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Can Soldiers Do “the Decent Thing” in War?

The Just War Tradition, The Laws of War, and *Saving Private Ryan*

Ted van Baarda

§ 1 Introduction and Research questions

For a lawyer, to discuss the just war tradition (hereinafter: JWT) with theologians and ethicists is a slightly hazardous undertaking. Adherents of legal positivism—which represents mainstream legal thinking—will argue that JWT is not, and never has been, a valid rule of international law.¹ Although a strict view on the separation of law and ethics is rarely maintained in its undiluted form today, the legal status of JWT remains in the balance.² Lawyers argue that the UN Charter sets an all-encompassing standard for the permissibility of the use of force to the exclusion of all other—theological, ethical, cultural, etc.—considerations. I will discuss JWT nonetheless on the basis of two research questions mentioned below.

The entry into force of the UN Charter on October 24, 1945, introduced a new normative framework on the permissibility of states to use armed force as a means to settle disputes. The starting point is a *lex contra bellum*. The UN Charter prohibits, save for limited exceptions, the use of force by states. It refers to the “scourge of war which twice in our lifetime has brought untold sorrow to mankind.” Article 1 § 1 lists its main aim, which is “to maintain international peace and security.” To this end, the UN may

1. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds.), *The Charter of the United Nations—a Commentary. Volume I* (Oxford University Press, 2012), 204; J. Kunz, “Bellum Iustum and Bellum Legale,” *American Journal of International Law* 45 (1951): 529–530; Yoram Dinstein, *War, Aggression and Self-Defense*, 5th ed. (Cambridge: Cambridge University Press, 2011), 69, § 183; F. Berber, *Lehrbuch des Völkerrechts, Vol. 2: Kriegsrecht*, 2nd ed. (CH Beck Verlag, 1969), 26–27 and 30–32; H. Wehberg, *Krieg und Eroberung im Wandel des Völkerrechts* (Metzner, 1953), 25–26.

2. Benedetto Conforti, “The Doctrine of ‘Just War’ and Contemporary International Law,” in *International Yearbook of International Law*, vol. 3 (2002): 3–4; Joachim von Elbe, “The Evolution of the Concept of Just War in International Law,” *American Journal of International Law* 33 (1939), 665–666; Ian Brownlie, *International Law and the Use of Force by States* (1963), 20–21; A. Nussbaum, “Just War—a Legal Concept?” *Michigan Law Review* 42 (1943–1944): 453 *et seq.*, in particular 476–477.

take “effective collective measures” in order to prevent or remove threats to the peace and to suppress acts of aggression.³ Article 2 § 4 stipulates that all member states of the United Nations “shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state. . . .” The words “shall refrain” outlaw the use of armed force.⁴ The UN Charter recognizes the right to “individual and collective self-defence” (Art. 51) as well as the possibility of armed force mandated by the Security Council in order to maintain international peace and security (Art. 42); however, the baseline remains the *lex contra bellum*.⁵ This stands in contrast to the nineteenth century when the demise of JWT was such that the predominant legal conviction was that a state had a right to engage in war “whenever it pleased.”⁶

The current contribution consists of two main sections.

In the first section, my research question is: How was the development of the modern laws of war influenced by JWT in general, and the criterion of right intent in particular? My key points will be that the advent of the era of legal positivism has reduced the influence of theology and ethics on JWT, reinforcing an ongoing process of secularization in which just intent has become virtually nonexistent in current law. Finally, I will make brief comments concerning the laws of neutrality.

In the second section, I ask how the answers found in the previous section can be applied to a case. I focus on a scene from the film and novel *Saving Private Ryan*.⁷ My key points will be that neither the criteria of JWT, nor the modern laws of war are helpful in giving substance to right intent in this case; other considerations are helpful—albeit to a limited extent.

On the basis of these two sections, I will offer a number of conclusions.

§ 2 Modern Laws of War and JWT

The laws of war comprise two main chapters, *ius ad bellum* and *ius in bello*. The former concerns the question of under which conditions a right to go to

3. Leland M. Goodrich, Edvard Hambro, and Anne Patricia Simons, *Charter of the United Nations. Commentary and Documents* (New York & London: Columbia University Press, 1969), 28.

4. International Court of Justice, ICJ Rep. 1946, *Corfu Channel Case* (Albania vs. United Kingdom), at p. 35; Simma *et al*, *supra* note 1, p. 203 *et seq.*; Ian Brownlie, *International Law and the Use of Force by States* (1963), 116.

5. Kunz, *supra* note 1, p. 116.

6. Dinstein, *supra* note 1, p. 78 at § 207–208.

7. Max Collins, *Saving Private Ryan* (Penguin Books, 1998), 145 *et seq.*; in the film directed by Steven Spielberg (1998) at approximately 50 minutes.

war exists; the latter discusses the question of what rules apply during battle. *Ius ad bellum* attempted to define, albeit with moderate precision, a legitimate case of a *casus belli*. *Ius ad bellum* concerns the justice of war, whereby considerations of pacifism need to be reconciled—however uncomfortably—with the need to have a credible defense against an enemy. The latter term is that of *ius in bello*, which concerns the rules which govern conduct of soldiers during battle. *Ius in bello* concerns justice during war. For a war to be just, it must meet, according to many authors, six criteria of *ius ad bellum*. These are (1) a just cause; (2) a legitimate authority; (3) right intent; (4) a fair chance of success; (5) proportionality; and (6) last resort.⁸ *Ius in bello* is considered to have merely two criteria which need to be met in order for a war to be fought correctly. These two are (7) discrimination—the distinction between combatants and noncombatants must be respected; and (8) proportionality—that the military advantages of a given attack must outweigh the consequences in terms of death and damage to civilians and civilian objects.

§ 2.1 *Ius ad bellum*: Influences of the UN Charter

It was *ius ad bellum* that was the most influenced by the entry into force of the UN Charter; its key criteria were made redundant or were at least drastically reinterpreted. The first criterion, the *causa iusta*, became obsolete because it presumes the permissibility of armed conflict.

Noteworthy is that the controversial issue of humanitarian intervention is not mentioned in the UN Charter. Since the legal premise is *ius contra bellum*, it stands to reason to conclude that an intervention without the framework of the UN Charter is in violation of international law. Since the Kosovo crisis, this conclusion has come under scrutiny: gross human rights violations may become so unbearable that intervention is required, a mandate of the Security Council regardless.⁹ This was at least the position of Belgium before the International Court of Justice.¹⁰ Thus, old theological

8. Among the large volume of literature: Bruno Coppieters and Nick Fotion, *Moral Constraints on War* (Oxford, 2002); Donald A. Wells, *An Encyclopedia of War and Ethics* (Greenwood Press, 1996), 256.

9. Conforti, *supra* note 2; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), UN Doc. A/57/303. This report was bolstered by the UN Secretary General Ban Ki-moon's report *Implementing the Responsibility to Protect* (2009).

10. ICJ Rep. (1999) *Legality of the Use of Force (Provisional Measures)* (Serbia and Montenegro vs. Belgium), Pleadings of Belgium, 10 May 1999, CR 99/15 (comptes rendu) 17 *et seq*; Simon Chesterman, *Just War or Just Peace?* (New York: Oxford University Press, 2001), 213; Jonathan I. Charney “Anticipatory Humanitarian Intervention in Kosovo” (1999), 32

and moral arguments, which lawyers presumed to have become redundant since the establishment of the UN, reappeared—albeit with a legal coating.

Article 2 § 4 of the UN Charter inevitably had consequences for the other criteria of *ius ad bellum*. The second criterion—concerning the right authority—has traditionally been seen as referring to the state, which possessed the exclusive right to decide whether it may go to war. Under the UN Charter, this right became circumscribed. Although the state still possesses the right to exercise force in self-defense, it came under an obligation to refer the matter to the Security Council (Art. 37 § 1), which has “primary responsibility for the maintenance of international peace and security” (Art. 24). In cases other than self-defense, a state may no longer decide whether there exists a *casus belli*; such questions now fall under the authority of the Security Council, if a “threat to the peace, a breach of the peace and act of aggression” exists (Art. 39). The peace referred to here is “international peace”; an internal disorder within the boundaries of a state will only fall within the jurisdiction of the UN if it effects international peace.¹¹ As Art. 2 § 7 points out, the Charter does not authorize the UN “to intervene in matters which are essentially within the domestic jurisdiction of any State.” Although this provision seems, at a first glance, obvious, it has become contentious in the case of gross, massive human rights violations which take place within the boundaries of a state, and which do not pose a threat to international peace.

The third, fourth and fifth criterion may all be considered obsolete, since their premise is the legitimacy of war. The sixth and last criterion by contrast, concerning war as a last resort, is still alive, although its interpretation is now cast in the framework of the UN Charter. Various provisions emphasize the obligation of states to settle disputes by peaceful means, such as mediation by the Secretary General (Art. 33 *jo.* Art. 98 and 99) or adjudication by the International Court of Justice (Art. 33 *jo.* Art. 94).

§ 2.2 *Ius in bello*: Influences from The Hague and Geneva

The other chapter of the JWT, *ius in bello*, has undergone a different development. *Ius in bello* was influenced decisively during the second half of the nineteenth century. In 1863, the Swiss merchant and Calvinist Henri Dunant witnessed the Battle of Solferino, where he conducted heroic efforts

Vand J Transnat'l L. 1231 and (1999) 93 *AJIL* 834, 836; Christine Gray, *International Law and the Use of Force*, 3rd ed. (2008), 45.

11. Goodrich *et al*, *supra* note 3, p. 27; Dinstein, *supra* note 1, p. 87, § 234.

to comfort the wounded. The publication of his memoirs combined with his subsequent actions led to both the adoption of an international treaty and the establishment of the International Committee of the Red Cross. In the same era, the czar of Russia initiated a peace conference. The conference adopted, in 1899, *The Hague Rules of Land Warfare*,¹² which were updated in 1907.¹³

These initiatives mark a gradual development in which *ius in bello* would become a chapter of the laws of war which would coexist on a par with *ius ad bellum*. Traditionally, the laws of war had been enshrined in custom, considerations of chivalry, and the Christian tradition. It encompassed a transnational professional ethic, which held sway between knights; an ethic which could be understood by a knight in, say, Burgundy, as well as in Bavaria.¹⁴ In the second half of the nineteenth century, however, the role of nation-states became dominant, and with it, the responsibility of those nation-states for the forces operating under their control. The laws of war evolved from a transnational professional ethic into a set of international codifications; *ius in bello* effectively transformed into a *lex in bello*. It matured considerably. Modern *ius in bello* is enshrined in the Charter of the International Military Tribunal at Nuremberg, four Red Cross Geneva Conventions,¹⁵ three Additional Protocols, a number of UN treaties such as the *Chemical Weapons Convention*,¹⁶ and the *Treaty Banning Landmines*,¹⁷ plus the Statutes of the International Criminal Tribunal of the former Yugoslavia, the International Criminal Court, etc. In all, modern *ius in bello* consists of more than five hundred substantive provisions, a number which stands in contrast to the two criteria of JWT.

12. *Convention II with Respect to the Laws and Customs of War on Land* (1899), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=CD0F6C83F96FB459C12563CD002D66A1&action=openDocument>.

13. *Convention IV Respecting Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land* (1907), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument>.

14. M. H. Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965); Robert C. Stacey, “The Age of Chivalry,” in Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press, 1994), 29.

15. ICRC website, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

16. *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (1993), <https://www.opcw.org/chemical-weapons-convention>.

17. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (1997), <http://www.apminebanconvention.org/overview-and-convention-text>.

In that codified form, *ius in bello* laid a claim to a universal validity irrespective of the question which of the warring parties possessed a *causa iusta*. Although the development had been gradual through the centuries, its importance is fundamental. Before the second half of the nineteenth century, the distinction between *ius ad bellum* and *ius in bello* had been pregnable. There existed no generic *ius in bello* as we know it today, and the rights and duties of the belligerents depended, according to Grotius and many of his predecessors, on the question who fought on behalf of the *causa iusta*. By contrast, the applicability of modern *ius in bello* would become separate from the question of which party possessed *causa iusta*. The reason for this development is obvious: in military history, virtually all parties have claimed that they possessed the just cause, while disclaiming the purported just cause of their enemy. Thus, if the application of *ius in bello* were to be dependent on the question of whether one's enemy respects one's own claim to a just cause, then one may readily assume that *ius in bello* would be applied only infrequently, if ever.¹⁸

§ 2.3 Intermediate conclusion (1)

While traditional *ius ad bellum* has been largely subsumed by the UN Charter, this is not the case with *ius in bello*, since treaty law on *ius in bello* existed before the UN was established. This leads to a peculiar legal situation. Modern *ius in bello* is arguably the only chapter of law which regulates a prohibited activity: even if a war is fought in violation of the *lex contra bellum*, the warring parties remain bound by *ius in bello*.¹⁹ One may call this an anomaly, but it is an admission that international law is, in comparison to national law, immature. A key premise of national law is that a governing authority exists which can not only proclaim, but also enforce, the law. As a result, there is no need to have a specific chapter in national law that prescribes how to act when the law is violated. No comparable authority exists on the international plane. An observation by Hall, dating back to the era before the League of Nations remains valid today, namely that "[i]nternational law has no alternative but to accept war, *independently of the justice of its origin*. . . . Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."²⁰

18. Berber, *supra* note 1, p. 32.

19. L. Oppenheim, *International Law. A Treatise, Vol. II, Disputes, War and Neutrality*, 7th ed. (H. Lauterpacht ed, 1952), 218, § 218.

20. W. E. Hall, *International Law* (Oxford: Clarendon Press, 1880) 52, quoted partially J. L.

The quote will not satisfy the reader’s sense of justice; it is but a sobering acknowledgement of realpolitik in a deeply divided and militarized world. The mood that the quote encapsulates marks the abandonment of attempts to distinguish just wars from unjust wars, and perhaps even lawful ones from unlawful ones.²¹ The italicized words make any reference to a *causa iusta* irrelevant. The quote has the merit of candor, in the sense that it admits that international law has failed in the main task of any legal system—to maintain peace and order.

Although the legal situation has changed since the days of the League of Nations, the importance of the changes should not be exaggerated. True, eye-catching changes have been made: the Charter of the International Military Tribunal includes the crime of aggression; true also, Art. 2 § 4 of the UN Charter codifies a *lex contra bellum*; the Security Council may, under Art. 39, determine “a breach of the peace or an act of aggression”; and the International Court of Justice may determine whether military activity by a state violates international law.²² However, concerning the powers of the Security Council, the UN Charter makes no mention of considerations of international law or justice. Proposals to include such a reference were resisted by the major powers “on the grounds that this would tie the hands of the Security Council to an undesirable extent and that, in any case, the object of collective measures was to prevent or suppress the use of armed force, and not to achieve a [just] settlement.”²³ Hence, with a slight exaggeration one might say that, by offering both warring parties an identical legal position, the applicability of the laws of war has become a matter of a legal technicality, rather than a matter of justice.

§ 2.4 The position of right intent in *ius in bello*

Well-known are the words of Augustine: “. . . the real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust for power.”²⁴ Reconciling early Christian pacifism

by Brierly, “International Law and the Resort to Armed Force,” *Cambridge Law Journal* 4 (1932), 308 (emphasis added). See also: von Elbe, *supra* note 2, p. 684–685; Kunz, *supra* note 1, p. 116.

21. Brierly, *ibid.*

22. ICJ Rep. (1986), *Military Activities in and Against Nicaragua* (Nicaragua vs. United States).

23. Goodrich, Hambro, and Simons, *supra* note 3, at p. 28 and 44; Simma *et al*, *supra* note 1, p. 1240–1241 and 1245–1246.

24. Augustine, *Contra Faustum*, XXII, 74; Roland Kany, “Augustine’s Theology of Peace and the Beginning of Christian Just War Theory,” in Heinz–Gerhard Justenhoven and Wil-

with the necessity of the state to defend itself against an external attack, Augustine argued that violence in defense of one's loved ones or comrades-in-arms is justified.²⁵ Augustine does not differentiate between *ius ad bellum* and *ius in bello*; judging by his choice of words, he appears to think of both.

Right intent is a criterion pertinent to both *ius ad bellum* as well as *ius in bello*, even though it is usually listed as part of the *ad bellum* chapter rather than the *in bello* chapter. According to Syse and Reichberg, "right intention should govern both the decision to resort to armed force (*ius ad bellum*) and the conduct of war itself (*ius in bello*)." They offer two reasons. "First, if participation in war is to have an ethical basis, it is necessary that effective coordination be maintained between the political aim (to oppose grave injustice, to achieve a fair and lasting peace) and whatever means are used to achieve that aim. . . . Right intention is relevant in a *second* manner, insofar as it ought to inform the inward disposition (*affectus*) of those engaged in the war effort. Hatred of the enemy and desire for sheer revenge were deemed wholly impermissible, even in times of war."²⁶ A twelfth-century author, Alexander of Hales, joined these two aspects of just war teachings and called the former *iustus affectus* and the latter *debita intentio*.²⁷

The right intent could justify as well as limit recourse to war (*ad bellum*); by the same token, it held sway over conduct during war (*in bello*).²⁸ One author writes that "[I]t was right intention that enabled belligerents to fulfill the manifold requirements of a just war. In this way, the rules of war were made dependent on the virtues of war. The moral psychology of the just warrior was not to be taken for granted. What did tend to be taken for granted were the principles themselves (particularly the principles of what later came to be called *ius in bello*). The reason for this seems clear. With *right intention* in place, the other criteria could take care of themselves. In its absence, no amount of moral deliberation could prevent a descent into the moral abyss of war."²⁹ However, technical developments—the invention of gunpowder in particular—made the development of articulate rules necessary.

liam A. Barbieri (eds), *From Just War to Modern Peace Ethics* (Berlin/Boston, 2012), 44.

25. Coppieters and Kashnikov, *supra* note 8, p. 64.

26. Henrik Syse and Gregory Reichberg, *Ethics, Nationalism and Just War: Medieval and Contemporary Perspectives* (Washington, DC, 2007), 206.

27. *Ibid.*, p. 206n.

28. J. Daryl Charles, "Framing the Issues in Moral Terms I: Applying the Just War Tradition," in James Turner Johnson and Eric D. Patterson (eds), *The Ashgate Companion to Military Ethics* (Farnham, 2015), 122 *et seq.*

29. Anthony Coates, "Culture, the Enemy and the Moral Restraint of War," in Richard Sorabji and David Rodin, *The Ethics of War. Shared Problems and Different Traditions* (Ashgate, 2005), 215.

De Vitoria referred specifically to military operations when discussing the doctrine of double effect. Well-known is his example of the enemy fortress which needs to be stormed at the risk of some civilians inside. The civilians are then a sad, but justifiable loss in view of the larger evil which has to be confronted.³⁰ Thus, De Vitoria raised a question which modern lawyers call “collateral damage.” The criterion of right intent was more limited in De Vitoria’s view than in Aquinas’ view. De Vitoria transformed Aquinas’ criterion of right intent into the requirement “not to harm out of greed.”³¹ Effectively, De Vitoria reduced the criterion of right intent to “. . . what Suarez and other authors in the sixteenth century were to call *debitus modus*, the right manner of waging war, the limit not to be exceeded.”³² Suarez’ analysis of just war was conducted *in foro externo* and had a legal flavor to it.³³ Under the concept of the *debitus modus*, warfare was mainly limited to lawful means and methods.³⁴ Justenhoven observes that, given the brutal behavior of Spanish conquistadores in South America, it seemed

...obvious, that the sixteenth-century soldiers requested a more specific advice than to have the right intention in waging a just war. The issue at stake was to know precisely of how to act externally when trying to have the right intention. The reference to the right intention as such seemed no longer enough in a time that produced a number of new ethical questions of the conduct of war.³⁵

30. Francisco de Vitoria, *De Indis et de Iure Belli Relectiones*, partially reproduced in David Kinsella & Craig L. Carr, *The Morality of War—a Reader* (Lynne Rienner, 2007), 76. Howard M. Hensel, *The Prism of Just War: Asian and Western Perspectives on the Legitimate Use of Military Force* (London/New York, 2016), 59.

31. Francisco de Vitoria, quoted by Heinz-Gerhard Justenhoven, “Francisco de Vitoria: Just War as a Defence of International Law,” in Justenhoven and Barbieri, *supra* note 24, p. 134; Alex J. Bellamy, *Just Wars. From Cicero to Iraq* (Cambridge, 2006) 50 *et seq.* Anthony Pagden, “Conquest and the Just War: the ‘School of Salamanca’ and the ‘Affair of the Indies’” in Sankar Muthu (ed), *Empire and Modern Political Thought* (Cambridge University Press, 2012), 34 *et seq.*

32. Gregory Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War. Classic and Contemporary Readings* (Blackwell, 2006), 323 and 360; Peter Hagggenmacher, “Just War and Regular War in Sixteenth Century Spanish doctrine,” *IRRC*, no. 290, 1992, 441; Robert Kolb, “Origin of the Twin Terms *Ius ad Bellum/Ius in Bello*,” *IRRC*, no. 320, 1997; Wolfgang Huber, Hans Richard-Reuter: *Friedensethik* (Kohlhammer, 1990), 65 and 80; Markus Kremer, *Den Frieden verantworten: politische Ethik bei Francisco Suarez* (Kohlhammer, 2008), 223 *et seq.*

33. Nussbaum, *supra* note 2, p. 462.

34. Suarez, quoted by Hensel, *supra* note 30, p. 59-60.

35. Justenhoven, *supra* note 24, p. 135.

Thus, “on the eve of the sectarian strife that was soon to engulf Europe,”³⁶ the stage was set for the quest for externalized—lawyers would say “objective”—standards. While the Age of Discovery raised—at the *ad bellum* level—fundamental questions about the legitimacy of conquest, the invention of gun powder, the introduction of muskets and canon, raised—at the *in bello* level—new questions concerning proportionality and distinction. Is it proportional to use muskets against an enemy that is only armed with knives and spears? Is the use of canon justified, if one no longer aims at an individual as in the case of a musket, but at a group of individuals where soldiers and civilians are caught up together (which is effectively De Vitoria’s example)? Do the laws of war apply only within one’s own cultural hemisphere—with all its Eurocentric and Christian implications—or do the laws of war also apply in wars with enemies from another cultural background? May any enemy be considered to be barbarian simply because he is a heretic or does not fit the Westphalian conceptual framework? In view of such complicated questions, the generic concept of right intent came in need of elaboration.

Thus, the standards of the just war gradually shifted from theology and ethics to externalized criteria in law. Grotius placed international law on a secular footing despite his frequent references to the Bible. Having emphasized natural law and Man’s ability to reason, Grotius announced that his theory would remain valid even if God did not exist.³⁷ Grotius retorted the Augustinian position on right intent, with its emphasis on the inner disposition of the individual. While Grotius recognizes an “insatiable desire for riches” as an unjust cause of war, such a criterion is, in his view, too subjective; the relations between states should be based on objectified criteria.

Nonetheless, it would be as late as the nineteenth century that a codified *ius in bello* would appear. Given the strict separation of *ius ad bellum* from *ius in bello*, the criterion of right intent was relegated, probably by default rather than design, to *ius ad bellum*. From the nineteenth century onwards, codified documents concerning *ius in bello* are virtually silent on the right intent.³⁸

The drafters of the *Hague Regulations on Warfare on Land* of 1899 and 1907 admit that they have not been able to agree on regulations “covering all the circumstances which arise in practice.” Therefore, they conclude that, in the absence of a specific legal provision, unforeseen cases should

36. Reichberg, Syse and Begby, *supra* note 32, p. 290.

37. Hugo Grotius, *De iure belli ac pacis*, prologomena XI; Nussbaum, *supra* note 2, p. 466.

38. *Supra* notes 25 and 26; Wehberg, *supra* note 1, p. 26; Nussbaum, *ibid*.

not “be left to the *arbitrary* judgement of military commanders” (emphasis added).³⁹ This is a remarkable statement. Of course, moral lapses occur in the heat of battle, but I am not aware any other profession whereby it is enshrined in law that the entire profession is presumed to be arbitrary. It seems as if right intent has never existed.

The drafters of the *Hague Regulations* also decided that unforeseen circumstances ought not to be relegated to a normative void. The Russian diplomat Martens drafted a clause—known today as the Martens clause—which reads that in cases where the laws of war are silent, soldiers take into account “...the principles of international law as they may result from the usages established by civilised nations, the laws of humanity and the requirements of the public conscience.” Again, the choice of words is interesting—right intent is not mentioned. What it does mention as its primary source, are the “usages established by civilised nations.” It needs the eye of the lawyer to notice the point: the quote refers to customary international law—that is to say, the practice of states to behave in a certain way because they believe that they are under a legal obligation to so—the *opinio iuris sive necessitas*. The term “usages established by civilised nations” does not refer to JWT; it does not refer to commanders who have to exercise their best judgement on the battlefield. Thus, right intent has effectively been “codified away.”

§ 2.5 Just War Tradition and Neutrality

It is necessary to briefly discuss a subject which is only infrequently mentioned in the context of JWT, namely the laws of neutrality. Under international law, neutrality designates the legal status of a state which does not participate in the armed conflict which is waged by other states. Neither the term neutrality nor the concept can be traced further back than fifteenth century when the term *stille sitzen* (to sit still) was used.⁴⁰ Neutrality did not fit the logic of JWT, with its emphasis of the struggle of good against evil. In such a seemingly apocalyptic battle, third parties should at the very least offer moral support to the side which possessed the just cause.⁴¹ The practical difficulties with this perspective were obvious. For third states, it was often difficult to know which side possessed the just cause, while it might also be perilous for them to make such a decision if one of the warring parties is considerably more powerful.

39. *Supra* note 12.

40. John Westlake, *International Law. Vol II, War* (1913), 190.

41. Stephen C. Neff, *Law and the War of Nations: A General History* (2005), 75.

Bynkershoek was the first author to decouple the just cause from neutrality. Bynkershoek argued “a neutral has nothing to do with the justice or injustice of war, it is not for him to sit as judge between friends who are at war with each other, and to give or deny more or less to the one or the other.”⁴² Thus, he made an important step toward establishing the laws of neutrality as an independent chapter under the laws of war.

During the nineteenth century—i.e. the century when JWT was fading—the laws of neutrality matured. The right of neutrals was not to be attacked; their key duties were two-fold, firstly to refrain from interfering in the hostilities, and secondly to treat the belligerents on an even-handed basis.

While neutrality became enshrined in international law, its moral praiseworthiness remained debatable. Oppenheim reminds the reader that among the war-tired belligerent peoples of the First World War there was the general feeling that a neutral state was shirking its share of the burden of humanity, while the belligerents did all the dirty work to save civilization from a brutal enemy.⁴³ The perceived low praiseworthiness of neutrality was also due to the fact that the *Hague Regulations* of 1907 did not prohibit commercial enterprises of neutral states from trading with either—or both—belligerents for a handsome profit. Neutrality became tainted by war profiteering.

Neutrality is not necessarily synonymous with a lack of integrity. *Stille sitzen* does not require that one should remain callous to the suffering on the battlefield. When Henri Dunant witnessed the Battle of Solferino, *stille sitzen* was not on his mind. Inspired by the suffering of the wounded, he created a metamorphosis of the traditional concept of state neutrality. Relying on the flag of his neutral Switzerland, he entered the battlefield and comforted the wounded. Dunant’s actions and the subsequent establishment of the ICRC added a new meaning to *neutrality*: neutrality was not merely an instrument which served the interests of states. Rather, the dignity of the victims presented itself as a new purpose which neutrality could serve. Symbolically, the flag of the Red Cross is an inversion of the flag of Switzerland. While state neutrality could be seen as an instrument of egoism—albeit perhaps justified egoism because a state may wish to protect itself from attack—medical neutrality could be seen as an instrument of altruism.

42. Bynkershoek, *Questiones juris publici* (1737) p. 62. Oppenheim, *International Law* (6th rev. ed., 1944), 489–490, §§ 287–288; Neff, *supra* note 41, p. 151–152.

43. Oppenheim, *ibid*, p. 498, § 292A.

§ 2.6 Intermediate Conclusion (2)

In sum, traditional *ius in bello* contrasts with modern *ius in bello*:

- today’s *ius in bello* is legal rather than moral or theological;
- today’s *ius in bello* is distinct from *ius ad bellum*;
- it is universally applicable rather than being Eurocentric and limited to Christian knights;
- today, compliance is mainly based on subordination to a sovereign on the basis of a culture of guilt, rather than shame;
- positive *ius in bello* works on the basis of the abstract and secular concept of the legal subject, rather than a naturalistic conception of Man as an image of God;
- whether a combatant has the right (pious) intent is barely relevant; he should obey orders, laws, and treaties;
- the laws of neutrality are separate from the just cause;
- neutrality evolved from a policy instrument of states into an instrument of humanitarian assistance.

§ 3 *Saving Private Ryan*—introduction

The current section focuses on the scene from the film *Saving Private Ryan*, where a squad of American soldiers comes into contact with a French family.⁴⁴ When analyzing the scene, I will seek an answer to my second research question, namely whether either JWT, or the laws of war as they stood at the time, or the criterion of the right intent, might have assisted the squad.

Almost immediately after US forces landed in Normandy on June 6, 1944, the film shows a scene in the offices of the Pentagon, where the American High Command takes cognizance of the fact that all three brothers of Pvt. Ryan have been killed in action. The order is given that the last living brother is to be brought home. Thus, Captain Miller, who is at the beach in Normandy, is ordered to lead a squad and find him. In one of the first liberated villages, buildings have been reduced to rubble. The squad finds a partially demolished house, where one of the outer walls has gone. A French family appears on the second floor: a father, a mother with a baby in her arms, and a little girl; they need to get off the second floor. Suddenly, the father grabs the girl. Near the edge of the floor, he lets her dangle in the air, waiting for one of the American soldiers to climb up the rubble

44. *Supra* note 9, <https://www.youtube.com/watch?v=CGypoXVt31k>; in the novel at p. 144–161. Slight discrepancies exist between the film and the novel.

and take the girl to safety. Private Caparzo decides, against orders, to take the girl from her father's hands.

§ 3.1 The deficiency of the usual criteria to assess the situation

What was the right thing to do for Captain Miller and his men? The moral dilemma for them is whether they should, at the risk of their own lives, get the family down. The dilemma does not relate to the application of violence, even though the enemy is lurking. Since the traditional criteria of *ius in bello*—the criterion of discrimination and the criterion of proportionality—relate to the application of violence, they can only circumstantially inform Captain Miller.

Other perspectives do apply, including the legal perspective. At the level of national law: Captain Miller's orders do not deal with humanitarian assistance, nor do they allow him to get distracted by all kinds of situations, the consequences of which may result in a failure to carry out the objective. In military parlance: the mission comes first. The fact that the surroundings are hostile emphasizes the point. Thus, national military law gives him clear grounds to not to assist the French family. Concerning international law: there did not exist, at the time, a Geneva Convention concerning the protection of civilians which required him to render assistance. In conclusion, both national and international law offer Captain Miller safe legal grounds if he would order the squad to move on.

Clear as the legal case may be, it does not bring me to a conclusion. At issue is not the question, What is the lawful thing to do? At issue is the question, What is the right thing to do?

JWT hardly paid attention to humanitarian assistance. Medieval thought was little concerned about the conduct during war, other than that civilians may not be attacked. The criterion of the right intent, as it is handed down from history, is both too limited in scope and too vague (as I will demonstrate below) to guide Captain Miller—a point which is reminiscent of the views of Spanish scholasticists like De Vitoria and Suarez. However, the preference of De Vitoria and Suarez to reduce the *recta intentio* to the *debitus modus* is not of much assistance either.

§ 3.2 The 'Morality of Decency' vs. the 'Morality of War'

Seemingly, the dilemma presents itself in a form that is archetypical for warfare—the clash between the necessity to defeat the enemy and humani-

tarian considerations. The spokesman for humanitarian considerations is Private Caparzo. With the girl in his hands, he says, “She reminds me of my niece, sir.” He emphasizes the psychological proximity of the person in need. He reminds us of the fact that he has a personal life. He is not only an infantryman; he is a brother, an uncle, an Italian American, and a guy from Chicago who is able to show tenderness in contrast to his usual hard-boiled posture. The moral framework of his personal life, as an uncle to his niece, is taking precedence over his professional life—the latter being construed around a utilitarian perspective of his role as an infantryman who needs to win battles. Inspired by his private moral framework, he appeals to common decency.

Captain Miller is the spokesman for the opposite perspective. In the book and film, he is largely depicted as a decent person, struggling to combine decency with his responsibility as a commanding officer.⁴⁵ Only much later in the book do we learn that he is a school teacher from Pennsylvania and a coach of a football team who has a wife and kids.⁴⁶ During the sniper scene however, his private being remains invisible; he adheres strictly to his role as commanding officer. Operational considerations are at the forefront of his mind.

The contrast between the opposing views is emphasized by what happens next. Climbing down the rubble, Private Caparzo says: “Captain, let’s do the decent thing. Let’s at least take these kids down the road to the next town.”⁴⁷ Moments later, he gets killed by the sniper. In his analysis of the film, Prior contrasts the morality of decency with the morality of war: “. . . the central contrast is between home and the battlefield. Home, which is interestingly enough the milieu of the individual morality of the soldier as a civilian, is the place in which we also find the morality of decency.”⁴⁸ Prior describes this as morality *simpliciter*: “[i]ts fundamental concept is a universal respect for all human beings as moral agents.” Captain Miller gets caught on the horns of the dilemma, casting any implicit reference to right intent overboard: “We aren’t here to do the decent thing. We are here to follow orders.” One does not have to sympathize with his emotions to recognize that he is, in an operational sense, correct. After Private Caparzo

45. William J. Prior, “‘We Aren’t Here to Do the Decent Thing’: *Saving Private Ryan* and the Morality of War,” in *US Army War College Quarterly*, Vol. XXX, Autumn 2000, no. 3.

46. Collins, *supra* note 7, p. 245 and 247.

47. *Ibid*, 148.

48. Prior, *supra* note 45.

gets shot—effectively for being decent—Captain Miller snarls: “That’s why we can’t take children with us.”

Is Private Caparzo representing the just war criterion of right intent when he refers to “the decent thing to do”? Or is he naïve? Or both? Is film director Spielberg trying to tell us that being decent in times of war is going to get you killed? In other words, is the morality of decency irreconcilable with the morality of war? If true, does this mean that the conclusion that the criterion of right intent places an undue burden on combatants is inescapable? But if JWT and humanitarian law forego the criterion of right intent—and, by implication, forego considerations of justice—what does that mean for the two criteria of *ius in bello*—the criteria of discrimination and of proportionality? What justifies the very existence of these two criteria, if considerations of justice are discarded? How can this be reconciled with the judgement of the International Court of Justice⁴⁹ that “elementary considerations of humanity” remain “exacting” in times of war?

When I discuss this scene with a class of military officers, they show their impatience with the lack of professionalism displayed by Private Caparzo. Although they understand why Private Caparzo sympathizes with the French family, they view this as no excuse to forget professional considerations. If Captain Miller and his men were to save the family—and my students emphasize “if”—then the first thing to do is ensure that the enemy is not lurking. A house-to-house search should be conducted first. After it has become clear that there is no enemy and perimeter security has been established, then a soldier could move forward to aid the family. By acting on impulse, Private Caparzo takes unilateral risks. This is contrary to military ethos. Warfare is quintessentially a group activity. “Everyone is part of the team, and the effectiveness of the whole depends on each individual . . . playing his or her full part.”⁵⁰

It is not inhumane to check the surroundings first, and *then* the captain can decide. Now, various soldiers shout, the captain loses control and chaos reigns, even before the sniper fires his shot. Right intent—taken here in the meaning of a willingness to consider the plight of the French family—is not some innocent, idealistic consideration detached from operational reality; it must be embedded in considerations of proficiency. My classes conclude

49. *Supra* note 4, p. 22.

50. Timothy Cross, “Military Values and Traditions,” in Kevin M. Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books, 1993), 94.

that Private Caparzo only demonstrates right intent in the naïve meaning of the word, but not in any militarily proficient sense.

§ 3.3 The Humanitarian Aspects of the Scene

Throughout the film, Miller’s men have difficulty with the fact that a squad of eight has to rescue one man who does not belong to their squad. Why should Ryan’s mother deserve such a treatment? All members of the squad have mothers, don’t they?⁵¹ Thus, the typical aspect of small-unit morality is played out, the “band of brothers,” the bond between a soldier and his immediate colleagues.

The decision to bring home Private Ryan is a humanitarian argument, but only to a limited extent. It revolves around one fellow American soldier. The encounter with the French family is arguably the most important interruption of the squad’s mission. Unexpectedly, Captain Miller and his men have to consider expanding their humanitarian responsibilities to a universal level. This lies uncomfortably with them. The arguments in favor of assisting the French family can be various: it may be psychological proximity, or Christian love for one’s fellow human being (Private Caparzo appears to offer a rosary to the girl);⁵² it may also be the concept of humanity which underpins the Red Cross.

Fischer refers to the novel *The Brothers Karamazov* by Dostoyevski, where the younger brother of father Zossima remarks that “everybody of us is responsible for everyone else, and I most of all.”⁵³ Appealing as this argument may be at first sight, it easily turns against itself. If one feels responsible for rescuing person A in situation A, then one must also feel responsible for rescuing person B in situation B, for person C in situation C . . . , etc. In the context of humanitarian emergencies the problem is one of focus: how one can focus on a given mission, or on a given priority, without being distracted by other urgent situations? This is a considerable stress factor for both military and humanitarian personnel alike, since it inevitably implies that victims are left to die. The humanitarian argument, important as it is, cannot be, by itself, sufficient to represent the right intent.

51. Prior, *supra* note 45.

52. Avery Cardinal Dulles, S.J., “Christians and Humanitarian Action,” in Cahill, *supra* note p. 50, 92–93.

53. David Fisher, “Humanitarian Intervention” in Charles Reed and David Ryall, *The Price of Peace: Just War in the Twenty-First Century* (Cambridge University Press, 2007), 110.

§ 3.4 Captain Miller's Consequentialism vs. Sergeant Horvath's Anthropological Perspective

That evening, with the sniper incident behind him, Captain Miller reflects on what happened in an empty church. In an unusually private conversation with Sergeant Horvath, both wrestle with the responsibility of a commanding officer. "Every time you get one of your boys killed,' Miller said softly, almost prayerfully, 'you tell yourself you just saved the lives of two, three, ten, maybe a hundred other men and boys. (...) You know how many men I've lost under my command?'"⁵⁴ When the Sergeant doesn't know the answer, Miller continues: "Caparzo made ninety-four. So, hell that means I have probably saved the lives of ten times that many. . . . See, it's that simple. Just do the math—it lets you choose the mission over the man, every time." With these words, Captain Miller sketches the dilemma of a commanding officer. While a commanding officer is responsible for the well-being of his men, he is required to send them into harm's way. The calculus is one of utility, based on military necessity. The interests of the individual become subordinate to the interests of the squad, company, or even the nation. It goes without saying that this calculus is uncomfortable in a democracy, which emphasizes individual freedom.

"'Except this time,' the Sergeant said, 'the mission is the man.'"⁵⁵ The response to Miller's words come as a surprise. The calculus of consequentialism is curtailed by considerations of a humanitarian, almost anthropological nature. Soldiers are no longer pawns on a chessboard, to be moved forward and backward as military expediency dictates. Ryan does not merely possess a functional value as an infantryman; Ryan is a human being with dignity in his own right.

Captain Miller would soon swing round to the Sergeant's point of view—that is, when Captain Miller and Private Ryan finally meet face to face at the bridge. There, Ryan not only learns that he has lost all three of his brothers, but also that two of Captain Miller's men have died in the effort to find him. Ryan refuses to leave the bridge and to return to his mother. Captain Miller does not press the order. The world seems peaceful to him, now: "Sergeant, we have crossed some invisible boundary."⁵⁶ The Sergeant responds in unpolished language: "... someday we might look back on this and figure savin' Private Ryan was the one decent thing we were able to

54. Collins, *supra* note 7, p. 181.

55. *Ibid.*, p. 182.

56. *Ibid.*, p. 261.

pull out of this goddamn shithole of a war.”⁵⁷ The morality of decency is raised again—and again by relating the professional role of a soldier to his civilian life. Private Ryan has also become a member of the band of brothers to which Sergeant Horvath and Captain Miller belong.

The strength of this brotherhood takes on an almost transcendental nature by what follows. When Miller is dying on the bridge from his wounds, he looks at the Private Ryan he had come to save.

“‘Earn this,’ Miller said softly.

‘Sir?’ Ryan asked.

Now the captain repeated it firmly, an order: ‘Earn this.’”⁵⁸

The captain’s last words emphasize the importance of meritorious and purposeful conduct—not consequentialism. His words are not lost on Private Ryan. In the brilliant epilogue, we see Ryan, retired, walking through St. Laurent Military Graveyard, in Normandy, followed by his wife, children, and grandchildren. Judging by their faces, his family struggles to understand. He is in tears, knowing that his visit to the graveyard will be a last farewell to a colleague whom he honors so much. At the grave, Ryan speaks to his Captain: “Not a day goes by I don’t think about what happened on that bridge. About what we did, and what you said to me. I just want you to know . . . I’ve tried. Tried to live my life the best I could. I hope that’s enough. I didn’t invent anything. I didn’t cure any diseases. I worked on a farm. I lived a life. I only hope, in your eyes at least, I earned what you did for me.”⁵⁹

With these words, it becomes apparent that Ryan, in his subsequent civilian life, interpreted the command “Earn it” as more than a mere invocation to live a meritorious life. His words demonstrate his feelings of being indebted, of showing right intent. He feels he owes his life, his happiness, and the existence of his entire family to someone he barely knew. In being indebted to a colleague, he finds his motivation and purpose in his civilian life. In the film there is not just a contrast between the civilian and military perspectives—they also reinforce one another. His biography has become inextricably intertwined with that of Captain Miller, in a way which he can not even explain to his wife. Nonetheless, he needs her to answer the question which he is actually asking Captain Miller: “Alice . . . have I lived a good life? Am I a good man?”⁶⁰ The question is immensely

57. *Ibid*, p. 262.

58. *Ibid*, p. 311.

59. *Ibid*, 315–316 and <https://www.youtube.com/watch?v=IZgoufN99n8>.

60. *Ibid*, p. 316.

important to him; he desperately needs to know whether he has “earned it.” When her answer is affirmative, he can give Captain Miller his final salute.

§ 4 Conclusions

The modern international order is primarily based on the concept of security—not justice. During the nineteenth century, the concept of *bellum iustum* came into disrepute. Under the UN Charter, it was replaced by the concept of *bellum legale*. For the first chapter of the JWT, the *ius ad bellum*, the coming into effect of the UN Charter meant that certain criteria became redundant, while others were reinterpreted.

For *ius in bello*, the developments were different. It too came under the aegis of legal positivism. It became a separate chapter of the laws of war, coming on a par with *ius ad bellum*. The criterion of right intent evaporated. The fading of JWT made it possible for the laws of neutrality to emerge.

In *Saving Private Ryan* the discussion about “the decent thing” appears in instances when the rescue of a human life is at stake—the little girl and Private Ryan himself. I assume that Private Caparzo is not familiar with the terminology of JWT; but when he refers to “the decent thing to do” he seems to refer unwittingly to right intent. His fate demonstrates that the “morality of decency” and the “morality of war” clash.

Neither the laws of war, nor JWT, nor the concept of right intent can sufficiently inform Captain Miller. However, while empathy, humanitarianism and respect for dignity are necessary and arguably new preconditions of the right intent, they are, on their own, insufficient and counterproductive. They will have to be embedded in considerations of military proficiency—if naiveté is to be avoided.

Finally—and at a higher level of abstraction—right intent seems to refer to considerations of an anthropological and perhaps transcendental nature: it curtails the calculus of a commanding officer which prioritizes the mission over the man, while it refers to a sense of purpose and indebtedness, which transcends the distinction between the military and the civilian life of a soldier. As the epilogue shows, there is no “case” of either Private Caparzo, or of Captain Miller or, for that matter, of Private Ryan. Cases can be closed and shelved. The epilogue reveals a narrative: the biographies of three men who tried to do their humanly fallible best amidst a hellish war have become inextricably intertwined.

Flexible to the extreme, the concept of right intent is beginning to receive a new conceptual content. In that renewed sense, it remains as valid as ever.