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Ad de Bruijne | Gerard den Hertog (Eds.)

The Present "Just Peace / Just War" Debate

Two Discussions or One?

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Introduction

Ad de Bruijne & Gerard den Hertog

In our times, problems of peace and war are encountered in new constellations with undiminished intensity. The close of the Cold War, heralded by the 1989 fall of the Berlin wall, brought a period of relative peace, at least from a Western perspective. Globally, many larger and smaller armed conflicts continued. Soon, serious, armed ethnic conflicts arose in the Balkan and Afghanistan, whereas Iraq saw military interventions on a scale so large we speak of the Gulf *War*. Although acts of combat were limited to the respective regions, they in part caused the rise of Islamic terrorism. The terrorist attacks on the New York Twin Towers on 11 September 2001 radically changed the world and placed the problems of war and violence on the map again, even more so as these suicide bombings were no one-off occurrences. Europe, too, has seen bloody attacks in Madrid, London, Manchester, Paris and Berlin, contributing to a changing popular mentality that makes itself known in the rise of anti-Islam parties and the call for security.

However, what we experience and fear is not *war* in the characteristic sense of the word, but terrorism. Civil wars aside, wars occur at our borders. The movements that may be reckoned part of Islamic terrorism, are networks that cross borders and often have power bases in unstable states, seriously complicating efforts to oppose them. Moreover, a revived nationalism and a continuing tribalism provide room to local warlords and leads to an increase in territorial conflicts that drag on for years without any prospect of a lasting solution. The consequence seems to be that the typical concept of *war* gives place to a new type of war, which the global community is presently at a loss dealing with. In the light of these developments it seems obvious to grant the international community and international law a larger role. But in parts of the world these categories are seen as strongly influenced by the West and thus not truly impartial. At the same

time, the international community is often really powerless, because proposals for condemnation and intervention by the UN often run aground in the Security Council as a result of the current balance of power, the cooling down of East-West relations and the rise of China. Additionally, the umbrella of a nuclear threat causes deeds of aggression to go unanswered, as can be observed in the occupation and annexation of Crimea, the continuing struggle in the eastern parts of Ukraine, and the Chinese annexation of the Nanhai Islands in the South China Sea. That armed conflicts and wars as they occur today are nearly impossible to combat with military means is not due merely to the silent threat of nuclear escalation. The rapid development and use of new technologies such as drones change these regional armed conflicts in character, too, as more and more can be done from a distance without risking loss of life among the ranks. Oliver O'Donovan wrote of the twentieth century that it was "terrorized" by weapons technology, "running ahead of moral, political and legal control."[1] This holds *a fortiori* for the first decennia of the twenty-first century.

These developments pose far-reaching questions to Western society, that partly concern practical, urgent matters. How to react to the threat of suicide attack? How to treat those that were captured during counter-terrorism operations? Besides those a renewed reflection on the ethics of war and peace comes into play. We should ask whether the concept of "Just War" is still relevant in the light of the developments mentioned. In both the Anglo-Saxon and German language areas these questions are posed again among Christian ethicists, and after mainstream thought, taught by the Second World War and the ensuing Cold War had in past decennia landed on a "Just Peace" approach, voices now arise arguing for the re-evaluation of the ancient concept of 'Just War'. At the same time, we note that there is little by way of exchange between these circuits where discourse takes place. In 2013 a study of Nigel Biggar, *In Defence of War*, appeared, to which both a 2014 issue of *Soundings*[2] and a 2015 theme issue of *Studies in Christian Ethics*[3], were dedicated, without any contribution from or addressing of ethicists from the German-speaking world. Also in 2015 a special issue of *Evangelische Theologie* appeared with the tile: "Gerechter Krieg – gerechter Friede? Gegenwärtige Heraus-

1 Oliver O'Donovan, *The Just War Revisited*, Cambridge 2003, 93: "Weapons technology has terrorised the twentieth century by running ahead of moral, politicial and legal control."

2 *Soundings: An Interdiscpinary Journal* Vol. 97 (2014) Number 2.

3 *Studies in Christian Ethics* Vol. 28 (2015) Number 3.

forderungen christlicher Friedensethik,"[4] which completely bypassed Biggar's evocative book and the discussion it provoked.

In light of this situation the joint research group of the theological universities of Apeldoorn and Kampen, "Reformed Traditions in Secular Europe," organised a conference on June 24th, 2016, in Apeldoorn, where two prominent representatives of both language areas were invited as keynote speakers: Nigel Biggar and Marco Hofheinz. The third keynote speaker was dr. Ted van Baarda, law scholar and *Executive Director* of the *International Society for Military Ethics in Europe* (EuroISME).

On the day of the conference some shorter papers were also presented, which have been included in this volume, with five other articles that appeared previously in another language or were written for this occasion. We are happy to note that Wolfgang Lienemann and Hans G. Ulrich, two of the foremost German-speaking Christian ethicists in this area of study, were willing to contribute to this volume, along with Guido de Graaff, who teaches in London and wrote a PhD on the influence of the friendship between bishop Bell of Chichester and Dietrich Bonhoeffer on their striving for peace.[5] Together with Biggar and Marco Hofheinz these ethicists caused the start of a joint discussion that begins in this volume.

The first set of articles is dedicated to "The present situation and debate". Dr. Ted van Baarda as a military historian writes on the question: "Can soldiers do the decent thing in times of war?", subtitled "Just War, the right intent and Saving Private Ryan." Prof. Dr. Wolfgang Lienemann summarized the current discourse on the theme Just Peace / Just War: "International Peace as Legal Order. On the recent debate on 'Just Wars' and the ethics of a 'Just Peace'."

The second set, "The ethical approach of peace and war reconsidered," begins with Prof. Dr. Nigel Biggar's lecture as given at the conference: "In defense of Just War: Christian Tradition, Controversies, and Cases," where he further develops the ideas expressed in his book *In Defence of War*. Subsequently Prof. Dr. Gerard den Hertog examines how Nigel Biggar came to a new approach to Just war theory through his engagement with reconciliation after conflicts, and how this point of view influences and also complicates the result: "Can sinners make a just war? Some reflections on Nigel Biggar's *In Defence of War.*" Then Prof. Dr. Marco Hofheinz, who wrote a 2012 study on "Johannes Calvins theologische

4 *Evangelische Theologie* Vol. 75 (2015) Number 4.

5 Guido de Graaff, *Politics in Friendship: A Theological Accoun*t, London 2014.

Friedensethik"[6] and two years later his *Habilitationsschrift* "*Er ist unser Friede". Karl Barths christologische Grundlegung der Friedensethik im Gespräch mit John Howard Yoder*[7], elaborates on the theme: "How to Intervene? The Vision of Just Peace and our Responsibility to Protect," where he shows himself a nuanced defender of the Just Peace tradition. This cluster of articles is concluded by a contribution by Dr. Guido de Graaf, who discusses the preeminent English Christian ethicist Oliver O'Donovan en his approach to questions of war and peace, from the point of view that was central to his dissertation: "Friends as Servants of Reconciliation: Expanding O'Donovan's 'Evangelical Counter-Praxis'." Prof. Dr. Hans G. Ulrich traces how peace work can take shape in concrete praxis and what role Christian witnessing can play: "Social practices of peace – against the loss of reality. The Christian witness as a critical resource for peace-making and peacebuilding."

The third set, titled: "Moral responsibility of and ethical assistance to the Soldier," contains contributions that look at soldiers. Army chaplain Drs. Jan Peter van Bruggen explores "The Moral Responsibility of the Soldier in Contemporary Just War Theory." Dr. Pieter Vos writes on aftercare for soldiers who served in peace missions and were confronted with ethical conflicts: "Peace after the Mission. Spiritual Care and Ethical Assistance to Veterans Experiencing Moral Guilt."

The fourth and final set is dedicated to the "Christian response to the theory of Just War." Dr. Greetje Witte-Rang, who works for the society for Church and Peace, draws lessons from the past of Dutch Christian pacifism: "Christian Pacifists reflections on the Theory of Just War." Prof. Dr. Ad de Bruijne questions how Christians possibly can fight one another in war and what reflection on that question yields for thinking on war and peace: "Christians fighting Christians in Just Wars".

[6] Marco Hofheinz, *Johannes Calvins theologische Friedensethik*, (Theologie und Frieden Bd. 41), Stuttgart 2012.

[7] Marco Hofheinz, *"Er ist unser Friede". Karl Barths christologische Grundlegung der Friedensethik im Gespräch mit John Howard Yoder*, (Forschungen zur systematischen und ökumenischen Theologie, Band 144), Göttingen 2014.

The present situation and debate

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 with theologians and ethicists is a slightly hazardous undertaking. Adherents of legal positivism – which represents mainstream legal thinking – will argue that Just War Tradition 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 Just War Tradition 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 Just War Tradition 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

[1] Brunno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (Eds.), *The Charter of the United Nations – a commentary. Volume I,* Oxford 2012, 204; J. Kunz, "Bellum iustum and bellum legale", *American Journal of International Law,* vol. 45 (1951), 529 f; Yoram Dinstein, *War, aggression and self-defense,* Cambridge [5]2011, 69, § 183; F. Berber, *Lehrbuch des Völkerrechts, Vol. 2: Kriegsrecht,* Munich [2]1969, 26 f and 30 ff; H. Wehberg, *Krieg und Eroberung im Wandel des Völkerrechts,* Frankfurt a. M. 1953, 25 f.

[2] Benedetto Conforti, "The doctrine of 'just war' and contemporary international law", in: *International Yearbook of International Law,* vol. 3, 2002, 3 f; Joachim von Elbe, "The evolution of the concept of just war in international law", *American Journal of International Law,* vol. 33, 1939, 665 f; Ian Brownlie, *International law and the use of force by states,* Oxford 1963, 20 f; A. Nussbaum, "Just war – a legal concept?", *Michigan Law Review,* Vol. 42 (1943–1944), 453 ff, in particular 476 f.

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 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 recognises 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 base-line remains the *lex contra bellum*.[5] This stands in contrast to the nineteenth century when the demise of Just War Tradition 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 Just War Tradition 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 Just War Tradition, reinforcing an on-going process of secularisation in which just intent has become virtually non-existent 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 Just War Tradition, nor of the modern laws of war are helpful in giving sub-

3 Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations. Commentary and documents*, New York & London 1969, 28.

4 International Court of Justice, ICJ Rep. 1946, *Corfu Channel case,* (Albania *vs*. United Kingdom), at p. 35; Simma *et al, supra,* footnote 1, p. 203 *et seq.;* Ian Brownlie, *International law and the use of force by states,* Oxford 1963, 116.

5 Kunz, "Bellum iustum and bellum legale", 116.

6 Dinstein, *War, aggression and self-defense,* 78 at § 207–208.

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

stance to right intent in this case; other considerations are – 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 Just War Tradition

The laws of war comprise of two main chapters, *ius ad bellum* and *ius in bello.* The former concerns the question under which conditions a right to go to war exists; the latter discusses the question 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 defence 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; 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 non-combatants 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* which was the most influenced by the entry into force of the UN Charter; its key criteria were made redundant or were at least drastically re-interpreted. 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 a *ius contra bellum,* it stands to reason to conclude that an intervention without the

[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*, Westport 1996, 256.

framework of the UN Charter is in violation of international law. Since the Kosovo crisis, this conclusion has come in for 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 and moral arguments which lawyers presumed to have become redundant since the establishment of the UN, re-appeared – 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-defence, 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-defence, 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 to which is referred 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 authorise 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, mas-

9 Conforti, "The doctrine of 'just war' and contemporary international law"; 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 ff; Simon Chesterman *Just War or Just Peace?*, New York 2001, 213; Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", in: *The American Journal of International Law* Vol. 93, No. 4 (1999), 32. *Vanderbilt Journal of Transnational Law,* 1231 (1999) and *American Journal of International Law,* Vol. 93 (1999), 834, 836; Christine Gray, *International law and the use of force*, Oxford ^{3}2008, 45.

11 Goodrich, Hambro and Simons, *Charter of the United Nations*, 27; Dinstein, *War, aggression and self-defense*, 87, § 234.

sive 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 emphasise 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 Just War Tradition, *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 to comfort to 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 co-exist 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 responsi-

[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, 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*, London / New York 1965; Robert C. Stacey, "The age of chivalry", in: Michael Howard, George J. Andreopou-

bility 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 Nuremburg, 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 500 substantive provisions; a number which stands in contrast to the two criteria of Just War Tradition.

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 of the question 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 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]

los and Mark R. Shulman (Eds), *The laws of war. Constraints on warfare in the Western world,* New Haven 1994, 29.

15 Website of the ICRC 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 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.

18 Berber, *Lehrbuch des Völkerrechts, Vol. 2: Kriegsrecht,* 32.

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 which 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]

The quote will not satisfy the reader's sense of justice; it is but a sobering acknowledgement of *Realpolitik* in a deeply divided and militarised world. The mood which 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 italicised words make any reference to a *causa iusta* irrelevant. The quote has the merit of candour, in the sense that it admits that international law has failed in the main task of any legal system – that is 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

19 L. Oppenheim, *International law. A treatise, vol. II, Disputes, war and neutrality,* (7th ed. H. Lauterpacht ed.), London / New York 1952, 218, § 218.

20 W. E. Hall, *International law*, Oxford 1880, 52, quoted partially J. L. by Brierly, "International law and the resort to armed force", *Cambridge Law Journal*, vol. 4, 1932, 308 (emphasis added). See also: von Elbe, "The evolution of the concept of just war in international law", 684f; Kunz, "Bellum iustum and bellum legale", 116.

21 Brierly, "International law and the resort to armed force", 308.

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 – TvB] 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 with the necessity of the state to defend itself against an external attack, Augustine argued that violence in defence 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

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

23 Goodrich, Hambro and Simons, *Charter of the United Nations*, 28 and 44; Simma, Khan, Nolte and Paulus (Eds.), *The Charter of the United Nations – a commentary. Volume I*, 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 William A Barbieri (Eds), *From just war to modern peace ethics,* Berlin/Boston 2012, 44.

25 Coppieters and Fotion (Eds.), *Moral constraints on war,* 64.

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 12th 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.

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

26 Henrik Syse and Gregory Reichberg, *Ethics, nationalism and just war: medieval and contemporary perspectives,* Washington D.C. 2007, 206.

27 Syse and Reichberg, *Ethics, nationalism and just war*, 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, 122ff.

29 Anthony Coates, "Culture, the enemy and the moral restraint of war", in: Richard Sorabji and David Rodin (Eds), *The ethics of war. Shared problems and different traditions,* Aldershot 2005, 215.

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