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## The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention

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## Abstract

I will try to show how the present laws of war might be viewed as consistent with the Augustinian just war tradition. The modern international legal regime, codified in the Charter of the United Nations ("U.N. Charter"), permits States to engage in war only in "individual or collective self-defense if an armed attack occurs against a Member of the United Nations;" or pursuant to a determination by the U.N. Security Council of "existence of any threat to the peace, breach of the peace, or act of aggression," and Security Council authorization of the use of force "to maintain or restore international peace and security." Thus, modern international law would seem to foreclose preemptive wars in advance of armed attack and humanitarian interventions lacking Security Council authorizations. Although just war theorists have argued the morality of limited subsets of both sorts of formally unlawful wars, Professor Elshstain's concern in her lecture, and mine in this Essay, is with humanitarian interventions that are seemingly unlawful under the U.N. Charter regime, for instance, because of a lack of Security Council preauthorization.

# THE AUGUSTINIAN JUST WAR TRADITION AND THE PROBLEM OF PRETEXT IN HUMANITARIAN INTERVENTION\*

Thomas H. Lee\*\*

I come to the subject matter of Professor Elstain's lecture as a lawyer, not as an ethicist, a philosopher, or a theologian. Although I have some formal training in political theory, my work in this area focuses principally on the *laws* of war, not the moral concept of the just war. (Of course, as I have discovered in teaching and writing on the laws of war, it is virtually impossible to separate altogether legality and morality on the subject.) A consequence of this difference in approach may be a more hospitable view of the existing international laws of war governing the resort to armed force.<sup>1</sup>

I would like to defend the laws, however, on Professor Elstain's own terms. That is to say, I will not challenge at the start her assumption of undue restrictiveness in the current laws governing the use of armed force in international affairs — her implicit claim that the existing laws forbid wars that are moral under the Christian just war tradition. Nor will I engage in a defense of what she presumes those laws to be by reference to lawyerly arguments or explanations grounded in international-relations theory. Rather, I will try to show how the present laws of war might be viewed as consistent with the Augustinian just war tradition.

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1. Professor Elstain acknowledges that the traditional laws of war did encompass the particular *casus belli* she considers moral, but the traditional laws of war as a general matter were more permissive of war. It was only in the twentieth century that international law moved to broad prohibitions of war, making lawful wars the rare exception, rather than recognizing war as a sovereign right. See Leslie C. Green, *What Is — Why Is There — the Law of War?*, in *ESSAYS ON THE MODERN LAW OF WAR* 1, 2-5 (2d ed. 1999).

tions;<sup>2</sup> or pursuant to a determination by the U.N. Security Council of “the existence of any threat to the peace, breach of the peace, or act of aggression,”<sup>3</sup> and Security Council authorization of the use of force “to maintain or restore international peace and security.”<sup>4</sup> Thus, modern international law would seem to foreclose preemptive wars in advance of armed attack and humanitarian interventions lacking Security Council authorizations. Although just war theorists have argued the morality of limited subsets of both sorts of formally unlawful wars, Professor Elshain’s concern in her lecture, and mine in this Essay, is with humanitarian interventions that are seemingly unlawful under the U.N. Charter regime, for instance, because of a lack of Security Council preauthorization.<sup>5</sup>

In a nutshell, Professor Elshain’s argument is that we are morally justified<sup>6</sup> in fighting such wars notwithstanding formal illegality. She applies her argument to a specific case: we, as citizens of the United States but more importantly as human beings, were morally justified in waging war against Saddam Hussein inasmuch as it was and continues to be a war of humanitarian intervention on behalf of the Iraqi people, regardless of whether the Security Council authorized the war or not.<sup>7</sup>

Moral justification inheres in the fact that “[o]ur morally inscribed natures are offended when we see people systemati-

2. U.N. CHARTER art. 51. The self-defense right has a sunset provision: “until the Security Council has taken measures necessary to restore international peace and security.”

3. *Id.* art. 39.

4. *Id.* art. 42.

5. The U.S.-led intervention by the North Atlantic Treaty Organization (“NATO”) in Kosovo is viewed as the leading example of this sort of unlawful but morally legitimate use of armed force. See generally Jonathan I. Charney et al., *Editorial Comments: NATO’s Kosovo Intervention*, 93 AM. J. INT’L L. 824, 824-62 (1999).

6. By “justified” I mean simply “permitted,” but it may be that she would argue that we are morally obligated to wage such wars. I should say that, notwithstanding my disagreement with Professor Elshain in this response, I share with her the belief that we, the United States, are morally obligated to wage wars of humanitarian intervention that are duly authorized by the Security Council. This moral obligation is not necessarily grounded in the Christian just war tradition, nor do I believe the obligation extends to other Nations that lack the sort of military power and logistical capacity to execute successful humanitarian interventions.

7. For the purposes of this Essay, I will avoid debate about the validity of resting moral legitimacy on a largely *post hoc* justification for the war. The principal justification articulated at the time the war began was preemptive defense on the since-discredited theory of Saddam’s possession of weapons of mass destruction.

cally ill-dignified.”<sup>8</sup> To fight for innocent human beings, our nature-neighbors, when they cannot fight for themselves against “systematic, egregious, and continuing harm,”<sup>9</sup> is to give effect to what Augustine of Hippo called *caritas*. We might now call that virtue “charity” or “empathy;” Professor Elshtain’s pitch-perfect rendition is “neighbor regard.”<sup>10</sup> *Caritas* is in our nature, indeed it is our nature, and to act even by means of violence because of it cannot transgress natural law, which is the only law that matters.<sup>11</sup>

Augustine well understood, however, that human beings have impulses that prevent us from realizing our natures. We have ambitions and passions that drive us to violence of a more sinister sort. Just as other-regarding *caritas* might (and ought to) move us to fight to defend other humans who cannot fight for themselves, *libido dominandi*,<sup>12</sup> the self-regarding will to dominate, can move us to fight out of a desire to bend others to our own self-interest.<sup>13</sup> But we ought not to use violence to get what we want, to get our way. We should only seek to use violence to help others.

8. See Jean Bethke Elshtain, *The Just War Tradition and Natural Law*, 28 FORDHAM INT’L L.J. 742, 752-53 (2005) [hereinafter Elshtain, *Just War Tradition*].

9. Elshtain, *Just War Tradition*, *supra* note 8, at 753.

10. See Elshtain, *Just War Tradition*, *supra* note 8, at 753-54. As Professor Elshtain points out, the Christian just war tradition is an incredibly rich and complex one, with subtle differences and refinements among key medieval thinkers such as Aquinas, Molina, Suarez, Vazquez, and Vitoria. It would be misleading to claim too much uniqueness in Augustine’s thought, but it seems to me fair to say that he, more than any other writers in the Christian just war tradition, was concerned about the internal disposition of right mind or intentions, by contrast, for example, to the object pursued in the Thomist sense. Given the limited scope of this Essay, I will take Professor Elshtain’s lead in focusing on Augustine’s writings on the subject, which, along with the work of St. Ambrose of Milan, are the foundational works of the Christian just war tradition. To be sure, both, but especially Augustine, were deeply influenced by Greek and Roman thought on the topic.

11. See Elshtain, *Just War Tradition*, *supra* note 8, at 754-55. Professor Elshtain is careful to qualify that “a ‘natural law’ and a stipulated absolutely clear-cut ‘policy choice’” are not “linked together inexorably.” *Id.* at 755. I take her to mean that even if one were to agree in principle on the morality of a theoretical act of force for humanitarian ends, there are prudential factors such as whether one has the military capacity to make a difference, that policymakers must take into consideration before making the decision to employ force in a particular case.

12. Augustine sometimes uses the word *cupiditas* as a synonym for the *libido dominandi*; in other contexts, *cupiditas* seems to refer to a blameless want or desire — a neutral condition that might evolve into *libido*.

13. See Jean Bethke Elshtain, *Why Augustine? Why Now?*, 52 CATH. U. L. REV. 283, 293-94 (2003) [hereinafter Elshtain, *Why Augustine?*].

For this reason, the war of self-defense, unexceptionably lawful under the U.N. Charter regime, is interestingly problematic in Augustine's thought, perhaps more so than he lets on in *City of God*, his *magnum opus*.<sup>14</sup> To see why, let us start from the simple case of individual self-defense: is it just to kill someone who seeks to kill or rape you? In Augustine's time, as today, it was certainly *lawful* to kill in self-defense. But for Augustine, the answer to whether it would be morally just to kill is "no," because the act of killing in such an instance is motivated by *libido*, the desire to preserve one's own life or bodily integrity and contrary to *caritas*, Christian charity in the "turn the other cheek" sense, or regard for the well-being of the assailant, a fellow human being. He writes:

Perhaps one might doubt whether life is somehow taken from the soul when the body is slain. But if it can be taken away, it is of little value; and if it cannot, there is nothing to fear. As for chastity, who would doubt that it is located in the soul itself, since it is a virtue? So it cannot be taken away by a violent assailant. . . . I don't blame the law that allows such people to be killed; but I can't think of any way to defend those who do the killing. . . . [T]hey are condemned by a more powerful, hidden law. . . . How can they be free of sin in the eyes of that law, when they are defiled with human blood for the sake of things that ought to be held in contempt?<sup>15</sup>

Augustine, however, does not go so far as to claim that it would be unjust for a soldier to kill an enemy in a war of national self-defense.

A soldier who kills the enemy is acting as an agent of the law, so he can easily perform his duty without [*libido*]. Furthermore, the law itself, which was established with a view to protecting the people, cannot be accused of any [*libido*]. . . . Therefore, the law that commands that enemy forces be repulsed by an equal force for the protection of the citizens can

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14. See generally AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* (R.W. Dyson ed. & trans., 1998). This is unsurprising given that *City of God* implicitly takes a favorable view of the Roman empire (safely Christianized by Augustine's time in the wake of the Emperor Julian's failed apostasy) and its historical wars of expansion on a capacious theory of self-defense. The specific aim of *City of God* was to defend Christianity from accusations that it had enervated Rome's ability to defend itself against Alaric and the Visigoths, who in 410 sacked the eternal, if not Godly, city.

15. AUGUSTINE, *ON FREE CHOICE OF THE WILL* 9 (Thomas Williams trans., 1993).

be obeyed without [*libido*].<sup>16</sup>

Augustine's reasoning is admittedly thin here, but we can readily intuit the missing step. A soldier who fights and kills is fighting not for self, but for those citizens within his State too weak or helpless to fight for themselves. His act of killing is, so it goes, an act of *caritas* not *libido*.

But it is not so easy to agree that the soldier's killing in national self-defense is necessarily an act of *caritas* and not *libido*. The soldier fights not merely to protect the dignity of other human beings, but on behalf of specific human beings — brothers, daughters, fathers, mothers, sisters, sons, wives, friends, and co-citizens — people in whose survival he has a personal, selfish stake. But on this logic, the moral case for wars of humanitarian intervention seems even more compelling: in such wars, the soldier's personal stake is diminished and the motivation is a purer form of other-regard.

Of course, when a Nation with sufficient military force, such as the United States, wages a war of humanitarian intervention, we are confronted with a State act, not an individual act. But neither Professor Elshtain nor just war theorists generally draw a distinction based on that fact.<sup>17</sup> Rather, they import wholesale the centrality of right motives in judging the justness of State-waged war. And if we are to accept the specific anthropomorphism presumed by the Augustinian just war tradition, the crucial question is whether the Nation that seeks to intervene is acting out of genuine other-interest, *caritas*, or self-interest, *libido*.

In practice, as the example of the individual soldier fighting for national self-defense illustrates, it will often be difficult to ascertain whether a Nation has the right intentions when it intervenes for humanitarian reasons. As in the U.S.-in-Iraq case, it is more likely than not that a typical case for potential humanitarian intervention today will implicate a mixture of other-regarding and self-regarding interests. To be faithful to Augustine, it seems necessary, even in light of this admixture, to determine

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16. *See id.* at 8-9.

17. I have elsewhere expressed doubt about the validity of such anthropomorphisms. *See* Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 *LAW & CONTEMP. PROBS.* 147, 154-55 (2004) (challenging normative justifications of sovereign equality based on human equality).

whether the use of force in such an instance is motivated more by *caritas* than *libido*.

This, however, is well-nigh impossible. The leaders of a Nation seeking to intervene primarily to advance self-regarding interests will never be so forthright to admit to the use of force in naked self-interest: humanitarian ends would surely be supplied as pretext. Accordingly, it is unlikely that we can ever discern real motives. How, then, to solve the puzzle of right intentions posed by the Augustinian just war framework?

The first step to a solution is to recognize that it is futile to look solely to statements of humanitarian motive; what is needed is an external check that filters out pretext. This is precisely what the current U.N. Charter regime on the use of force accomplishes in a crude and possibly unintended way. An authorization of armed force for humanitarian ends requires the concurrence of all five permanent members and the affirmative votes of nine members of the fifteen-member Security Council.<sup>18</sup>

To be sure, how a member votes will not be couched in terms of evaluations of *caritas* or *libido* as the motive of the desirous intervenor, but a member's pragmatic incentives to vote may align with the Augustinian inquiry. If one powerful Nation (a permanent member) stands to gain disproportionately from a humanitarian intervention, there is a stronger likelihood that other permanent members will veto the action. In this way, self-interest checks self-interest. But the requirement of unanimity is not just about power politics: if the aspiring intervenor is really acting out of *caritas*, the sentiment is more likely to be universally shared, and no one should object. The end result may be unfortunate in the greater risk that truly selfless interventions might be falsely identified as selfish ones, but this is a risk we should be prepared to take if we are to take seriously Augustine's directive to extinguish *libido*.

Applying this intuition to the U.S.-in-Iraq case leads to one of two possible conclusions. First, one could say that the lack of U.N. Security Council preauthorization is strong *prima facie* evidence of pretext — *libido* masquerading as *caritas*, and so the United States should be anxious about the possibility that the war is unjust under an Augustinian standard, regardless of international legality. Second, one might conclude that, contrary to

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18. See U.N. CHARTER art. 23.

Professor Elshtain's initial premise, it is not the case that the international laws of war preclude just wars; rather, it is plausible to understand the current laws as a pragmatic instantiation of Augustinian just war concerns given the absence of a means to ascertain true intentions. Either way, the apparent restraints of formal legality might be viewed as consistent with, not antithetical to, the Augustinian just war tradition.

In the end, there is very little in Professor Elshtain's scholarly (yet accessible) exposition of Augustinian thought with which I disagree. My point, rather, is that her attempt to bring his wisdom to bear on the current laws and policies of war misses a crucial insight of Augustine's which the existing laws of war, perhaps unwittingly, address. Augustine cherished *caritas* and saw it as a reason (indeed the only reason) for the just war. But at the same time, he was wary of *libido* and its power to foment the unjust war. It seems prudent today to take heed of both the exhortation and the admonition.