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## Just Cause and the Continuous Application of *Jus ad Bellum*\*

What one is ultimately interested in with regard to ‘just cause’ is whether a *specific* war, actual or potential, is justified – for example the concrete historical 2003 Iraqi war against the invading Coalition forces, or a war one is contemplating in response to some concrete aggression. I call this ‘the applied question’. Answering this question requires knowing the empirical facts on the ground; and answering it with reference to any concrete historical or potential war is beyond the scope of the present chapter. However, an answer to the applied question regarding a specific war requires a prior answer to some more general questions, both descriptive and normative. It is these questions that are the subject of this chapter. The questions are: What *kind of thing* is a ‘just cause’ for war (an aim, an injury or wrong suffered, or something different altogether)? I call this ‘the formal question’. Then there is what I call the ‘the general substantive question’. Depending on the previous answer to the formal question, the general substantive question can be formulated as: ‘Which causes are just?’ or as ‘Under what conditions is there a just cause?’ A final question, which has recently elicited increased interest, is what I call ‘the question of timing’: does the ‘just cause’ criterion only apply to the *initiation* of a war or also to the *continuation* of a war, that is, can a war that had a just cause at the beginning lose it at some point in its course (and vice versa)?

In the following I argue, regarding the formal question, that a just cause is a state of affairs. Moreover, the criterion of just cause is not independent of proportionality and other valid *jus ad bellum* criteria. One cannot know whether there is a just cause without knowing whether the other (valid) criteria (apart from ‘right intention’) are satisfied. The advantage of this account is that it is applicable to all wars, even to wars where nobody will be killed or where the enemy has not committed a rights violation but can be justifiably warred against anyway. This account also avoids the inefficiency of having proportionality considerations come up at two different points: in a separate criterion of just cause and in the criterion of proportionality proper. As regards the general substantive question, I argue that all kinds of aims can, *in principle*, be legitimately pursued by means of war, even aims that might sound dubious at first, like vengeance or the search for glory. Thus, the pursuit of such aims does not make the war disproportionate or deprive it of just cause. As regards the question of timing, I argue that the criteria of *jus ad bellum* apply throughout the war, not only at the point of its initiation. While starting a war at  $t^1$  might be justified, continuing it at time  $t^2$  might be unjustified (and vice versa), and this insight does not require an addition to *jus ad bellum* but is already contained in it.

1. *The formal question: what kind of thing is a ‘just cause’ for war?*

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\* Forthcoming in Larry May, Shannon Elizabeth Fyfe, and Eric Joseph Ritter (eds.), *The Cambridge Handbook on Just War Theory* (Cambridge: Cambridge University Press, 2017).

There are different ways the term ‘just cause’ is used in just war theory and political discourse. In one sense, a ‘just cause’ refers to what causes the war, to what *gives occasion* to it. As the 16<sup>th</sup>-century just war theorist Francisco de Vitoria states: ‘There is a single and only just cause for commencing a war, namely, a wrong received.’<sup>1</sup> In law, for example, a so-called ‘cause of action’ is a fact or set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. Clearly, a rights-violation, or the fact that it has occurred, would give one a cause of action to sue for compensation or for the enforcement of the right. It is conceivable, therefore, that a rights-violation can also provide a cause of action in other contexts: a rights violation might give one a justification to seriously consider the use of force, including military force. Whether one may then *actually* use force, however, might still be dependent on further conditions, in particular on whether the use of force would be proportionate and necessary.

In another sense of ‘just cause’, however, the term refers to a *goal or aim one is fighting for*. For instance, for Frances Kamm the term refers to ‘a limited set of goals, called a just cause, that would justify starting a war’.<sup>2</sup> Thus in the first sense ‘just cause’ refers to a *rights violation* (or at least an immoral act); and in the second sense of the term it refers to the *aim of defending against, rectifying, or punishing* said rights violation.

Both uses of the term ‘just cause’ are problematic. The problem with conceiving of just cause as an aim is that something can only be an aim if, in fact, somebody is aiming at it. However, if an innocent people is threatened with total annihilation by a genocidal aggressor, it seems to make perfect sense to say that the attacked people have a just cause to resort to a war of self-defence even if they are all pacifists, do *not* aim at defending themselves (nor does anybody else), and in fact do not resort to war but allow the enemy to slaughter them. To say that under these circumstances they do not *have* a just cause is just to confuse the criterion of just cause with the different one of right intention. In other words, there can *be* a just cause without anybody *fighting for* or *intending* to militarily achieve a certain just goal.<sup>3</sup>

In addition, Kamm’s claim that a certain ‘limited set of goals’ can ‘justify starting a war’ is rather odd for a deontologist like Kamm: after all, a defining element of deontology is the view that the ends (by themselves) do *not* justify the means. This is, of course, also the position taken by traditional just war theory, which insists on the satisfaction of criteria like proportionality, last resort, etc.

This leads us back to the first rendering of ‘just cause’: why should we not just conceive of just cause as a rights violation – or as the *fact* that a rights violation has occurred – and simultaneously accept that for the justification of a war more is needed

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<sup>1</sup> Francisco de Vitoria, *De Indis et de Iure Belli, Relectiones*, ed. by Ernest Nys (New York and London: Oceana Publications and Wildy & Sons, 1964), Second Relectio, § 13, available at [http://en.wikisource.org/wiki/De\\_Indis\\_De\\_Iure\\_Belli/Part\\_3](http://en.wikisource.org/wiki/De_Indis_De_Iure_Belli/Part_3).

<sup>2</sup> Frances Kamm, *Ethics for Enemies* (Oxford: Oxford University Press, 2011), p. 119.

<sup>3</sup> This also affects Steven P. Lee’s account, according to which a ‘just cause is a *justifying reason*, that is, a reason for an action, such as going to war, that morally justifies (or helps to justify) it. A state goes to war for a reason or reasons, which may be just or unjust’. See Lee, *Ethics and War: An Introduction* (Cambridge: Cambridge University Press, 2012), p. 73.

than a mere rights violation?

There are two problems with this proposal. First, it seems implausible to say that *every* rights violation, even the mildest, is a just cause for *war*. If blogger A from state B insults innocent writer C from state D as ‘untalented little pig’, we would hardly consider this a just cause for war (nor would B’s refusal to punish A be such a cause) – otherwise ‘just cause’ could hardly still exercise a restraining function on the pursuit of war and would be misplaced in just war theory (which does purport to restrain war). Second, it is not conceptually impossible to have legitimate wars *without* any prior rights violation: there could be consensual wars, for example, or wars where two parties fight over scarce resources that both of them need to survive. Instead of saying that both parties are unjustified, it is arguably also possible to say that both parties have a necessity justification (and one should at least not exclude this possibility by definitional fiat). It should also be noted that the rights violation is supposed to be one that has been committed by the party one is warring against. However, there could in principle be situations where a third party credibly threatens to commit some catastrophic crime unless A wages some restrained war against innocent B. In this case, again, there can be a necessity or lesser evil justification to engage in a war.<sup>4</sup>

Thus, both senses of ‘just cause’ discussed so far have serious shortcomings. There are two alternative understandings of ‘just cause’, however, that could avoid the shortcomings just mentioned (it remains to be seen whether they both avoid other shortcomings). The one defended here is to conceive of just cause as a criterion that is *not* independent of (all the) other just war criteria. On my account, proportionality is a subcriterion of just cause; furthermore, last resort and prospects of success are subcriteria of proportionality: whether a war is proportionate also depends on what other means are available and how likely they are to achieve the positive results the war is supposed to bring about. Thus one can only determine whether there is a just cause by considering these other criteria.<sup>5</sup>

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<sup>4</sup> For a related example, see Jeff McMahan, ‘Just Cause for War’, *Ethics and International Affairs* 19 (2005), pp. 1-21, at 15-16. McMahan, however, denies that such wars have a just cause. Yet he has no plausible argument for this denial. See on this Uwe Steinhoff ‘Just Cause and “Right Intention”’, *Journal of Military Ethics* 13(1) (2014), pp. 32-48, esp. at 37. Moreover, while McMahan rightly states that one’s use of the terms ‘just war’ and ‘just cause’ should preserve a certain ‘conformity with the ways in which they are commonly used’, his own use of ‘just cause’ decidedly deviates from common usage. To give just one example: on his account (both old and new), which connects just cause to the moral responsibility of those warred against, a people defending itself against a collective of genocidal but psychotic (and hence non-responsible) enemies would have no just cause for war. However, according to common sense a proportionate war of self-defence against genocide certainly does have a just cause, whether the *genocidaires* are psychotic or not.

<sup>5</sup> I do not regard last resort and prospects of success as *necessary* conditions for the justification of a war, though; still, they need to be taken into account. I do not need to go into this any further for present purposes, but see Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), pp. 23-25 and 28-30, where I further discuss these two criteria and their relation to proportionality.

This account is not so different from traditional accounts. For example, the 16<sup>th</sup> and early 17<sup>th</sup> century just war theorist Francisco Suárez explains that ‘not every cause [is] sufficient to justify war, *but only those causes which are serious and commensurate with the losses that the war would occasion*. For it would be contrary to reason to inflict very grave harm because of a slight injustice’.<sup>6</sup> Thus in Suárez’ account the presence of a just cause for war is not independent of proportionality considerations; on the contrary, only by taking proportionality into account can one establish whether there is a just cause for war or not. Luis de Molina, around the same time, takes the same position, talking of ‘a just cause *in comparison to the damages that will be inflicted by the war*’.<sup>7</sup> He further clarifies that ‘there is a just cause for war if we take possession of that which belongs to us or is owed to us, *provided that we cannot obtain it in any other way than by the means of war*’,<sup>8</sup> thus connecting just cause also with the criterion of last resort: if there are less harmful means to get what others owe you, there is no just cause for war in the first place.

The second alternative, in contrast, is to claim that a just cause for war is an aim of a certain, particularly weighty kind. That is, authors taking this route conceive of the criterion of just cause as some kind of list of acceptable aims that a war is to achieve, for example: defending the nation against an aggressor, stopping a genocide, toppling a tyrant, etc. (Some authors, alternatively, consider a just cause as being a list of rights violations that a war is supposed to avert, for example: aggressive invasion, genocide, tyranny, etc. However, this approach cannot overcome the second problem mentioned above.) These authors regard just cause as independent of proportionality (and last resort and prospects of success). In other words, they think that only particularly important aims can be a just cause for war, and that there can be a just cause for war without the war being just or justified (even if the condition of right intention is satisfied): the war might still be disproportionate or not a last resort, for instance. Since war normally involves the killing of persons, these authors seem to think, a just cause must be an aim (or rights violation) that can *in principle* justify killing people in order to achieve the aim or stop, mitigate, or punish the rights violation.

I reject this approach for three reasons. The first reason is that war does not *necessarily* involve the killing of people,<sup>9</sup> and thus such non-lethal wars can be justified even if the aims pursued in them cannot justify the killing of people. The second reason not to conceive a just cause as an aim of a certain kind, in particular, an aim that can *in*

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<sup>6</sup> Francisco Suárez, *Selections from Three Works of Francisco Suarez, Vol. 2* (Oxford: Clarendon Press; London: Humphrey Milford, 1944), p. 816, my emphasis. Compare also Melchor Cano, ‘Questio XL “De Bello”’, (Prima Quaestio, Sexta Conclusio), in Heinz-Gerhard Justenhoven and Joachim Stüben (eds.), *Kann Krieg erlaubt sein? Eine Quellensammlung zur politischen Ethik der Spanischen Spätscholastik* (Stuttgart: Kohlhammer, 2006), p. 151.

<sup>7</sup> Molina, ‘Questio XL “De Bello”’, (Articulus Primus, Disputatio Segunda, 50), *ibid.*, p. 271, my emphasis.

<sup>8</sup> *Ibid.* (23), p. 247, my emphasis.

<sup>9</sup> This might appear to be a weird claim, but I have shown elsewhere that it is not. See What is War – And Can a Lone Individual Wage One?, *International Journal of Applied Philosophy* 23(1) (2009b), pp. 133-150, at 141-2; and ‘Just Cause and “Right Intention”’, p. 34-5.

*principle* justify killing (or at least maiming) people, is that such a conception has the embarrassing consequence of making just causes shoot up like mushrooms and in the most unlikely places. The aim of avoiding the killing of innocent people through enemy force is certainly an aim that can in principle justify killing the killers in self- or other-defence. Yet in virtually all<sup>10</sup> modern wars, including those that allegedly have a just cause and are justified, innocent bystanders are ‘collaterally’ killed even by the justified side. Thus if Noble Defender State invades Evil Genocidal State to stop the latter’s ongoing genocide of some ethnic group and in the process kills only *one* innocent bystander ‘collaterally’, then *every* state, on the account criticized here, suddenly has a just cause of war against Noble Defender State, *even* Evil Genocidal State. This seems absurd.

The third reason for rejecting this approach is that it is impossible to give a list of all aims that ‘could in principle’ justify a war without in the end relying on some more general criteria. In other words, while one can indeed give some examples, in the end one has to say (or imply) things like: ‘Just causes are those aims the pursuit of which by means of war can in principle, that is, under conditions that are at least possible, satisfy the criteria of proportionality, last resort, etc.’ However, this has the consequence that we end up using the criterion of proportionality (and other criteria) twice: first in order to establish, for instance, whether there are *in principle* conditions under which measures involving the killing of people are proportionate and necessary means to retaliate against a foreign power’s insulting one’s own king, and subsequently in order to establish whether this is so *in the concrete case*. What, one might wonder, is the purpose of this procedure, given that it seems to be somewhat superfluous and uneconomical? After all, the result of the second application of the criteria is decisive, not the result of the first one; and the second application by no means presupposes the first one.

The above three objections, incidentally, do not just apply to the view that a just cause is an *aim of a certain, particularly weighty kind*, but also to the view that a just cause is a *rights violation of a certain, particularly severe kind*.<sup>11</sup> It is instructive, and also further confirms my assessment of the two approaches, that Jeff McMahan, who has provided the most elaborate defence of the importance of weight or severity in this context in the past,<sup>12</sup> has recently felt compelled to abandon this position precisely, it seems, in the light of the first and the third objections just mentioned.<sup>13</sup> (As already noted, however, both his old and his new account succumb to the second objection.) To wit, in the past McMahan claimed that ‘the just causes for war are limited to *the prevention or correction of wrongs that are serious enough to make the perpetrators liable to be killed or maimed*’.<sup>14</sup> Now, in contrast, McMahan claims that ‘there is a just cause for war when those whom it is

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<sup>10</sup> Not necessarily in absolutely all wars.

<sup>11</sup> This latter view, unlike the former, *also* succumbs to the above-mentioned problem that it simply stipulates that only rights violations can be just causes – but there is no reason to accept such a stipulation. I overlooked this actually rather obvious additional problem in Steinhoff ‘Just Cause and “Right Intention”’.

<sup>12</sup> McMahan, ‘Just Cause for War’.

<sup>13</sup> Jeff McMahan, ‘Proportionality and Just Cause: A Comment on Kamm’, *Journal of Moral Philosophy* 11 (2014), pp. 428-453.

<sup>14</sup> McMahan, ‘Just Cause for War’, p. 11.

necessary to attack or kill as a means of achieving a war's aim or aims satisfy the agent-based conditions of liability to be attacked or killed, and thus will be actually and not merely potentially liable to be attacked or killed if the circumstance-based conditions of necessity [and] proportionality are satisfied as well'.<sup>15</sup>

As formulated, this is difficult to understand. So let us explain. There are three noteworthy changes in comparison to McMahan's earlier account. First, just cause is now no longer an *aim*. I am not entirely sure whether McMahan actually realizes this shift since he does not explicitly note it, although it would certainly have been noteworthy. In any case, I will set this issue aside. More important for present purposes is that he is, second, merely talking of *attack* now, and attacks, of course, need neither kill nor maim – they could be comparatively mild. The third change is the introduction of the odd category of 'potential liability'.<sup>16</sup> What is that? We first have to know what liability is. McMahan explains that 'part of what it means to say that a person is *liable* to attack is that he would not be *wronged* by being attacked'.<sup>17</sup> (The other part, which need not concern us here, is that on his concept of liability people can only become liable to attack by *forfeiting* rights *through their own responsible action*.<sup>18</sup>) People are '*potentially* liable to be attacked' if they are 'morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable to be attacked or killed *if*, but only if, the circumstance-based conditions of liability are also satisfied'.<sup>19</sup> The two 'agent-based conditions of liability' are precisely 'posing a threat of unjustified harm' and being 'morally responsible for doing so';<sup>20</sup> the circumstance-based conditions are, as we already saw, necessity and proportionality. Given, however, that on McMahan's account necessity and proportionality are 'internal to liability',<sup>21</sup> which means that one cannot be liable to just *any* harm, but only *to proportionate and necessary harm*, his talk about 'potential liability' is confused. To repeat, McMahan says that people are '*potentially* liable to be attacked' if they are 'liable to be attacked or killed *if*, but only if, the circumstance-based conditions of liability are also satisfied', that is, if, but only if, the attack is necessary and proportionate. However, since people can, on his account, only be liable *to* necessary and proportionate attack (not to an unnecessary and disproportionate one), he is in effect saying that people are 'potentially liable' to necessary and proportionate attack if and only if they are morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable *to proportionate and necessary attack* if, but only if, *the attack is necessary and proportionate*. The italicized parts of this sentence show that this is a mere tautology: in other words, 'potential liability' and liability are exactly the same thing on McMahan's account, although he has not noticed this. Given McMahan's own framework, one cannot be potentially liable without being

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<sup>15</sup> McMahan, 'Proportionality and Just Cause', p. 434.

<sup>16</sup> He had already talked of 'potential liability' in Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), pp. 19-20, but made no further use of the concept there.

<sup>17</sup> *Ibid.*, p. 8.

<sup>18</sup> *Ibid.*, pp. 7-37; see also Jeff McMahan, 'Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros', *Utilitas* 24(2) (2012), pp. 279-299, at 296.

<sup>19</sup> McMahan, 'Proportionality and Just Cause', p. 433-4.

<sup>20</sup> *Ibid.*, p. 433.

<sup>21</sup> *Ibid.*

liable, and vice versa – which is also confirmed by the fact that according to McMahan ‘the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm’,<sup>22</sup> that is, one is not only ‘potentially’ liable but *liable* to proportionate and necessary force if one fulfils the ‘agent-based conditions of liability’.

If, however, one insists on rejecting the tautological reading of McMahan’s ‘potential liability’ formula, then the only alternative that might suggest itself is that McMahan wants to say that people are ‘potentially liable’ to necessary and proportionate attack if and only if they are morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable to proportionate and necessary attack if, but only if, *they are actually subjected* to a proportionate and necessary attack. This would mean that as long as they are not *actually* subjected to necessary and proportionate attack they are also not liable to proportionate attack. This, however, not only contradicts what McMahan says about ‘the criterion of liability’, it is, in addition, also like saying that a sugar cube is only then *soluble* (that is: *able* to be dissolved) in water if it is *actually* put into water. Such a stance shows a lack of understanding of what solubility or, in the case at hand, liability *means*. It simply makes no sense. For the reasons given, therefore, both McMahan’s old and his new (or not so new) account of ‘just cause’ must be rejected.<sup>23</sup>

A noteworthy additional reason to reject McMahan’s new account in particular is its underlying motivation. McMahan claims that the appeal to ‘potential liability’ ‘secures the independence of the requirement of just cause from the *ad bellum* necessity and proportionality conditions, so that there can be a just cause for war even if war would be unnecessary or disproportionate’.<sup>24</sup> We already saw that this is incorrect since ‘potential liability’ either *is* liability or else makes no sense. Even if it were correct, however, it is entirely unclear (McMahan certainly does not provide an explanation) why this alleged independence should be an advantage.

Some might argue that a separate criterion of just cause, incoherent or not, offers an additional protection against precipitate recourse to war. If one already knows that certain acts, *lèse-majesté* for example (as we want to assume), cannot even *in principle* justify killing people in order to avert, rectify or punish such acts, then this is to be welcomed, after all. Such knowledge prevents people from ‘getting bad ideas’ in the first place.

But if such acts cannot justify killing ‘in principle’, they cannot justify it in the concrete case either. Conversely, however, there are things that are unable to justify killing a person in the concrete case at hand – but *can* do so ‘in principle’. If on the basis of this one then assumes that one does have a just cause for war, this only invites ‘bad ideas’ instead of avoiding them.

These remarks might be somewhat abstract, so let me offer an example from the sphere of personal self-defence (which is to be understood as including other-defence). In

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<sup>22</sup> McMahan, *Killing in War*, p. 35.

<sup>23</sup> An additional reason for rejecting McMahan’s definitions of ‘just cause’ and also of ‘just combatants’ and ‘unjust combatants’ is that they make his thesis of the ‘moral inequality of combatants’ true by stipulative definition (and irrelevant for practice). See Uwe Steinhoff, ‘Rights, Liability, and the Moral Equality of Combatants’, *The Journal of Ethics* 13 (2012), pp. 339-366, section 4.1. McMahan has never addressed this issue, let alone overcome it.

<sup>24</sup> McMahan, ‘Proportionality and Just Cause’, p. 434.

many jurisdictions (and morally as well, in my view), the danger of losing an arm at the hands of an unjustified attacker can justify killing the attacker. It justifies it, for example, if the arm cannot be saved from the attacker by any other means than killing him. The aim of defending one's arm against an unjustified attacker *could* thus be a just cause for self-defence. However, if in the concrete case the arm can be saved as effectively and efficiently, that is, without additional costs and risks for the defender, by merely knocking the attacker down, then killing the attacker would be excessive and hence unjustified in this case.

Thus, while according to accounts that make just cause independent of proportionality there would be a just cause for killing in this case, on the account defended here there is *no* just cause for killing in this case. It would appear that the latter account is to be preferred if one would like to avoid misunderstandings that could have grave consequences. After all, the more or less subtle point that one has a just cause for war (or killing) but is nonetheless unjustified in resorting to war (or killing) will hardly be one that can be successfully communicated to all politicians, military brass, soldiers, and citizens.

With regard to just cause one also has to make a distinction that, unfortunately, is never made in the literature – which often leads to considerable confusion. To wit, one has to distinguish the question *whether an agent* (for example a private person or a state) has a just cause for war from the question *whether a particular war* (which can be actual or potential) has a just cause. Let us again use the self-defence example. If in a concrete case a potential defender can save her arm from an unjustified attack only by knocking down the attacker, then the potential defender has a just cause for using force against the attacker. If, however, *the* force or violence she actually uses far exceeds what is necessary under the circumstances – if, for example, she kills him although simply knocking him down would have been as easy, safe, and efficient – then there is *no* just cause for *this* use of force. This distinction relates to (but does not coincide with) Elizabeth Anscombe's correct (and almost completely ignored) observation that waging *a* war can be morally justified under certain circumstances while *the* war that is actually waged under said circumstances is impermissible. For instance, she was of the opinion that the British were justified in waging *a* war against the Nazis but that the war they *actually* waged was nevertheless unjustified as it was disproportionate, guided by illicit intentions, and violated the principle of discrimination between the guilty and the innocent.<sup>25</sup>

Thus, I propose the following characterizations regarding 'just cause':

An *agent* has a *just cause* for waging war (alternatively we could say: there *is* a just cause for waging *a* war) if there is an injustice, an emergency, or an agreement to wage war between the potential parties to the war,<sup>26</sup> such that under the given (for

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<sup>25</sup> Gertrude Elizabeth Margaret Anscombe, 'The Justice of the Present War Examined', in *idem*, *The Collected Philosophical Papers, Vol. 3: Ethics, Religion and Politics* (Oxford: Blackwell, 1981), pp. 72-81, esp. at 73.

<sup>26</sup> The idea of a (justified) consensual war will seem absurd to many people. However, see Steinhoff, *On the Ethics of War and Terrorism*, pp. 23-25. Eberle criticizes my view, but has to offer little beyond dogmatic stipulation. See Christopher J. Eberle, *Justice and the Just War Tradition: Human Worth, Moral Formation, and Armed Conflict* (New York and London: Routledge, 2016), pp. 84-85, esp. n. 39. He promises his readers to



example geographic, strategic, military-technological) circumstances the military rectification or punishment of the injustice or the defence against it, the military response to the emergency, or the military realization of the agreement, is not necessarily disproportionate; that is, under the given circumstances a proportionate war is possible.

A *particular war* has a *just cause* if there is an injustice, an emergency, or an agreement to wage war between the potential parties to the war, such that under the given circumstances the military rectification or punishment of the injustice or the defence against it *through this particular war*, the military response to the emergency or the military realization of the agreement *through this particular war*, is not disproportionate (or would not be disproportionate, in the case of a potential war.)<sup>27</sup>

It is thus possible for an agent (that is, a person, a state or some other collective) to have a just cause for war without the (kind of) war the agent is actually waging or contemplating having a just cause. Moreover, the account defended here has the attractive feature that it both continues a venerable tradition and need not be supplemented with *additional* theories (of ‘*jus ad vim*’, for example<sup>28</sup>) that deal *separately* with non-lethal force and *separately* with force that answers to things other than rights violations. In short, it is both simpler and more comprehensive than alternative accounts – two features that make this theory more useful in its practical application.

We are now in a position to answer the question asked at the beginning of this section, namely: ‘What kind of thing is a just cause?’ In the light of the previous discussion, the proposals that a just cause is an aim or some kind of injury or wrong or something that is necessarily connected to ‘liability’ or ‘potential liability’ must be rejected. Instead, as implied by the characterization of a just cause I have just given, a just cause is a set of circumstances or conditions. A just cause is a certain state of affairs.<sup>29</sup>

## 2. The general substantive question: ‘Which causes are just?’ or ‘Under what conditions is there a just cause?’

As far as my own account of a just cause is concerned, I have already answered this latter

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offer ‘a full-scale critique’ of my ‘dubious claim’ on another occasion. I will postpone my criticism of his own dubious claims until then.

<sup>27</sup> In Steinhoff, ‘Just Cause and “Right Intention”’, I had forgotten to include emergencies in my final formulation of the conditions of a just cause, although of course the importance of emergencies (which give rise to necessity justifications) was and is part of my criticism of accounts which claim that just cause is necessarily connected to wrongs or injuries.

<sup>28</sup> See Daniel Brunstetter and Megan Braun, ‘From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating Our Understanding of the Moral Use of Force’, *Ethics and International Affairs* 27(1) (2013), pp. 87-106. These two authors overlook the fact that we can also ‘recalibrate’ (to use their term) our understanding of the moral use of force as I did here, by recalibrating *jus ad bellum* instead of coming up with an additional theory of *jus ad vim*.

<sup>29</sup> Some paragraphs of this section draw on material from Steinhoff, ‘Just Cause and “Right Intention”’.

question with the two indented characterizations offered above. Of course, this answer raises additional questions, in particular the question as to when, exactly, a war is or is not proportionate. A precise answer to this latter question, however, is beyond the scope of this chapter. Nevertheless, some general things can be said, which will also help to further clarify how the account of just cause defended here works in practice.

We can approach the issue by considering the distinctions that accounts which conceive of a just cause as an aim tend to make. The general aims regularly appearing in the literature are defence against ongoing or imminent attacks, prevention of some non-imminent future attacks or threatened evils, rectification (of some injustice, for example unjust seizure of property or territory), and punishment. Punishment is the most protean concept here since punishment can have different sub-aims, in particular special deterrence (the punished agent is deterred from further punishable acts), general deterrence (the punishment of the agent also deters other agents), and retribution (making the punished agent suffer is considered as good in itself or as something that is good insofar as it satisfies the unjustly harmed victims' desire for revenge<sup>30</sup>). Moreover, some authors claim that punishment can, via deterrence, be a means of defence.<sup>31</sup> Yet it should be noted that *defence*, properly speaking, can only be directed against ongoing or imminent attacks, not against future threats.<sup>32</sup> This is not a mere quibble about words; rather, the self-defence justification (applicable only to ongoing and imminent attacks) and the justifying emergency justification (applicable also to future threats) are governed by different justificatory requirements and thus yield different results.<sup>33</sup>

Be that as it may, it would appear that at least *some* defensive, preventive,

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<sup>30</sup> There are many different characterizations of what 'retribution' and the philosophical view called 'retributivism' amount to. For an overview, see Walen, Alec, 'Retributive Justice', *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>>. For a critical discussion of retribution as a good insofar as it satisfies the victim's desire for revenge, see David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), pp. 152-154 and 269-275. I find Boonin's criticism of this 'revenge-based retributivism' entirely unconvincing, but need not go into this here.

<sup>31</sup> Kenneth W. Kemp, 'Punishment as Just Cause for War', *Public Affairs Quarterly* 10(4) (1996), pp. 335-353; Jeff McMahan, 'Aggression and Punishment', in Larry May (ed.), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), pp. 67-84; David Luban, 'War as Punishment', *Philosophy and Public Affairs* 39(4) (2012), pp. 299-330; Nigel Biggar, *In Defence of War* (Oxford: Oxford University Press, 2013), p. 161; Victor Tadros, 'Punitive War', in Helen Frowe and Gerald Lang (eds.), *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), pp. 18-37, at 19-20.

<sup>32</sup> Kimberley Kessler Ferzan, 'Defending Imminence: From Battered Women to Iraq', *Arizona Law Review* 46 (2004), pp. 213-262; Shawn Kaplan 'Punitive warfare, counterterrorism, and *jus ad bellum*', in Fritz Allhof, Nicholas G. Evans and Adam Henschke (eds.), *Routledge Handbook of Ethics and War: Just war theory in the twenty-first century* (New York and London: Routledge, 2013), pp. 236-249, at 236-8.

<sup>33</sup> See Uwe Steinhoff, 'Self-Defense and Imminence', ms. available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2653669](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653669).

rectificatory, and deterrent wars can be justified – and hence have a just cause – if the stakes are high enough. In fact, if the stakes are high enough, there is very little that cannot be justified.<sup>34</sup> On the other hand, however, one can make the stakes part of the characterization of certain wars and certain war aims, thus arriving at more specific aims. For instance, David Rodin claims that one cannot, for reasons of proportionality, justifiably pursue by means of war the aim of defending one’s nation against what he calls a ‘bloodless invasion’<sup>35</sup> or ‘political aggression’, namely against an aggression that ‘is primarily directed towards obtaining a political or material advantage for the attackers’.<sup>36</sup> He comes to this assessment on the basis of his premise that lethal self-defence is only permissible against threats to ‘vital rights’ (like the rights not to be killed or raped) but not, for example, in defence of mere property, territory or the right to vote.<sup>37</sup> If he were right (and if one accepted Rodin’s implicit further premise, which I do not, that wars will necessarily involve killing people), then these kinds of wars could not have a just cause provided a just cause is tied to proportionality (as it is in the account defended here). Yet Rodin’s account is based on a gross misinterpretation of the proportionality requirement of self-defence. On more plausible interpretations of the proportionality requirement, wars of national self-defence against ‘political aggression’ can be justified and have a just cause, which indeed is the traditional view of the matter. Since I have argued this point at length elsewhere,<sup>38</sup> I will not pursue it further here.

In any case, short of stipulatively inserting the violation of certain valid just war criteria into the very definition of certain war aims, all kinds of aims can be legitimately pursued by means of war, even aims that might sound dubious at first, like the search for glory. If, for instance, Christine kills Bela (who is about to murder Alfred) in order to enjoy the glory of the intrepid defender (but not to save Alfred’s life), then her act is still justified. What matters is that Christine knew that Anna was about to kill Bela and that Christine’s measures were a necessary and proportionate means to stop her from doing so.<sup>39</sup> Her aims, in contrast, do not matter. This is a further reason why conceiving of a just cause as an aim either will hardly serve to restrict war or will only ‘serve’ to incorrectly restrict it, prohibiting it where it should be allowed. The account defended here avoids such mistakes.

Finally, if retribution is actually a good in itself insofar as it makes guilty people suffer what they deserve and also good because the victims of the guilty draw satisfaction from retribution (and why should that not be a good?), then the fact that a war is also retributive counts *for* its proportionality, not against it. Accordingly, on my account,

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<sup>34</sup> Uwe Steinhoff, *On the Ethics of Torture* (Albany: State University of New York Press, 2013), pp. 150-53.

<sup>35</sup> David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), pp. 127-138.

<sup>36</sup> David Rodin, ‘The Myth of National Self-Defence’, in Cécile Fabre and Seth Lazar (eds.), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), pp. 69-89, at 81.

<sup>37</sup> Rodin, *War and Self-Defense*, pp. 43-8, 127-38.

<sup>38</sup> Uwe Steinhoff, ‘Rodin on Self-Defense and the “Myth” of National Self-Defense: A Refutation’, *Philosophia* 41 (2013), pp. 1017–36.

<sup>39</sup> See Steinhoff, ‘Just Cause and “Right Intention”’, section II.

which tightly connects just cause to proportionality, retribution can contribute to a war's having a just cause.

3. *The question of timing: does the 'just cause' criterion only apply to the initiation of a war or also to its continuation?*

Some authors have recently argued that 'moral considerations regarding whether and how to end a war are distinct from *jus ad bellum*'.<sup>40</sup> All three authors mentioned in the footnote deem it necessary to complement *jus ad bellum* with what they call '*jus ex bello*', '*jus terminatio*', or the ethics of 'war exit', respectively. And all three think that this complementation is a significant innovation.

It would indeed be an innovation, yet an entirely superfluous one. The three authors simply misunderstand *jus ad bellum*: it does not only refer to the *initiation* of war, as they suggest, but also to its *continuation*.<sup>41</sup> In fact, this should be glaringly obvious: after all, it is clearly also the case for the analogous examples of the self-defence justification and the necessity justification. I know of no jurisdiction on the planet that would, for instance, distinguish between the criteria governing the initiation of self-defence and those governing its termination. The reason for this is that, again, it is simply obvious that the criteria have to be applied 'diachronically', as Schulzke would say. To wit, that you have at a time  $t^1$  a self-defence justification to beat Paul does not mean that you also have a justification to continue beating him at  $t^2$ . For self-defence to be justified there *has* to be an imminent or ongoing attack, and the defensive measures *have* to be necessary – it is not sufficient that *they once were* necessary and that *once there was* an attack. Every lawyer, every judge, and every citizen knows that: if you beat Paul because he tries to slit your throat, you will have a self-defence justification for beating him if this is necessary to stop him, but this does not provide you with a justification to continue beating him if

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<sup>40</sup> Darrel Moellendorf, 'Jus ex Bello', *The Journal of Political Philosophy* 16(2) (2008), pp. 123-136; *idem*, 'Two Doctrines of *Jus ex Bello*', *Ethics* 125(3) (2015), pp. 653-673; David Rodin, 'Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression', in Carsten Stahn and Jann Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (The Hague: T. M.C. Asser, 2008), pp. 53-77; *idem*, 'The War Trap: Dilemmas of *jus terminatio*', *Ethics* 125(3) (2015), pp. 674-695; Cécile Fabre, 'War Exit', *Ethics* 125(3) (2015), pp. 631-652.

<sup>41</sup> Steinhoff, *On the Ethics of War and Terrorism*, p. 2; Marcus Schulzke, 'The contingent morality of war: establishing a diachronic model of *jus ad bellum*', *Critical Review of International Social and Political Philosophy* 18(3) (2015), pp. 264-84; Eberle, *Justice and the Just War Tradition*, pp. 105-107. Schulzke (p. 266) claims that '[c]ontemporary just war theorists tend uncritically to accept the synchronic conception of *jus ad bellum*' (according to which there is *jus ad bellum* throughout the war if it is there at the beginning). I don't think that is quite correct, and I at least have explicitly stated that *jus ad bellum* applies to both the initiation and continuation of war. Be that as it may, unlike the three authors from footnote 69, Schulzke realizes (p. 266) that '[m]ost medieval and early modern just war theorists ... do not impose temporal restrictions on the application of concepts' (namely on the just war criteria), which means that, indeed, traditionally *jus ad bellum* already covers "jus ex bello", "jus terminatio" or the ethics of "war exit".

he already lies unconscious on the ground – it is not necessary anymore and there is not even an ongoing or imminent attack anymore. Realizing this and operationalizing this insight most certainly does not require an ‘ethics of defence exit’ to complement self-defence statutes; rather, the existing law and morality of self-defence already cover this because it is universally understood that they must be applied diachronically. The same is true for the existing just war criteria in the case of war.

Yet Rodin claims that ‘in fact *jus terminatio* poses distinctive moral problems that cannot be resolved by simply applying *ad bellum* conditions continuously over the course of a conflict’.<sup>42</sup> Why not? Because, says Rodin, of ‘new emergent costs, like the risk of defeat’. He thinks that before you fight you only risk, let’s say, the enemy seizing your territory or killing your people, but once you start to fight you also risk being *defeated* (in the sense of losing a fight – you cannot lose a fight if you haven’t fought at all). And Rodin asks: ‘[H]ow did the defender acquire a permission to inflict additional harms [in trying to avoid defeat] over and above the initial [before one started fighting] proportionality assessment . . . , simply by entering into a state of war? This looks entirely mysterious’.<sup>43</sup> However, first, Rodin’s argument rests on a wrong premise: he makes it appear as though in the *initial* proportionality consideration the risk of defeat must not be considered. But that is like saying that a doctor who considers operating on a patient must not consider the risk of *botching* the operation before she starts the operation but only once she has started it. Such a suggestion, however, is inane. Moreover, even if one granted Rodin that assumption, there would still be no mystery involved. To wit, if at time  $t^1$  someone faces a threat against which the use of some force would be proportionate and at time  $t^2$  he faces *more* threats or a bigger or more comprehensive one, then, all else being equal, the use of *more* force would be proportionate. That is not mysterious but logical. To give an example: You stand in front of your apartment with an apple in your hand and someone tries to steal the apple from you. It would, let’s assume, be proportionate to push him away (but not to knock him down). Instead of pushing him away, you take a step back into your apartment. A person’s dwelling, however, is afforded special protection by law and morality. If now the thief still comes after you to get the apple, you would be permitted to use more force in defence against a more severe threat – the threat not only of losing the apple but now also of the violation of your apartment. While Rodin might find it ‘mysterious’ why you are allowed to use more force ‘simply by entering’ your apartment, nobody else will.

Rodin also adduces what he calls ‘a fanciful case’<sup>44</sup> to argue against doing proportionality assessments in war (and elsewhere, it seems) on a purely ‘forward-looking basis’ (which considers harms or wrongs done during the war as sunk costs that need now not be further considered).<sup>45</sup> Note, however, that I am arguing here for applying *ad bellum* conditions continuously over the course of a conflict, but such *continuous* application is quite compatible with *also* looking backwards. Rodin seems to equate the continuity account with ‘forward-looking’ accounts, but that is a mistake. The forward-looking account is only *one* version of the continuity account. However, since it is indeed

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<sup>42</sup> Rodin, ‘The War Trap’, p. 677.

<sup>43</sup> Ibid., p. 678.

<sup>44</sup> Ibid., p. 687.

<sup>45</sup> Ibid., p. 689.

a version of the continuity account, it is instructive to see why Rodin's argument against it fails.

Rodin considers a case where one dangles another person out of the window for the mere fun of it and without the person's consent, and then realizes that it is wrong but is unable to lift the person back into the room without help. Rodin claims that *both* continuing to dangle the person *and* stopping doing so (by letting go) is wrong. Accordingly, he thinks that both the continuation and the discontinuation of a war can be wrong. Thus, he sees a dilemma here.<sup>46</sup> But there simply is no dilemma since continuing to dangle the person as part of an attempt to rescue her is *not* wrong.<sup>47</sup> Rodin claims, however, that this is 'clearly false'.<sup>48</sup> He states that if 'dangling for less than ten minutes and dangling for ten minutes or longer are separate offences, then I will clearly be morally and legally liable for the more serious offence, even though I only dangled you for five minutes prior to the epiphany. The continued dangling after the epiphany contributes to my culpability, despite the fact that I am morally required to do it.'<sup>49</sup> This is clearly false. Part of an offence, and element of the crime, is *mens rea*, the guilty mind, but once I dangle the person with the intent to *rescue* her, I have no guilty mind anymore. (Rodin claims that '[n]o one can benefit morally from his own wrongdoing, and removing or mitigating my culpability for harmful action that would otherwise be wrong would be a benefit to me'.<sup>50</sup> Yet both law and morality, quite reasonably, do allow people to benefit from not having a guilty mind, and this is the only benefit that is accorded here.) Incidentally, if *mens rea* were *not* an element of the crime, then you would also be culpable and committing an offence if you had grabbed a person who fell out of the window by no fault of yours, trying to save her. But that, of course, is absurd. In Rodin's case, I would, however, be *civilly* liable (I would have to pay adequate compensation) for the continued dangling, for this is a consequence of my initial wrongdoing and I am responsible for it. But that in no way implies that the rescue-dangling after my moral epiphany is *criminal* or *culpable*. Thus the dilemma that Rodin unnecessarily wants to construe can easily be avoided by simply applying the appropriate moral and legal categories.

Moellendorf, like Rodin, also argues against the 'forward-looking conception of proportionality'<sup>51</sup> and thus against one version of the continuity account. He considers an argument provided by McMahan in support of the forward-looking account. McMahan considers a case where a runaway trolley will kill five innocent people unless the trolley is diverted onto another track where it would kill only one innocent person.<sup>52</sup> Assuming that even killing two – but not three – innocent people as a side-effect of saving the five is proportionate, a bystander would be justified in diverting the trolley. Yet when the bystander pulls the switch, there is an unforeseen malfunction that fails to affect the

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<sup>46</sup> Ibid., p. 687.

<sup>47</sup> See also Moellendorf, 'Two Doctrines of *Jus ex Bello*', p. 659.

<sup>48</sup> Rodin, 'The War Trap', p. 687.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., p. 688.

<sup>51</sup> Moellendorf, 'Two Doctrines of *Jus ex Bello*', p. 663.

<sup>52</sup> Jeff McMahan, 'Proportionality and Time', *Ethics* 125(3) (2015), pp. 696-719, at 703-4. He provides another good and rather convincing example, see *ibid.*, p. 708.

trolley but accidentally kills two other innocent persons. The bystander quickly repairs the switch and thus can still divert the trolley. Is it still permissible for him to do so? It is if one regards the previous accidental killing of the two bystanders as ‘sunken costs’ that need not be considered in the decision now; it is not, however, if the two previously killed persons enter into the new proportionality consideration, for then the saving of the five would have the total cost of killing three, and that would, *ex exemplo*, be disproportionate. McMahan thinks that it would be counter-intuitive to take the latter position and to declare that now the bystander has to let the five innocent people die instead of being permitted to divert the trolley to the track with only one innocent person. I agree with him.

Moellendorf does not. He thinks that the forward-looking account faces two problems, namely that it ‘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’ and that it ‘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’.<sup>53</sup> Both claims are mistaken. First, there obviously is a clear limit set by the continuity account in the given example: *ex hypothesi* the proportionality requirement would make it disproportionate for the bystander to divert the trolley if he foresees that at least three people will then be killed. Of course, Moellendorf’s point is that one could kill three people *again and again* if each time the (miraculously still unforeseen) malfunction occurs (killing two people) and one could still save the five by diverting the trolley to the one. Yet that does not in the least change the fact that *at each time* there is a clear proportionality constraint. Moreover, Moellendorf’s second point is wrong too. There is a limit also to the cumulative costs. While it might be proportionate to save the five at the cost of killing two people as a side-effect, saving the five at the cost of slowly torturing one person to death (or of having her, as a side-effect, transported into an automated torture machine that will do the same) might well be disproportionate. If so, then there is no limit on how many people can be ‘cumulatively’ killed in the endless reiteration of the attempt to save the five, but there is a limit on how many people can be cumulatively tortured (namely none), and thus the continuous account also sets a proportionality limit for the cumulative case.

Finally, if Moellendorf’s account of proportionality were correct, it would also have to apply, for the same reasons, to proportionality in self-defence. Suppose it were proportionate to defend your wallet against a thief by knocking him down, but anything beyond this were disproportionate. You are walking through a tough neighbourhood. A robber tries to take your wallet, and in pursuit of the ‘just cause’ of keeping it you knock him down. After 100 meters more you come across another robber (or perhaps even the same one: he tries again) who tries to take your wallet. On Moellendorf’s ‘budget’ account you have to let him because you already exhausted what he calls your ‘proportionality budget’<sup>54</sup> with the first robber. In other words, you cannot defend your wallet anymore now. This is entirely counter-intuitive if not downright absurd, however, and most certainly not an account of proportionality that any jurisdiction on this planet subscribes to. Accordingly, there is also no reason to subscribe to such an account in the

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<sup>53</sup> Moellendorf, ‘Two Doctrines of *Jus ex Bello*’, p. 663.

<sup>54</sup> *Ibid.*, p. 661-2, italics removed.

case of war.<sup>55</sup> To wit, if a genocidal enemy attempts to kill the entire population of one million people in a certain territory, then Moellendorf's account implies that there is some 'proportionality budget' so that, for instance, 'collaterally' killing 1000 innocent civilians in the course of the whole defensive war against this genocide attempt would be proportionate while killing 1001 would not. This further implies that after already having collaterally killed 970 innocent civilians without having averted the genocide, one would now have to let the genocide simply take its course if one could only avert it by 'collaterally' killing 31 additional civilians. Again, this seems to be absurd (at least barring absolutist convictions).

Finally, it should perhaps be noted that the continuous application of *jus ad bellum* does not undermine the distinction between *jus ad bellum* and *jus in bello*. This distinction does not concern timing (nor does it concern any declarations of war or of peace), but the level of agency and decision making. To wit, imagine a people can only save themselves from being malevolently slaughtered by an enemy group if they engage in organized collective self-defence. Their *jus ad bellum* question is: "May we, as a collective, wage war?" Assume they know that if they do, a few of their soldiers will violate *jus in bello* restrictions, for example kill some wounded enemy soldiers who are already *hors de combat*. This fact and knowledge would not necessarily undermine the justifiability of the war as a whole, as a *collective* action, since the war could still be justifiable as the lesser evil even if some *individual* acts of the soldiers are unjustifiable. To use an analogy: if a person can only save herself from being killed by a culpable aggressor if she asks someone for help of whom she knows that he will use slightly excessive force, then *she* is nevertheless justified in doing so (an attempted murderer being exposed to somewhat excessive force is a lesser evil than his succeeding in his murder attempt), even though *her helper* is not justified in using excessive force. She is justified since she has no alternative means than asking the helper and the helper's acts are not under her control. The helper, on the other hand, is *not* justified in using unnecessary force since his own acts obviously *are* under his control. In the same vein, a collective can be justified in resorting to war (and thus in enlisting its soldiers' help) even if it is known that some of the soldiers will, against the collective's wishes, use excessive force.

We can thus conclude that the objections against the continuous application of *jus ad bellum*, including just cause and proportionality, are spurious. The criteria of *jus ad bellum* apply throughout the war, not only at the point of its initiation. While starting a war at  $t^1$  might be justified, continuing it at time  $t^2$  might be unjustified (and vice versa), and this insight neither requires an addition to *jus ad bellum* (it is already contained in it) nor does it undermine the distinction between *jus ad bellum* and *jus in bello*.<sup>56</sup>

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<sup>55</sup> If one *knows* that one will be attacked again and again and perhaps that each defence would produce slight collateral damage, then this could go into the proportionality consideration. However, this would of course be forward-looking.

<sup>56</sup> I thank Nicholas Parkin and the editors of this volume for useful written comments on earlier drafts of this chapter.