

DRAFT: NOT TO BE QUOTED WITHOUT APPROVAL.

“JUST WAR AND THE PROTECTION OF HUMAN RIGHTS”

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One of the most striking aspects of the post-September 11th political and military responses, especially in Iraq and Afghanistan, has been the extent to which the popular discussion has taken place within the general categories of just-war thinking. Spurred in part by the interventions of Vatican and other religious officials' messages, we seem to be entering an era when just war theory, declared moribund on numerous occasions in the past, might very well serve as the touchstone for broader considerations of international conflict. With that in mind, it is important that we understand with greater clarity than one typically finds in the public presses what the principles of just war thinking are, and, for our purposes here, how they might be related to the question of human rights and humanitarian conflict.

This paper aims at addressing the full account of the just war theory as articulated in St. Augustine and St. Thomas, and then reflecting on the role that a concern for human rights in the modern context might play within that account of just war. We begin with the presumption that it is proper to focus on the question of rights, and that undoubtedly the modern world, and especially America and Western Europe, is fundamentally concerned with the question of rights. As John P. Hittinger, among many others, has put it, "the moral and political landscape of America today is dominated by a single feature: the discourse of rights."¹ There is no doubt that there indeed has been a "human rights revolution" in the world.

What this paper will attempt to do is provide an outline for just war discourse, drawing on the tradition of Augustine and Aquinas, arguably the two seminal thinkers among the Church Fathers on this topic. We will then raise the issue of how we think about human rights in the context of that just war argument, which really entails thinking more deeply about the larger question of rights themselves.

¹*Liberty, Wisdom, and Grace: Thomism and Democratic Political Theory* (Lanham, MD: Lexington Books, 2002), p. 73.

ST. AUGUSTINE ON JUST WAR

St. Augustine, of course, did not author anything like a treatise on law, or treatise on war and what would constitute just and unjust prosecution of such wars. The reader is then left with culling passages from a wide variety of writings in order to piece together a coherent set of principles that could guide policymakers and analysts in reflecting on the circumstances that would justify military intervention.

It may seem a bit surprising to some readers of Augustine that he should have come to be identified as the substantive originator of the theory of just war, given his clear commitment to the principle of peace. It is from Augustine, for instance, that we inherit some of the most famous description of the desire for peace. In Book XIX of the *City of God*, for example, we find him expounding on the yearning for peace:

The peace of the city is an ordered concord concerning commanding and obeying among the citizens. The peace of the heavenly city is a fellowship perfectly ordered and harmonious, enjoying God and each other in God. The peace of all things is the tranquility of order.²

It is precisely this Augustine, though, who in the same breath speaks of the conditions of just war. Earlier in Book XIX, in the context of his discussion of the troubles that are part of the sum and substance of human life, in the soul, the family, the city and the world, he turns to consider the manner in which imperial rule comes about establishing an order to society, thus reducing the effects of cultural differences between and among peoples. This may in fact be a sign of some improvement in the human condition, he suggests, as it allows for a greater likelihood that people will be able to communicate with each other, but this order and stability has come about only as a result of massive bloodshed and misery. Still, a defense is made of such actions:

They say, however, that the wise man will wage only just wars – as if, mindful that he is human, he would not much rather lament that he is subject to the necessity of waging just wars. If they were not just, he would not be required to wage them, and thus he would be free of the necessity of war. It is the iniquity on the part of the adversary that forces a just war upon the wise man.³

It is true, then, that some wars can be considered just wars, but it is also true that no one should revel in the destruction that such wars bring, or in the corruption that justifies the war.

²Michael W. Tkacz and Douglas Kries, trans., *St. Augustine: Political Writings* (Indianapolis: Hackett Publishing Company, Inc., 1994), p. 154.

³*City of God*, Book XIX, Chapter 7 (*St. Augustine: Political Writings*, p. 149).

It is, in fact, the critique of empire that invites some of Augustine's earlier thoughts on the nature of war and just wars in the *City of God*. In Book IV, at the outset of his analysis of the success of the Roman empire, Augustine argues that empire itself is not a desirable form of government (better that here be a multitude of small republics), and that even when it is justified, it is never something that ought to be sought. As he puts it, this is not something to celebrate:

Let our opponents [the defenders of Roman imperialism] consider the possibility that rejoicing over the extent to their reign is not appropriate for good men. To be sure, the iniquity of those against whom just wars were waged helped the empire to grow, because it surely would have stayed small if its neighbors were peaceful and just and did not, through wrongdoing, provoke war.⁴

The problem in defending the Roman expansion, though, is that it can only have come about through the carrying out of war, and if those wars were justified (and, of course, Augustine does not think that they were), then that could only be because of the presence of human sinfulness.

Waging war and extending the empire by subduing peoples is therefore viewed as happiness by the wicked, but as a necessity by the good. But because it would be worse if wrongdoers dominated those who are more just,⁵ it is not inappropriate to call even this necessity "happiness."

Nevertheless, without doubt it is a better happiness to have concord with a good neighbor than to subjugate a bad one through war.

Here, then, we find Augustine's justification for just war, that the capacity to prevent greater evil on the part of those bent on doing evil might be realized. It is important to notice that his justification for the use of force is something of a negative one, and when he elsewhere outlines with some greater detail the conditions for just war we must bear in mind the qualifications he introduces here.

⁴*City of God* Book IV, Chapter 15 (*St. Augustine: Political Writings*, p. 32).

⁵The question of which side in a war is "more just," rather than simply which side is just, is one of the peculiar – that is, unique – marks of Augustine's consideration of just war; on this point, see, e.g., Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), pp. 20-22.

ST. THOMAS AQUINAS ON JUST WAR

In *Summa Theologica* II-II, Aquinas sets forth what comes to be the standard set of principles for just war theory for centuries to come, in his article “Of War,” discussed under the umbrella heading of the virtue of charity. The reason for including it under the consideration of charity becomes evident when one examines the context and surrounding articles, addressing as they do discord,⁶ contention,⁷ schism,⁸ strife,⁹ sedition,¹⁰ and scandal.¹¹ All these issues concern the health of the community, though most are concerned with establishing harmony in the internal dynamics of society, while war primarily addresses the community’s external relations. All, though, are encompassed within the larger concern for promoting charity in human relations.

⁶II-II.37.

⁷II-II.38.

⁸II-II.39.

⁹II-II.41.

¹⁰II-II.42.

¹¹II-II.43.

Aquinas' discussion of war takes up four articles, taking into consideration whether it is always sinful to wage war, whether it is ever lawful for ecclesiastics to fight, whether it is lawful to lay ambushes in war (that is, to deceive the enemy), and whether it is lawful to fight on holy days.

In response to the first issue, Aquinas lays out the basic principles that guide his just war thinking. The first point is that the war must be declared by the proper authority; no private individual can declare war, or gather people together in the way the legitimate sovereign must in wartime.¹² This principle St. Thomas sets forth as guided by the concern for the common good, what might be considered to be the heart of Aquinas' thinking on social and political matters. In replying to the first objection he raises in this Article, that war is forbidden because of the Lord's admonition that "All that take the sword shall perish with the sword,"¹³ St. Thomas relies on the distinction between seizing the sword in vengeance oneself, and using the sword at the behest of the authority of the legitimate sovereign. In other words, while employing the sword for the private ordering of justice is forbidden, using it under the command of the proper authority ought not bring condemnation or punishment. He concludes the Scriptural analysis by asserting that Christ's statement must be understood metaphorically (or anagogically), such that we see that those who make use of the sword are not necessarily slain with the sword, but they "always perish with their own sword, because, unless they repent, they are punished eternally for their sinful use of the sword."¹⁴ While it may not be the case that those who employ the sword will literally perish by it, it is true that wielding the sword, or power more broadly, in an improper fashion, does violate the divine instruction, and thus merits punishment.

The importance of having the decision to go to war settled upon by the proper authority is a theme central to Aquinas' larger political teaching, as we discover in the opening discussion of law in the "Treatise on Law" in the *Prima Secunda* of the *Summa Theologica*. There, in the context of his introduction to the concept of law proper, St. Thomas gives a definition of law that must be fulfilled by every law, for it to have the authoritative character of law: law is "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."¹⁵ 000

The second principle Aquinas addresses in the discussion of war in Question 40, Article 1, is that just cause must exist for any war to be legitimate. This he describes as follows: "that those who are attacked, should be attacked because they deserve it on account of some fault."¹⁶ The "fault" possessed by the enemy may be varied, and Aquinas suggests here two, taken from Augustine's writings: "refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."

The concern for just cause is connected to the concern for the common good, and is central to Aquinas' response to the second objection he raises, that war is contrary to the Divine precept, as found both in Matthew ("But I say to you not to resist evil"), and in Romans ("Not avenging yourselves, my

¹²See passage in Treatise on Law on authority to make law, not belonging to any individual or head of household.000

¹³Matthew 26:52.

¹⁴II-II.40.1.ad 2.

¹⁵I-II.90.4.corp.; Aquinas has spelled out each of these elements in the previous Articles of Q. 90.

¹⁶II-II.40.1.corp., p. 1354.

dearly beloved, but give place unto wrath").¹⁷ Aquinas' answer to the objection tracks that given in his response to the first objection. Here he suggests that these Scriptural admonitions "should always be borne in readiness of mind," as Augustine indicates, such that we are always prepared to obey them.¹⁸ Nonetheless, he says, "it is necessary sometimes for a man to act otherwise for the common good, or for the good of those with whom he is fighting."¹⁹ Thus, while self-defense as a response to an attack is a position that one might refrain from undertaking, one has to think otherwise when there is a connection between defense of self and either the common good or the particular good of the enemy, who might very well be in need of correction. To this end he again calls upon Augustine, who suggests that it is often necessary to treat people in a manner contrary to their will:

For when we are stripping a man of the lawlessness of sin, it is good for him to be vanquished, since nothing is more hopeless than the happiness of sinners, whence arises a guilty impunity, and an evil will, like an internal enemy.²⁰

It is imperative, then, when considering the justice of war, to consider the condition of the enemy,

¹⁷II-II.40.1.*obj.*2.

¹⁸In *de Sermone Dom. in Monte* 1.19. 000

¹⁹II-II.40.1.*ad* 2.

²⁰*Ibid* (internal quotation from Augustine's Letter to Marcellinus, 138). One of Augustine's more important, and oft-quoted, passages concerning justice and injustice in political rule, the account of Alexander the Great and the pirate, is concerned precisely with the question of acting with impunity (see *De Civitate Dei* 4.4). 000

including apparently their spiritual disposition; political considerations, in other words, seem to carry in their train theological concerns. And it is seemingly precisely these concerns that justify violating the Divine admonitions cited in the original objection here.

The third principle of the just war is that “the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.” It is possible, he notes, to have a situation in which war has a just cause, and is declared by the legitimate authority, and yet is “rendered unlawful through a wicked intention.” Here Aquinas again draws upon Augustine as a source for considerations of intention. True religion considers those wars just, Augustine is quoted as saying, that are waged “not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good.”²¹ The right intention, then, requires the avoidance of the passions that might very well provide obstacles to a judicious assessment of the justice of the war and its prosecution. Thus, Augustine (as quoted by Aquinas) cautions, “The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war.”²² One can see here the difficulty in fulfilling the demands of the just war, as it is routinely the passions noted here that are most difficult to keep under control, especially in the violent conditions brought on by wartime situations.

The third objection St. Thomas raises to the justice of war is that nothing can be contrary to virtue, except sin, yet war is opposed to peace, and so war must be sinful. Aquinas’ response to the charge is that it is rightful to assert that peace is a virtue, but that “those who wage war justly aim at peace,” only not at that evil peace which Christ Himself warned against (citing Matthew 10:34²³). Thus

²¹*Ibid.* Citing *De Verb. Dom.*, but likely a quote instead from another work. The sentiment, though, is certainly consonant with Augustine’s own stated views.

²²Quoting *Contra Faustem Manichean*, 22.74.

²³“Do not think that I came to send peace upon earth: I came not to send peace, but the sword.”

Augustine, again, is quoted, reminding us that “we do not seek peace in order to be at war, but we go to war that we may have peace.”²⁴ Even war, then, has the goal of peace, but a certain kind of peace, and it is that qualification which allows St. Thomas to speak to the justice of war, which may on the surface appear to be clearly opposed to peace.

²⁴II-II.40.1. *ad* 2; quoting Letter to Boniface, 189.

This last issue, the concern for right intention in going to war, may seem at the outset to be either a relatively minor question, or perhaps one that doesn't admit of easy analysis and thus difficult to assess with any degree of precision. Yet, if we consider the most common method of analyzing the intention or motivation behind an action (say, in the law), what we discover is that the intention behind an action is most typically understood through the actions that one takes.²⁵ In terms of war, then, the way in which one might best arrive at an understanding of the intention of a state actor would be by a judicious assessment of the conduct of the war itself, for in the means chosen to conduct the war we may see displayed the real animating spirit behind the decision to engage in the action. In other words, what later in the tradition comes to be called the *ius in bello*, as distinct from the *ius ad bellum*, can be seen in many ways as an elaboration of the question of right intention, as the way to discover that intention may very well be through the way in which the war is conducted — a willingness to violate common norms of moral action in the conduct of the war is probably good evidence that the intention in going to war was not so pristine or justified.²⁶

The longest part of St. Thomas Aquinas' treatment of law in the commonly denoted "Treatise on Law" of the *Summa Theologica* is an analysis of the various aspects and teachings of the divine law, and within that analysis by far the bulk of it consists of a treatment of the Old Law. That this part of the *Summa* generally garners little attention is unfortunate, for there is much to learn from what Aquinas lays out therein. The more common area for analysts of Thomas' teaching on economics and property to focus their attention is in Part II-II of the *Summa*, where within the treatment of the virtue of justice he devotes some attention to the merits of property ownership and the principles governing the exchange of goods.²⁷ The advantage of examining the treatment of property found within the analysis of the Old Law in Part I-II is that this discussion is more particular, focusing on the practical application of the principles of property ownership treated in the later passages.

The treatment of the Old Law is itself divided into three parts, as Thomas deals with the various precepts of law, broken up into moral precepts, ceremonial precepts, and judicial precepts. The moral precepts of the Law are those which relate to acts of virtue, and St. Thomas addresses them in Question 100. In Questions 101-103 he deals with the ceremonial precepts, their causes,²⁸ and the duration of the precepts.²⁹ The ceremonial precepts are the precepts of the Old Law that "refer to the Divine Worship,"³⁰ and include external actions by which "man makes profession of his subjection to God."³¹ Since the ceremonies of the Old Law ceased at the Incarnation, it is no longer lawful to follow these precepts: "it

²⁵In the same way that the criminal law judges the motive of a murderer, say, by looking at what benefit may have come to the suspect through the death of the victim.

²⁶On this point see the discussion in John Finnis, *Aquinas* (New York: Oxford University Press, 1998), 284-287.

²⁷See especially II-II Question 66, "Of Theft and Robbery" (discussed briefly below), and Questions 77-78.

²⁸I-II.102.

²⁹I-II.103.

³⁰I-II.99.3.*corp.*

³¹*Ibid.*.

would be a mortal sin to observe those ceremonies which the fathers of old fulfilled with devotion and fidelity."³² The legal ceremonies under the Old Law, as St. Thomas puts it, are both dead and deadly.

³²I-II.103.4.*corp.*

In Question 104, though, we encounter the judicial precepts of the Old Law, which concern man's relation to man, but which receive their binding force not because they were designed by human reason for the sake of some political good, but rather from the fact that they were divinely instituted.³³ And while the judicial precepts, like the ceremonial precepts, have been annulled by the coming of Christ, they are treated in a distinct manner by St. Thomas. The rationale for the different treatment is that there is a fundamental distinction between the two types of precepts. The ceremonial precepts were instituted as primarily figurative, "chiefly for the purpose of foreshadowing the mysteries of Christ to come."³⁴ The judicial precepts, on the other hand, were not figurative, but instead were intended to serve the function of guiding the just order of the people. Thus, when that state no longer existed, after the coming of Christ, the judicial precepts lost whatever binding force they had, but the performance of the actions prescribed by the judicial precepts was not therefore deadly to salvation, unless one followed them as if he were still bound by the Law.³⁵ The judicial precepts, then, are dead but not deadly.

The importance of this argument concerning the judicial precepts is seen once St. Thomas begins taking up his analysis of the particular precepts given under the Old Law, an analysis that takes up the whole of Question 105. In Article 1, Aquinas asks whether the Old Law established suitable precepts concerning rulers, and then commences to defend the establishment of offices and powers laid out in the Old Law. Indeed, so willing is he to defend the arrangement that he suggests that the Mosaic form of government could be understood to be simply the best form of government, following as it does the Aristotelian model for the best regime, combining the elements of kingship, aristocracy, and popular rule.³⁶ But it is in the succeeding passages that we find the considerations most relevant to our concern here, with war and its justification.

In Question 105, Article 3, Aquinas turns to an analysis of whether the judicial precepts regarding foreigners were suitably drawn. He breaks down the precepts into those concerning peaceful relations and those directed to hostile relations, and in the latter discussion he raises the constituent elements of just war doctrine. Because the discussion is fairly succinct and orderly, and in order to compare it with the

³³I-II.104.1.*corp.*

³⁴I-II.104.3.*corp.*

³⁵*Ibid.*

³⁶I-II.105.1.*corp.*

above discussion of just war principles, it might be worth quoting it (almost, but not quite) in full:

For, in the first place, it commanded that war should be declared for a just cause... Secondly, it enjoined that when once they had entered on a war they should undauntedly persevere in it, putting their trust in God... Thirdly, it prescribed the removal of whatever might prove an obstacle to the fight, and that certain men, who might be in the way, should be sent home.³⁷ Fourthly, it enjoined that they should use moderation in pursuing the advantage of victory, by sparing women and children, and by not cutting down fruit-trees of that country.³⁸

³⁷One presumes that these men are those who later come to be known as conscientious objectors, though Aquinas may also be referring to those feared to become deserters, to the extent they can be identified ahead of time.

³⁸I-II.105.3.*corp.*

As Aquinas works his way through these criteria, he has a bit more to say about some of them, and so we can get a more thorough view of his teachings. For instance, in regard to just cause, he notes that it is commanded in Deuteronomy that when the Israelites besieged a city “they should at first make an offer of peace.”³⁹ Here we get a foretaste of the later argument for the justification of war only as a “last resort.” In terms of the second issue, Aquinas says that in order to encourage fulfillment of this command to persevere in war, “on the approach of battle the priest should hearten them by promising them God’s aid.”⁴⁰ The last three concerns all touch upon the conduct of the war itself, and are all seemingly predicated on fulfillment of the first condition, that of having a just cause for going to war in the first place. One can, it seems, fulfill all of the criteria for the prosecution of the war, and yet if it is declared without a just cause the legitimacy of every other action is undermined. In addition, of course, the corollary is true: one can have a just cause for going to war, but the actual conduct or prosecution of the war might compromise that justification.

If one consider a point St. Thomas makes in his subsequent discussion of the New Law (or, the New Testament), it perhaps becomes a bit clearer what the animating principle behind his considerations of war and justice might be. In Question 108, Article 3, in the context of his discussion of whether the New Law sufficiently directs man’s interior actions, Aquinas raises an objection that whereas the Old Law contained numerous judicial precepts, the New Law contains only a few (concerning divorcing one’s wife, punishment by retaliation, and persecuting one’s enemies⁴¹). His response to this charge is that it represents a fundamental misreading of the motive behind the precepts. Without going into too much detail on the point, suffice it to say that the Scribes and Pharisees did not understand that certain actions

³⁹*Ibid*; citing Deuteronomy 20:10 (“If at any time thou come to fight against a city, thou shalt first offer it peace”). Consider here also Augustine’s comments on the Roman treatment of the Sabine women.

⁴⁰I-II.105.3 *corp*. As St. Thomas says in II-II.41.2, there is a role for prelates in war, but not in fighting; not “by having recourse themselves to material arms, but by means of spiritual weapons... Such are salutary warnings, devout prayers, and, for those who are obstinate, the sentence of excommunication” (II-II.41.2 *ad2*; this passage may also be linked with the question of removing obstacles to the successful prosecution of the war).

⁴¹I-II.108.3. *obj.2*.

which they took to be done out of revenge, lust, or hatred, were in fact done out of a sense of justice.⁴²
So, for example:

They thought that the movement of hatred was lawful, on account of the commandments of the Law about the slaying of one's enemies; whereas the Law ordered this for the fulfilment of justice, as stated above (Q[105], A[3], ad 4), not to satisfy hatred.

That is, the precepts of the Old Law itself, properly understood, are really in many places precepts of justice, but he seems to be suggesting that justice is a largely forgotten virtue.

⁴²“In another way they erred by thinking that certain things which the Old Law commanded to be done for justice's sake, should be done out of desire for revenge, or out of lust for temporal goods, or out of hatred of one's enemies; and this in respect of three precepts” (I-II.108.3. *ad.2*).

CONCLUSION

What appears to be common in the approach of both Augustine and Aquinas to the question of just war is the larger focus on the centrality of the concern for the common good. In addition, neither of our authors talks about the question of rights or human rights, whether it be the rights of the unjust or the just party. Indeed, not only do they not speak of rights in this context, neither do they consider the question in the rest of their writings, in terms of the question of justice, or of the protection of the individual from the excesses of state power, or as a protection against the potential injustice of individual citizens or private groups within the political community.

From the point of view of political philosophy, the difficulty with squaring the concern for human rights with the framework of just war theory is that the basic justification for the rights analysis comes from a tradition that in its origins is at odds with the principles that animate it.

As much as authors such as John Finnis attempt to show the compatibility of the principles, it is unclear that the argument has in fact sufficiently advanced in the direction of symmetry, and nor divergence.⁴³ There is an additional difficulty with the language of rights and their ubiquitous use, and this critique comes from the opposite starting point, in a way. The concern is exemplified in a passage from Jean Elshtain, in which she is discussing Michael Walzer's *Just and Unjust Wars*⁴⁴:

Take, for example, Walzer's discussion of American use of the atomic bombs on Hiroshima and Nagasaki, unjustifiable, he argues, within a just war frame. He goes on to ask: "How did the people of Hiroshima forfeit their rights?" The language of rights and their forfeiture is impoverished in this context, inadequate to describe what happened on those dreadful days.⁴⁵

In Elshtain's view, then, the problem with employing the language of rights in this context is that it is an insufficient guide to understanding the immensity of the horror inflicted by the dropping of the bombs, as if what was being surrendered was perhaps along the lines of a due process right.

The larger question is where to fit the concern for human rights into the theoretical framework of the just war doctrine, and what principle animates it. It is important to arrive at some kind of answer to this question if we are going to understand the consistency behind just war thinking, and its corollaries in terms of the rule of law and the law of nations. It behooves us, then, to think through again the principles

⁴³See Finnis's work, *Aquinas*, in which he devotes a chapter to the question of rights in St. Thomas's thinking.

⁴⁴New York: Basic Books, 1977 (since revised in a Third Edition, 2000).

⁴⁵Jean Bethke Elshtain, "Reflections on War and Political Discourse: Realism, Just War, and Feminism in a Nuclear Age" (in Elshtain, ed., *Just War Theory*, Washington Square, New York: New York University Press, 1992, 260-279), p. 268.

at the heart of human rights concerns.

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