endorse here differs from the first one above, in the following respect. Then, the threat posed by soldiers<sub>B</sub> was construed as a *future* threat of harm, whereas at *this* juncture it is construed as a present threat of future harm. A paradigmatic example of the latter is 'if you do not give me your money now I will kill you in five seconds.' I submit that the attacker is liable to defensive force in this case. Contrastingly, if the attacker

says: 'if you do not give me money now, it is very likely that I will threaten you with death some time in the future', it is not clear at all that the attacker is liable.

<sup>15</sup> I am assuming that B has not acquired a justification for continuing with the war. I shall deal with such cases in section III. For criticisms of the forced choice argument for defensive killing, see S. Lazar, 'Responsibility, Risk, and Killing in Self-Defense', *Ethics* 119 (2009): 699-728. One might object to my point here that A is not forced into doing anything: it could have decided not to go to war in the first instance and submitted to B's demands at *t*. I argue against this particular way of construing A's predicament in 'Cosmopolitanism and Wars of Self-Defence' in C. Fabre and S. Lazar (eds), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014).

<sup>16</sup> See J. McMahan, 'The Morality of Military Occupation', *Loyola International and Comparative Law Review* 31 (2009): 101-123; Moellendorf, 'Jus ex Bello'; J. Rocheleau, 'From Aggression to Just Occupation? The Temporal Application of Jus Ad Bellum Principles and the Case of Iraq', *Journal of Military Ethics* 9 (2010): 123-138.

<sup>17</sup> See, e.g., M. Walzer, *Just and Unjust Wars - A Moral Argument with Historical Illustrations*, 4th ed. ed. (New York: Basic Books, 2006), 111-117. See also Coady, *Morality and Political Violence*, 270-78; McMahan, 'Just Cause for War', 2. McMahan makes an exception in the case of Nazi Germany, on account of the nature of the regime. See also Kecskemeti, *Strategic surrender*, ch. 7, for a good treatment of unconditional surrenders which focuses on the cases of Italy, Germany, and Japan in 1943-45.

<sup>18</sup> As Winston Churchill himself put it in his report to Parliament on February 22, 1944. (*Hansard*, HC Deb 22 February 1944 vol. 397 cc663-795.)

<sup>19</sup> See Rodin, 'Two Emerging Issues of *Jus Post Bellum*', 58, for a similar point.

<sup>20</sup> See Weinberg, *A World at Arms*, 822-823; A. Beevor, *The Fall of Berlin 1945* (London: Penguin, 2002); I. Kershaw, *The End: Hitler's Germany, 1944-45* (London: Allen Lane, 2011) The claim that German soldiers were permitted to carry on fighting against the Soviet Army as a means to forestall imminent serious violations by the former of the rights of prisoners of war and civilians presupposes that pre-emptive killing is sometimes permissible. I take that assumption for granted here (and thus distinguish pre-emptive from preventive killings.)

<sup>21</sup> I am grateful to Larry May for pressing me on this.

<sup>22</sup> I regard the view as highly implausible because it implies that, for example, police officers would act wrongly by killing a suicide bomber in defence of 500 innocent bystanders in the following circumstances: if they kill him, they would provide a corrupt fellow officer with an incentive to plant evidence accusing an innocent person of being a terrorist (as opposed to a lowlife criminal with evidence of his corruption) and then using this as a pretext to kill him. Surely, however, it is permissible for them to kill the bomber, for the sake of saving 500 innocent lives.

<sup>23</sup> See Moellendorf, 'Two Doctrines of *Jus Ex Bello*'. For the view that there is no difference, from the point of view of proportionality, between fighting an ongoing war and starting a new one, see J. McMahan, 'Proportionality and Time'.

<sup>24</sup> See, e.g., M. Kaldor, *New & Old Wars*, 2nd ed. (Cambridge: Polity, 2006).