

## ***Jus post bellum* over Ukraine: What does Ukraine really need in the post-conflict reconstruction?**

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### Abstract

On 24<sup>th</sup> of February, Russia invaded Ukraine. There are several analyses of the justness of the causes and conduct of this invasion, that is, issues of *jus ad bellum* and *jus in bello*, from the perspective of the just-war theory. However, there are only a few articles analyzing the issues of *jus post bellum* (justice after war) over Ukraine. Therefore, this article examines who has the right and obligation toward reconstruction of Ukraine, and what Ukraine really needs to rebuild its institutions in the post-conflict phase.

Keywords: *Jus post bellum*, Responsibility to rebuild, European Union

### **1. Who has the right and obligation toward reconstruction of Ukraine?**

#### ***Just Post Bellum***

According to Orend (2007), the just-war theory is a coherent set of concepts and values designed to enable systematic and principled moral judgement during wartime. The just war tradition revolves around two points: the justness of a war or *jus ad bellum* and the justness of the way that war is fought or *jus in bello* (Bass 2004). Nevertheless, much less has been discussed regarding the post bellum period in the existing scholarship. Existing just war theory provides some guidance for theorizing *jus post bellum* because certain rights and responsibilities of postwar conduct stem from the requirements for the justness of causes and conduct of war (ibid). The *jus ad bellum* requires a just cause, and *jus in bello* entails proportionality, which means that there must be restraint, and that excessive means cannot be exercised even to achieve just ends. If *jus post bellum* is incorporated into the just war theory, then if a war has a just cause and is fought justly, it still has to lead to a just post-conflict settlement (ibid). Thus, apart from the legal justice after the war, “responsibility to rebuild (Pattison 2013)” Ukraine needs to be discussed in the framework of *jus post bellum* in this article. Analyzing the issues regarding *jus post bellum* in Ukraine at present might lead us into the trap of “is–ought problem” suggested by David Hume (1896). Furthermore, it might be too early to discuss; yet, this article makes the first attempt to identify who has the right and obligation to reconstruct Ukraine.

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### **Causes, means, and consequences of this invasion**

Through discourse analysis, this article first points out that President Putin mentioned Ukraine's denazification as a cause of the war. According to the President of Russia (2022), "the purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime. To this end, we will seek to demilitarise and denazify Ukraine, as well as bring to trial those who have perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation."<sup>2</sup>

Concerning the means of this invasion, on March 17, 2023, Pre-Trial Chamber II of the International Criminal Court ("ICC" or "the Court") issued the arrest warrant of Russian President Putin in the context of the situation in Ukraine, which determines him to be allegedly responsible for the war crime of unlawful deportation and transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute) (ICC 2023).

In terms of the consequences related to *jus post bellum*, Immanuel Kant famously asserts that "one must act from duty and not from inclination (Kant 2013)." When it comes to the duty and responsibility of Ukraine's reconstruction, the categories of responsibilities need to be examined first. According to Miller (2001), there are four categories of approbatory ways of allocating responsibility in general: causal responsibility, moral responsibility, capacity, and community. Thus, in the next section, these categories of responsibilities are examined.

### **Responsibilities toward reconstruction of Ukraine**

Immediately after the end of World War II, the United States of America (USA) and international organizations, such as the World Bank and the International Monetary Fund (IMF), provided Germany and Japan with substantial support packages. They had moral responsibilities and sufficient capacity, and fulfilled their obligations. "Belligerents Rebuild Thesis," which holds those who have been involved with the fighting, such as the victor, just belligerent, and unjust aggressor, should be tasked with the responsibility to rebuild (Pattison 2013). Based on this thesis, Russia will have causal and moral responsibilities that will be discussed in the tribunals after the end of the war. However, we cannot or should not expect Russia to fulfill these responsibilities because of a lack of capacity and even willingness. In a practical sense, since we cannot expect Russia to

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<sup>2</sup> This article does not validate whether this is the just cause of the war in the framework of *jus ad bellum*, yet we have to take it into account that denazification is one of the purposes of his operation.

fulfill its moral or causal responsibilities for the reconstruction of Ukraine after the end of the war, which was clearly shown in the case of Georgia in 2008<sup>3</sup>, capacity and community factors must be considered. Likewise, as mentioned earlier, since denazification, more precisely, changing of the guard in Kyiv, is the objective of Russia's special operation, we cannot assign Russia to take rights for reconstruction of Ukraine because "victorious states have no right to reconstruct a conquered polity simply out of self-interest (Bass 2004)"<sup>4</sup>. Even though it is not always true that leaders ought to be punished for their crimes, it is vital that they are not allowed to benefit from them (Walzer 1977).

Hence, considering its capacity, the European Union (EU) should play a key role in Ukraine's reconstruction. This approach can be regarded as the "responsibility to rebuild," which is within the framework of the "responsibility to protect." Pattison (2013) suggests that the international community is also responsible for rebuilding. However, one might attempt to avoid bearing its duties amidst ambiguity. Thus, this article attempts to identify who has the right and obligation to reconstruct Ukraine, that is, the EU.

The EU has allocated 18 billion euros to Ukraine as of August 2023, and many EU member states provided Ukraine with military equipment. Needless to say, the top priority of each EU member state is internal political and economic issues, and helping Ukraine is a hectic process. In fact, Hungary's leader Viktor Orbán has refused to send military aid to Kyiv, and recently concluded a new gas deal with the Kremlin. He's also open to continuing regular diplomatic relations with Russia, traveling to Moscow for the funeral of Mikhail Gorbachev. Moreover, US Ambassador David Pressman said on April 12,

"The Hungarian government continues to maintain close relations with Russia and supports the Russian war machine in various economic ways" (Aljazeera 2023). As such, each member state of the EU has its own agenda and priority. Nonetheless, the EU as a European community has sufficient capacity to help Ukraine, and Ukraine's reconstruction is also crucial for the stability of the region as a whole. Furthermore, in terms of morality, the EU should play a role in rebuilding and reconstructing Ukraine since Ukraine decided to conclude the Association Agreement (AA) with the EU, including the Deep and Comprehensive Free Trade Agreement (DCFTA) in 2014, in

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<sup>3</sup> Russia unilaterally declared the independence of Abkhazia and South Ossetia right after end of the 2008 War in Georgia, and Russia claimed that it was not the direct party of the 2008 war at the International Court of Justice.

<sup>4</sup> This article does not argue who will win or lose in the war, yet it is obvious that the opponent of Ukraine has causal and moral responsibilities, since it started to wage war, and uses the excessive rhetoric of threatening Ukraine with nuclear weapons. It is clearly lack of proportionality, which is the requirement of *jus in bello*.

accordance with Moldova and Georgia. At the same time, it was also the decision made by the EU after the Euro-Maidan, after former Ukrainian President Yanukovich refused to conclude the AA, and the EU granted Ukraine candidate status of the EU in June 2022. This implies that the EU hailed Ukraine's aspiration for Euro-Atlantic integration, and from that point, the EU has possessed not only the capacity to deal with issues related to Ukraine but also the moral responsibility over Ukraine. Moreover, regarding energy security, EU, especially Eastern Europe, has been dependent on natural gas and oil from the Druzhba and other pipelines through Ukraine. The EU cannot be a free-rider in this energy security environment, and has a certain moral responsibility for Ukraine.

In a strategic sense, the reconstruction of Ukraine would be advantageous to the EU, since reconstruction by the EU and EU membership of Ukraine could be regarded as conflict prevention measures. Compared to the North Atlantic Treaty Organisation (NATO) enlargement, a sheer reaction from Russia would not be expected when Ukraine and the EU accelerate the rapprochement of both realms i.e., Ukraine and the EU<sup>5</sup>. In fact, Russia paid only slight attention when the Baltic States became members of the EU in 2004. Clearly, Ukraine's EU membership will be a long and winding road, particularly on how to accept the *Acquis Communautaire* by Ukraine. Turkey has been awaiting EU membership since 1987. The fact that Ukraine also has a large population and territory like Turkey means that it would have substantial influence in the European Parliament and other EU institutions if accepted in the EU. This makes it more difficult for Ukraine to become a member due to the political concerns of existing EU member states. Nonetheless, strengthening Ukraine's resilience will be beneficial for the EU because this stability of the EU's eastern flank, is crucial to the EU's interest with respect to conflict prevention and energy security. Hence, what does Ukraine really need to rebuild? It is the EU's support.

### **What Ukraine really needs to rebuild its institutions in the post-conflict phase**

The EU has the capacity and moral responsibility to rebuild Ukraine, which it should fulfill. As such, EU membership is crucial for both Ukraine and the EU. Ukraine's diplomatic trajectory should be toward EU membership, and the EU's conditionality on Ukraine could be a clue to analyzing how Ukraine should reform its institutions and how the EU should support Ukraine's efforts in the post-conflict situation.

According to the European Commission (2022),

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<sup>5</sup> Refer: Euronews 2022. "Putin says Russia has 'nothing against' Ukraine joining EU". <https://www.euronews.com/2022/06/18/uk-ukraine-crisis-eu-russia>.

The European Commission has found that Ukraine overall is well advanced in reaching the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; has continued its strong macro-economic record, demonstrating a noteworthy resilience with macroeconomic and financial stability, while needing to continue ambitious structural economic reforms, and has gradually approximated to substantial elements of the EU acquis in many areas.

Thus, structural economic reforms are one of the issues that Ukraine needs to address, and the EU should support Ukraine's initiatives in this respect. Additionally, anti-corruption measures in Ukraine are crucial for good governance of Ukraine. In September, 2003, President Volodymyr Zelensky replaced the defense minister of Ukraine, and dismissed all six deputy ministers of defense due to allegations of corruption. Without sound anti-corruption measures, donor countries have difficulty in continuing to provide Ukraine with military aid. According to the Analytical Report on Ukraine issued by the European Commission (2023),

Managerial accountability has not yet been fully incorporated into legislation and administrative practice. The organisational and methodological principles of internal control and internal audit are determined by the Cabinet of Ministers. In the absence of a specific law on this, the Cabinet has empowered the Ministry of Finance to regulate the matter by way of a resolution. The Cabinet has adopted basic principles of internal financial control that apply to the activities of spending units at all levels, including the head of the institution responsible for financial management, but the principles do not go into detail about lower-level management and employees. The effective implementation of basic managerial accountability mechanisms for central government bodies remains limited.

Therefore, Ukraine needs to enact laws on the organizational and methodological principles of internal control and internal audit, and implement the basic managerial accountability mechanisms for central government bodies. Otherwise, even in the post-conflict situation, donor countries would hesitate to provide Ukraine with financial support. According to Transparency International's Corruption index (2022), ranking of Ukraine is 116, Moldova is 91, and Georgia is 41. Thus, Ukraine is the most corrupt country among those which applied for EU membership in 2023. The EU granted Ukraine and Moldova candidate status for the EU, while Georgia was rejected. This could affect the credibility of the EU, since Ukraine was granted candidate status but Georgia was rejected, although Ukraine is much more corrupt than Georgia. Hence, the EU needs to support the anti-corruption measures not only for Ukraine but also for the EU *per se*.

## 2. Conclusion

This paper first examined the concept of *jus post bellum* in the context of the just-war theory. Both *Just ad bellum* and *Jus in bello*, relate respectively, to a just cause and proportionality, crucial for a just-war. However, *Jus post bellum*, a relatively new concept, needs to be examined theoretically, and this concept may be key for thinking about how to rebuild post-conflict Ukraine, because the rights and responsibility regarding Ukraine's reconstruction need to be assigned. Needless to say, a sovereign country has a right to reform and rebuild itself, yet as discussed, the EU would have moral, capacitating, and community responsibilities toward Ukraine. Thus, the EU would constitute support for Ukraine, although existing EU member states have their own agendas and priorities. This approach would be beneficial not only for Ukraine but also for the EU's credibility. What kind of support should the EU provide Ukraine? Currently, the EU provides Ukraine a comprehensive package, especially military aid because Russia's invasion of Ukraine is regarded in current Western rhetoric as an autocracy's aggression on a democracy and the West seeks to sustain the democratic order. In the post-conflict situation, however, the EU should focus on the structural economic reforms and anti-corruption measures first, because this must be regarded as *jus post bellum* in the context of "responsibility to rebuild" and donors cannot keep on pouring water into a bucket with holes. Thus, Ukraine with help from the EU should fix these holes, so Ukraine's structural economic reforms and anti-corruption measures are vital for achieving its EU membership. This is what the EU should focus on. Moreover, only the EU can do this since outside donors including The USA are having difficulty continuing support due to domestic voices questioning continuous support to Ukraine. Many in the USA insist on addressing inflation, job security, and domestic issues. This is merely an expression of democracy, and existing EU member states have similar issues. Nevertheless, the EU should assume moral responsibility for Ukraine's AA, candidate status in the EU, and its energy security environment. Additionally, the EU as a whole has enough capacity to rebuild Ukraine, and it should do so as a European community.

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