

# *Jus ex Bello* and Just War as a Non-Zero-Sum Game

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*Popularized by Darrel Moellendorf with his 2008 paper of the same name, jus ex bello is an emerging field of exploration in Just War Theory. Though jus ad bellum, jus in bello, and jus post bellum are widely considered to cover most lines of inquiry in Just War Theory given proper interpretation, their domains of the cause of war, the conduct of war, and making peace, respectively, have left questions open of when and how to continue or end a war. Such questions are even more concerning given recent protracted conflicts such as the Global War on Terror, and they are precisely the kinds of questions jus ex bello seeks to address. Besides Dr. Moellendorf, another notable figure in the field, David Rodin, explores the theory under the terminology of jus terminatio. We choose to use Moellendorf's terminology in discussing the extent of both theories broadly but elect to use one or the other where specifically appropriate in the paper. As a new field of thought, jus ex bello's tenets need work, and we intend to show how its current structure can lead to the paradoxical situation of two sides in a conflict being simultaneously justified. This may represent the need for revision, but we also give thought to the utility of the idea, such that further work corroborating it as, indeed, not paradoxical, could still be a fruitful advancement of Just War Theory.*

To clarify what exactly is meant by just war as zero-sum, and therefore what we intend to prove about its non-zero nature under *jus ex bello*, consider how the Oxford English Dictionary defines a zero-sum game: “generally ... any situation in which an advantage to one participant necessarily leads to a disadvantage to one or more of the others.”<sup>1</sup> When we speak of just war being zero-sum (or not), we are speaking of just war strictly, a situation in which war is just. After all, if both sides have no moral standing, we rightly proclaim it an unjust war. Such a case is not morally interesting, as the implication for both sides of the conflict is obvious: End the war as soon as possible, mitigating as much further injustice as possible. Moellendorf says as much in “Two Doctrines of Jus ex Bello”: “if it is unjust to continue a war, then it is reasonable to ... end it.”<sup>2</sup> Excluding this scenario, the zero-sum game arises out of our moral intuition being a logical exclusive-or. Consider anti-war propaganda. Regardless of the ethical framework used, anti-war movements often shortcut proving a war on one side is unjust by attempting to prove the other side is just. The implied connection between our enemy's righteousness and our depravity assumes the impossibility of their righteousness coexisting with ours. Michael Walzer himself would agree with this assumption, as his eminent *Just and Unjust Wars* proposes just that. In his review, Igor Primoratz concisely summarizes Walzer's stance: “There are no wars in which both sides' causes are just.”<sup>3</sup> Thus, in this constrained just war, in which at least one side is just, it is also the case that only one side can be just. The debate is then which side is the just side, a debate that is clearly zero-sum, in that evidence for or against any one side necessarily applies opposite weight to the other.

Moellendorf's assertions under *jus ex bello* “set aside the question of whether the evaluation of a war is belief or

1 “Zero-sum, adj.,” Oxford English Dictionary Online, Oxford University Press, 2021.

2 Darrel Moellendorf, “Two Doctrines of Jus ex Bello,” *Ethics* 125:3 (2015): p. 658.

3 Igor Primoratz, “Michael Walzer's Just War Theory: Some Issues of Responsibility,” *Ethical Theory and Moral Practice* 5:2 (2002): p. 228.

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fact sensitive,” and we do the same while maintaining the neutrality of our analysis.<sup>4</sup> This is because epistemic considerations exhibit themselves just as competitive a game as considerations of fact, if not more so. Belief-sensitive claims are more appropriately spoken of in confidence levels, probabilities, and percentages, but even this scale is usually thought of as sum-conservative, since we would say one side being 100% justified implies the other is 0%, and it may be reasonable to extend this to other splits, such as 80/20 or 50/50. Let us not get too lost in the weeds here, as it is possible for the generalizations above to be too broad, but the point about the competitiveness of both actual and epistemic moral value in war should be self-evident.

Regardless of the specific relationship, then, there seems to always be a logical entanglement between the moral value of one side and another. The aim of this paper is to rectify this entanglement, at least to point out how it could be explained by the current *jus ex bello* framework. It is obvious that if we only knew one side was wrong in a conflict, we could not deduce the moral value of the other. Currently, the same cannot be said if we know one side is right. Disproving this requires an exemplary situation in which the moral gain of another does not detract from that of their opponent, in which, to directly oppose perhaps the greatest just war theorist ever, both sides’ causes *are* just.

### The “Game”

The root of a situation in which both sides are justified in conflict gets to the core of *jus ex bello* and Darrel Moellendorf’s independence thesis: “the claim that there is no necessary connection between the justice of resorting to war and the justice of continuing it.”<sup>5</sup> We assume the truth of the thesis since this is a discussion of the implications of *jus ex bello*’s tenets more than an evaluation of them. However, familiarization with the proof makes further discussion of the thesis’ interaction with other tenets easier, so it will be covered. In general, the independence thesis rests on the truth value of these two claims:

- 1) “It could be morally required to end a war that initially satisfied all four of the principles of *jus ad bellum* even though a victory has not been obtained.
- 2) It could be right to continue a war that initially failed to satisfy any one (or more) of the four principles of *jus ad bellum*.”<sup>6</sup>

Moellendorf defends the first claim by showing that “a war initially correctly judged to succeed according to the objective interpretation may in the course of events prove to be very unlikely to succeed, or unlikely to succeed within the constraints of proportionality.”<sup>7</sup> As for the second claim, Moellendorf “take[s] each [*jus ad bellum*] principle in turn” and shows how they can evolve from being unsatisfied to satisfied. However, only just cause and proportionality are relevant here. Moellendorf shows how it can evolve such that “prior to hostilities there was no injustice whose remedy would serve to justify the war ... but during the course of the war such an injustice somehow manifests.”<sup>8</sup> His example is the Iraq war, which for the purpose of the thought experiment failed to satisfy just cause on invasion, but soon became a humanitarian crisis requiring continued occupation to mitigate. As far as the proportionality consideration, Moellendorf acknowledges “the very unlikely event that war proves somehow to be less costly morally than it was originally judged to be,” but places greater emphasis on how proportionality considerations change with respect to change in just cause.<sup>9</sup> Again, in the case of the Iraq war, no amount of aggression is worth the lack of just cause, but at least some is worth abating a serious humanitarian crisis.

The second tenet of *jus ex bello* relevant to this discussion arises out of the concern that *jus ex bello* “serves to minimize the importance of determining the *jus ad bellum* justice of a war prior to its onset since later moral assessments might

4 Moellendorf, “Two Doctrines of Jus ex Bello,” p. 655.

5 Ibid., p. 654.

6 Darrel Moellendorf, “Jus ex Bello,” *Journal of Political Philosophy* 16:2 (2008): p. 124.

7 If this scenario is difficult to imagine, reference Ibid., pp. 123-126.

8 Ibid., p. 127.

9 Ibid., p. 128.

redeem an unjust war.”<sup>10</sup> “On the contrary,” Moellendorf says, “whether or not to start a war is a gravely important moral decision,” and “even if it can be just to continue a war that failed to satisfy *jus ad bellum*, the fact that it so failed” remains.<sup>11</sup> This can be seen as the flip side of the independence thesis, since if its main implication is that *jus ad bellum* considerations are inappropriate for judging the continuation of war, the inverse of that is *jus ex bello* being inappropriate for judging the beginning of war. This may seem clear stated outright, but the concern over abuse of *jus ex bello* is a valid one, so it is important to emphasize that “in the event that a war that was unjust to initiate becomes just to continue, the case ... is based in part on the danger of compounding the initial injustice ... [and] offers no support for the original injustice.”<sup>12</sup> Here, it is prudent to acknowledge the difference between this formulation of *jus ex bello* and David Rodin’s conception of *jus terminatio*. Though we have previously stated our preference for Moellendorf’s terminology and use of it as a stand-in for the ground covered by itself and *jus terminatio*, their relationship is more robust than mere nomenclature. Some of Rodin’s work augments Moellendorf’s, while other parts of it are in noteworthy tension. The augmentation here is yet another reason to consider *jus ex bello* separate from *jus ad bellum*, whereas the tension is one of the moral status of actors under *jus ex bello* considerations. As far as considering *jus ex bello* separate from *jus ad bellum*, Rodin contends with what the authors feel to be a somewhat reductionist version of Moellendorf’s independence thesis defense, calling it “dubious.”<sup>13</sup> But he continues with a new reason to distinguish *jus ex bello* from *jus ad bellum*: There are unique costs after the start of war, such as the cost of defeat (as opposed to that of initial surrender). The cost of defeat is not the only “justifying condition for violence appl[ie]d differently at the commencement of conflict than when conflict is in progress,” but it, as well as others, can give rise to “moral problems” or “dilemmas” if the “*ad bellum* conditions continuously [apply] over the course of the conflict.”<sup>14</sup> That is, *jus ad bellum* is insufficient because it leads to lose-lose situations, as opposed to creating clear courses of action, as intended.

Now, it is precisely these situations, or dilemmas, for which Rodin wants to use the language of *jus terminatio*, but offers no real solution besides “more often than not, the only good way to get out of a trap is not to get in.”<sup>15</sup> Here is our more concrete reason for siding with Moellendorf’s *jus ex bello* over Rodin’s *jus terminatio*: It provides a way forward instead of a recursive ‘oops.’ As Moellendorf explains, our second tenet’s allowance of a present justice to coexist with a past injustice more accurately describes such situations:

“David Rodin maintains that a war that was unjust to begin is necessarily unjust, even though it may also be unjust not to continue to prosecute it ... he aims to support that view by means of what he claims to be an analogous dilemma. Suppose one were to dangle another person out the window, then come to realize that doing so is wrong, but be unable to lift the person out of the window without help. One may not simply stop dangling the person by letting go. But Rodin claims that the continued dangling is also wrong. The conclusion drawn from the analogy, however, is not convincing because the continued dangling of the person, if it has become part of an activity of rescue, is not wrong. Doing what one can to rescue a person, even if one’s efforts alone are insufficient, is commendable. The example looks rather more like a case in which the moral character of a war has changed because the reason for the war—the cause—has become just.”<sup>16</sup>

Rodin names his dangling man analogy a “sunk-cost dilemma”<sup>17</sup> since the moral relevance of the time spent dangling pre-epiphany is complicated. Do we add it to the time post-epiphany and indict the dangler for total time dangled? Or do we ignore it, and regard all the time post-epiphany as righteous given that it was being used to attempt

10 Ibid., p. 130.

11 Ibid.

12 Ibid.

13 For Rodin’s characterization of Moellendorf’s argument, see David Rodin, “The War Trap: Dilemmas of Jus Terminatio,” *Ethics* 125:3 (2015): pp. 676-677.

14 Ibid., p. 677.

15 Ibid., p. 675.

16 It is the opinion of the authors that while Moellendorf’s rebuttal, cited here from “Two Doctrines of Jus ex Bello,” is insufficient for all of Rodin’s arguments, it is capable of being adapted to all of them. To assess Rodin’s arguments more comprehensively, see Ibid., pp. 674-695.

17 Ibid., p. 686.

retrieval? Moellendorf obviously thinks this is not a “dilemma,” but he does not treat the problem of moral sunk costs lightly. In his discussion of *jus ex bello* proportionality, Moellendorf speaks at length on why the moral costs accrued under the *jus ad bellum* “proportionality budget” should not be completely discounted even while *jus ex bello* considerations may be changing the nature of the conflict.<sup>18</sup> He recognizes the potential for what he calls a “purely forward-looking conception of responsibility” to accrue sunk costs *ad infinitum*. Moellendorf credits Rodin for being first to “ask the question clearly” in his article “Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression.” The example Rodin considers, and Moellendorf reconsiders, centers on a set number of acceptable casualties in war and shows that if the next expected number of casualties is less than the original, then fully writing off sunk costs can cause bodies to pile up forever.<sup>19</sup> Moellendorf quotes Rodin saying, “the sunk costs conception of proportionality ‘essentially hands a blank cheque to combatants to continue a war on revised assessment of its future costliness.’”<sup>20</sup>

The above metaphors only take Moellendorf so far in his conception of proportionality, however. He writes off discounting sunk costs, but after considering Jeff McMahan’s extended trolley problem—in which a malfunctioning lever can kill bystanders before the train arrives at its junction and several people have a chance to consider pulling it before the train arrives—basically says ‘it depends’ on right limitation. “We need not settle these fundamental matters of proportionality,” he says, “to make the modest point that even if one warring party is required to stop a war on proportionality grounds it might not follow that another may not take up the cause.”<sup>21</sup> Even more so, the exception he makes for just cause, as far as this paper is concerned, is the most crucial tenet of *jus ex bello*. It is also probably the most suspect, but given its interesting implications, we press forward with about as much justification for it as Moellendorf gives. In “consider[ing] again the case of Afghanistan,” he says, “suppose for a moment that preventing post-invasion widespread civil war ... provides a just cause for a continued ... military presence there. In that case,” he continues, “counting all of the past moral costs against the proportionality budget would be rather like factoring the costs of the war in Iraq into the judgment of whether to continue the war in Afghanistan ... the costs of another war are not to be counted.” What makes this a new war? The “new just cause.” Further, in response to challenges based on “temporal and geographical continuity,”

“[These] are not determinative of the moral identity of the war over time. More important is the cause for war. Judgments of proportionality, prospects for success, and necessity are all relative to the just cause of the war. Once the cause changes, these judgments also change.”<sup>22</sup>

Now for a big question: If the moral *identity*, not just the moral *value* of our wars, can evolve through cause alone, can the enemy’s as well? What if moral identities evolve in a different direction? Or what if they are simply in a position that resists evolving with us for some reason? Much of Just War Theory is written on a one-sided basis (i.e., how do we know when we/they are right/wrong), but there is little on the relationship between the two. Perhaps there is some latent zero-sum intuition there. However, let us ponder for a moment that since ostensibly our cause for war was never our enemy’s cause for war (often, though not always, they are opposites), does a shift in our cause necessitate anything about our enemy’s cause? *Jus ex bello* is silent on the issue, but we think the necessity of the connection is doubtful within it, if for no other reason than the leftover injustice of violating *jus ad bellum* principles. Recall how the *jus ex bello* considerations not only do not erase this but occupy such a morally distinct lane that a given actor can simultaneously be justified and unjustified under each. Presumably, the enemy could be so split, or perhaps not even, since if we hypothesize a war in Afghanistan in which there are no other moral considerations besides us as the *jus ad bellum* unjustified aggressor, Afghans would become *jus ad bellum* justified defenders. The space between the physical domain and the moral domain Moellendorf has created here—that

18 Though meant “in the wide sense, as Jeff McMahan understands it, namely, the harms or wrongs imposed only on those who are not morally liable to attack ... for the sake of simplicity, [he takes] the moral costs covered by the proportionality budget to be the killing of civilians.” Moellendorf, “Two Doctrines of Jus ex Bello,” p. 662.

19 For the full argument, see *Ibid.*, pp. 661-668.

20 *Ibid.*, p. 665.

21 For the full argument, see “Two Doctrines of Jus ex Bello,” pp. 665-668.

22 *Ibid.*, p. 669.

parties in one physical conflict can be engaged in two distinct moral wars because of a difference in cause—brings up more potential ramifications than can be fleshed out.

For now, let us complicate things even more, augmenting the conversation with Rodin's examination of *jus terminatio* in Iraq. Like Moellendorf, Rodin, in his "War Trap" deliberations, cites the fact that "many people believe ... it lacked just cause," going on to say that "once the allies had toppled the Saddam regime, the Iraqi population ... faced anarchy and civil war ... [and] occupying forces were therefore under an obligation to continue with the occupation" to prevent societal collapse.<sup>23</sup> He says this is a real-life moral dilemma, but for reasons previously discussed, under Moellendorf, this situation is one that fails *jus ad bellum* while meeting *jus ex bello*. Regardless, it is mere background for Rodin's stance that "new entrants (provided they are acting with the appropriate intention) can contribute to an unjust course of action without any culpability at all, if such action is permissible or required on a forward-looking basis."<sup>24</sup> Now, we have also previously discussed the issue with a strictly forward-looking morality, so let us assume there is an implied limit on Rodin's forward-looking basis to keep everything straight. His example includes that possibility, as he considers a U.S. citizen enlisting in the Army after the invasion of Iraq who "believes the invasion ... lacked a just cause but ... to prevent anarchy there ... contribute[s] to the occupation." Rodin says not only is this soldier "without any culpability," but even that "a newly elected president may continue to prosecute a disproportionate war commenced by his predecessors without any culpability, when doing so would mitigate ... the war's proportionality."<sup>25</sup> These particular claims seem to fail "right authority," a *jus ad bellum* consideration not explicit to *jus ex bello*, but probably implicit to it. However, reminiscent as they are of Moellendorf's proposition that "another [warring party] may ... take up the cause" without assuming previous moral cost, the examples are reasonable to elevate to the state level.

Consider New Zealand. Rodin's idea is that in some cases only initiators are "responsible for ... the wrongful course of action."<sup>26</sup> If we use May 1, 2003, the date of President Bush's infamous "Mission Accomplished" speech, as the end date of the invasion and the beginning of the security phase, then New Zealand's deployment of troops in September 2003 would be directly analogous to Rodin's enlistment example. Assuming no further moral complications, surely we would not hold New Zealand responsible for the *jus ad bellum* considerations that we do the United States, and it would have moral credit to its name for right continuation of war under *jus ex bello*.

If we apply this to our hypothetical two-moral-war Afghanistan, then lack of culpability leads to all sorts of interesting places. Say we have a New Zealand analogue continuing a war under *jus ex bello* considerations and not bearing the *jus ad bellum* cost the United States does. At some point, New Zealand fighters could engage Afghans (under the auspices of morally distinct wars, recall) and carry no moral weight of any kind. The same can be said of Afghan allies, since at this point it may be difficult to imagine what moral weight the Afghans themselves are carrying, if there is any, those joining them later certainly have the potential for less. At some point, New Zealand fighters and Afghan allies may find themselves fighting each other, justified under *jus ex bello*, and neither of them holding any kind of moral culpability, for anything. Further, imagine a situation in which the United States and the Afghans leave the war (perhaps not rightly).<sup>27</sup> If the *jus ex bello* conditions hold, we have New Zealand fighters and Afghan allies as not just two but the only participants in a conflict, bearing no moral weight while maintaining their obligation to fight. Such a situation may be difficult to imagine for our particular example, but we believe it is possible given another.

## Conclusion

Based off the independence thesis, the non-resolution of *jus ad bellum* transgressions, and the transience of war's moral identity, we have explored how *jus ex bello* considerations give rise to situations in which both sides are

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23 Ibid., p. 689.

24 Ibid., p. 691.

25 Ibid.

26 Ibid.

27 Indeed, the United States did withdraw its troops from Afghanistan in August 2021.

separately justified. Within these situations, we identify two immediate moral goods. The first is, perhaps, just another answer to the criticism of *jus ex bello* explored earlier, namely the possibility of military leaders taking advantage of changing moral status by entering a specious conflict under *jus ad bellum* considerations, only to lay claim to the different requirements of *jus ex bello*. The temptation to plan on being able to say ‘Yeah, I was wrong then, but now I’m right’ may seem great, so Moellendorf’s rebuttal is worth repeating here in a different context: “Insofar as [*jus ex bello*] is a case against compounding injustice [i.e., creating another injustice by ending a war that should be continued], it offers no support for the original injustice,” in that the violation of *jus ad bellum* stands as a distinct moral injury.<sup>28</sup> That another actor could build off this initial injury to be their just cause for conflict seems a compelling cost to consider *ante bellum*. Very few, presumably, would want to fight someone who has legitimate reason to fight back, as the potential disadvantages are by no means limited to increased enemy resolve and lack of public support.

The second moral good of this *jus ex bello* framework is its implications for maintaining just cause in future conflicts, even when there is a shift from the original *ad bellum* justification. In recalling war’s epistemic shroud, it can be easy to forget how many soldiers become convinced of the righteousness of their side in conflict. While moral theorists, the public, or high-level decision makers may tolerate agnosticism about the actual moral state of their conflict and settle for probabilities, often a conscious or subconscious need to resolve cognitive dissonance makes those on the ground believe in the purity of their cause, if only to justify the horrendous actions they are asked to perform. This certainty feeds into the moral intuition this paper has tried to subvert, and they come to believe their enemy is evil since they are good. This reductionism on the ground can lead to dehumanization, which itself can lead to violation of *jus in bello* principles and mass atrocity. Not all soldiers resolve their internal conflict in this way, and certainly most who do, do not follow through on their certainty by pillaging, raping, and massacring, which might itself stem from a moral perversion beyond the reach of the point here. However, if our righteousness in conflict does not necessitate the depravity of our enemy, then that can be yet another institutional and cultural barrier against dangerous lines of thinking.

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28 Moellendorf, “Jus ex Bello,” p. 130.