

Ukraine has no *jus ex bello* obligation to enter into concessionary negotiations

Darrel Moellendorf

1,450 words (without title and author's name)

On December 28, 2022, Reinhard Merkel wrote in the *Frankfurter Allgemeine Zeitung* that the government in Kiev has a duty to “accept ex bello negotiations and end their unqualified rejection.” His argument invokes a doctrine of just war theory, *jus ex bello*, which I have played a prominent role in developing. As I understand it, *jus ex bello* is directed to guiding our thinking about two questions: First, whether a war may be permissibly continued or must be ended? Second, if it should be ended, how that morally should be done? Merkel’s position seems to be that in answer to the first question, Ukraine is obliged to enter into concessionary negotiations to seek an end to the war. I fundamentally disagree with Merkel’s moral judgment, and I reject the political implications that it has.

Merkel correctly distinguishes Ukraine's right to self-defense under international law from the moral question of whether it should continue its defensive war against Russian aggression. He is also correct to condemn the injustice of the Russian invasion. *Jus ex bello*, however, is particularly significant when developments within a war give compelling reason to believe that the just cause of war cannot be realized, or at least not within the bounds of morality. This makes *jus ex bello* a hard doctrine. Its conclusions can be difficult to accept, especially when a just cause to continue fighting remains. Arguably this was the case before the US pulled out of Afghanistan in 2021. However, Merkel does not provide a convincing argument that Ukraine, a country suffering war crimes at the hands of another seeking to impose colonial rule, should make concessions for the sake of peace. On the contrary, there are good reasons to believe that any such argument is implausible in present circumstances.

Jus ex bello shares some of the formal features of *jus ad bellum*, which establishes when entering into war is morally permissible. In both cases, the aim is to limit the justified use of military means. The theory of the just war, to which both *jus ex bello* and *jus ad bellum* belong differs from pacifism in that it permits some wars in principle. The doctrine has sometimes been accused of being a collection of excuses for war. However, this is to mistake the basic logic of just war theory. Just war theory assumes that wars are unjust unless they meet a number of conditions, even if there are profound disagreements among just war theorists about what these conditions are and whether and how exactly they apply to a particular cases.

Just war theorists generally agree, however, that war is permissible only if it is a response to a grave injustice. Opinions may differ as to what exactly constitutes a “just cause.” But it is widely agreed that a just cause alone cannot justify a war. For there may be morally less costly ways, diplomatic means for example, to achieve justice. And even when this is not the case, the costs that a party must impose in military pursuit of a just cause may be too high, or the chance of success too low. These considerations are referred to as “necessity,” “proportionality” and “reasonable likelihood of success.”

As part of *jus ad bellum* a war must not be started unless there is a just cause, it is necessary to achieve justice, its moral costs are proportionate to the realization of the cause, and the chances of success are reasonable. In my view of *jus ex bello*, the same conditions apply when the issue is whether to continue a war that was just to initiate. The war may be continued only if there are no diplomatic means for achieving justice, the wrongs war involves have not been

and will not be excessive in comparison to the end pursued, and the prospects for achieving the end remain reasonably good.

As far as I can tell Merkel does not disagree with me on the importance of just cause, necessity, proportionality and the chances of success. An advantage of agreement on such a moral framework is that one can focus on specific points of contention. Merkel and I agree that Ukraine has a just cause to resist Russian aggression. But we disagree about whether the war is proportional.

The idea of proportionality states that there is an equilibrium point between the justice a war champions and the cost it imposes. A pursuit of justice that requires imposing costs beyond this equilibrium point would be wrong, even if victory were possible. There is no good that may be pursued at all costs. How to understand what the equilibrium point and how it is justified are ongoing discussions in just war theory. Be that as it may, Professor Merkel's argument errs in its attribution of the costs of the war. He seems to hold the erroneous view that if the overall moral costs of the war would be predictably massive—regardless of which side imposes them—then Ukraine is obliged, as a matter of proportionality, to end the war. That view does not clearly differentiate between costs that are imposed and costs that are suffered in pursuit of a defensive war. Such a view would hold Ukraine obligated to end the war because of Russia's war crimes.

Since the political stakes are high, moral clarity is especially important. Let me explain in more detail where Merkel's judgment goes wrong. First, he claims correctly that Ukraine cannot deny responsibility for the deaths in the Polish village of Przewodów, if Ukraine errantly caused them in an effort to protect itself from a Russian attack. Accidental deaths are typically counted under proportionality because they are costs imposed by a warring party, even if not intended.

Amazingly, however, the case of Przewodów is the only concrete example of Ukrainian cost-imposition that Merkel cites to support the claim of the excessive cost of the country's defensive war. Compared to the death toll and massive misery caused by Russia's terror campaign of targeting the civilian population and public infrastructure, the Ukrainian military has been remarkably restrained. But as Merkel sees it, "Ukraine may be able to win this war in the end, politically and perhaps also militarily, but at most with a record of destruction that does not correspond to the concept of such a victory tangible meaning." Counting the large number of Russian crimes as a reason against Ukraine's defensive war amounts victim blaming. It is not those who caused the misery who are held to account, but those who suffer it.

Merkel anticipates the victim blaming charge, but his dodge fails to convince. He insists that Ukraine bears responsibility for the destructiveness of the war, even though Russia is the culprit: "Governments have a duty to protect the citizens of their countries. This also includes defending the state against aggressors, but also protecting the life and limb and future of its citizens." This is simply not a credible view and is completely contrary to the idea of proportionality, which limits the imposition of costs. Any defensive struggle can result in the aggressor mistreating and murdering the citizens of the defending state. Counting these misdeeds against the justice of defense would result in defensive wars quickly becoming disproportional; the invader must simply wreak enough havoc.

It would be a different matter if the citizens of Ukraine protested against their suffering and demanded that their government start negotiations. In this counterfactual situation, Merkel's

assertion that the Ukrainian government has a duty to negotiate a concessionary end would appeal to the dwindling confidence in the legitimacy of the war. However, there is no evidence in the current reporting that many Ukrainians actually hold such views. Hence, the claim that the Ukrainian government owes it to its citizens to immediately seek a negotiated solution is untenable.

Professor Merkel's claims to the contrary notwithstanding, the justice of Ukraine's continued fight comes down to four considerations taken together. First, the cause of repulsing the Russian effort at domination is just. Second, there is no effective means for doing so other than militarily. Third, although the prospects for success are hard to gage, it is important to bear in mind that from the beginning the capacity for Ukrainian success has been underestimated. Finally, as long as one does not falsely attribute the wrongs of the unjust Russian aggression to Ukraine, its defensive efforts are certainly proportional.

None of this is to argue that there will never come a time when negotiations would be a reasonable means by which to cease hostilities, but nothing about the application of *jus ex bello* to contemporary circumstances entails that Ukraine is obliged to seek a concessionary settlement. The only route to that conclusion is via moral misunderstanding.