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## **The Morality of Retributive Targeted Killing**

### **Introduction**

Most contemporary just war thinking as well as international law accepts self-defence as the only just cause for war between states. This modern consensus deviates markedly from one reading of the classical Christian just war which took the just cause of self-defence for granted and concentrated on retribution instead.<sup>1</sup> This natural law based just war considered the use of force primarily as a means to re-establish a state of justice which had been disrupted by prior wrongdoing.<sup>2</sup> Seen from a historical perspective, today's limitation of just cause to self-defence has been the result of a changed understanding of political authority as well as of prudential considerations. Enshrined in the Westphalian settlement this new understanding did no longer follow the understanding of the sovereign as a divinely instituted avenger of justice who held responsibility for the common good.<sup>3</sup> After 1648, the sovereign was commonly considered the representative of the people only who had been entrusted with the people's fundamental right of self-defence. The new understanding of sovereignty, moreover, limited the ruler's responsibility for the common good to the people entrusted to her within a defined territory whereas the earlier understanding had also emphasised the common good of all mankind (Johnson 2014, 1-2). As a result, the Westphalian principles of political sovereignty and territorial integrity effectively superseded the earlier responsibility for the common good of all mankind which, in principle, allowed for intervening in other sovereigns' affairs in response to grave injustice.<sup>4</sup> In addition, the concern to stop sovereigns from intervening in each other's affairs over the issue of religion contributed to the limitation of just cause to self-defence.<sup>5</sup> The dreadful experience of modern warfare as well as the destructiveness of modern weaponry added, several centuries later, further prudential concerns which resulted in the UN framework and just war theory's contemporary consensus about self-defence as the only just cause for war between states.<sup>6</sup>

Over the last almost two decades, however, the Westphalian model has come under pressure by the seemingly borderless threat of Islamist terrorism. A considerable amount of ink has been spilled over the question whether the Westphalian paradigm still applies to the confrontation with such non-state actors.<sup>7</sup> After all, fighting Islamist terrorism seems to sit uneasily between law enforcement within a state's borders and war on another state's territory.<sup>8</sup> That said, all post-9/11 US administrations have considered the fight against "al Qaeda and associated forces" as war based on the just cause of self-defence. Although arguably retributive rationales have featured into the calculus regarding the targeted killing of terrorists such as Osama bin Laden or Anwar al-Awlaki the US officially justifies such operations within the confines of self-defence. At first look, following the retributive reading of just war, this limitation seems unwarranted as, following from natural law, the sovereign's responsibility for the common good permits both defensive and retributive rationales. However, the conclusion that this particular reading of the Christian just war allows for the just cause of retribution in principle has not yet dealt with prudential considerations arising from actual human conduct. This article assesses whether the arguably justified limitation to self-defence for war between states as a legacy of Westphalia should also be applied to the confrontation with non-state actors. It argues that it should not and puts forward an argument for a just cause of retribution for war between states and culpable unjust individuals. In terms of outline, the article starts off with the contemporary argument against war as retribution. The focus will hereby be on Luban's (2012) comprehensive critique of "war as punishment." In the following section, an interpretation of the Thomistic just war will be presented which establishes that retribution can, in principle, be a just cause for war. The reason for this, it will be argued, is Aquinas's conceptualisation of war as analogy to the death penalty. The article then argues that the prudential concerns which justify the abandonment of the just cause of retribution for war between states do not apply to the war between states and culpable unjust individuals.<sup>9</sup> In order to be morally justifiable, however, retributive targeted killings must also

pass the crucial test of right intention. Inspired by the development of Catholic Social Thought with regard to the death penalty and war the article concludes with a practical illustration of how right intention should be applied with regard to retributive targeted killing. It will be argued that while such action is justifiable in principle situations in which such uses of force can be just are rare. Finally, the article reflects on possible consequences for the Catholic teaching on just war in the wake of the very recent decision of Pope Francis to rule out the death penalty not just on prudential grounds, but in principle.

### **The Contemporary Consensus against War as Retribution**

The idea of retribution as a just cause for war has overwhelmingly been rejected in today's conversation about the morality of war. Importantly, this rejection is upheld by both Walzerian theorists and their revisionist critics. Walzer (2015, 62), while attributing a place to punishment "once the aggressor state has been militarily repulsed," rejects the idea of war as a means of punishment.<sup>10</sup> Representing the revisionist side, McMahan (2008, 83) flatly denies the legitimacy of retributive war as "the worst sort of vigilante action." Consequently, addressing the policy of targeted killing, McMahan (2012) rules out a justification based on retribution, advocating his account of liability to defensive killing instead. Among today's critics of punitive war, Luban has arguably provided the most comprehensive argument against retribution as a just cause for war. To begin with, one must distinguish between retribution and vengeance. As Luban himself explains, the former "is undertaken for moral reasons as a practice of justice" while the latter "is undertaken out of rage and hatred" (2012, 318-319). Of these two rationales, Luban (2012, 319) is correct in pointing out, that only retribution "is a genuine moral basis for punishment." He (2012, 305) subsequently argues that war as punishment is unjustifiable because of five particular reasons: "(1) It places punishment in the hands of a biased judge, namely the aggrieved party, which (2) makes it more likely to be vengeance than retributive justice. (3) Vengeance does not follow the

fundamental condition of just retribution, namely proportionality between punishment and offense. (4) Furthermore, punishment through warmaking punishes the wrong people and (5) it employs the wrong methods.”

To add more detail, the “biased judgment objection,” according to Luban (2012, 318), holds that “All states believe that justice lies on their side, and that their adversary has committed abominable injustice.” Consequently, belligerents are unable to objectively judge each other’s guilt which, however, is the necessary prerequisite for an impartial judgement. As a result of this bias, the just cause of retribution turns into “an open invitation to self-serving, unfair, overly harsh, and excessive punishment” (2012, 318). In other words, when the in principle justifiable just cause of retribution degenerates into vengeance the crucial determination for just retribution, namely to find the right balance between punishment and wrongdoing, inevitably fails. Regarding his fourth objection Luban essentially argues that even if retributive war could be justified it would be indiscriminate and therefore unjust. While it might be possible to, in theory, only hit the guilty elements of the state the just side seeks to punish, this argument does not withstand a reality check. In Luban’s words (2012, 325-326): “War is a blunt instrument. ... Wars are the equivalent of natural disasters such as floods and hurricanes, and even the most discriminate war breaks whatever it touches. Thus, if war is retributive punishment, we must acknowledge that it is *collective* punishment, indeed collective corporal punishment.” Finally, closely related to the argument that war as retribution is necessarily indiscriminate, Luban (2012, 326) suggests that the methods commonly employed in war do rarely allow for exclusively striking at the unjust belligerent’s guilty elements but, more often than not, hit civilians, too.

### **The Classical Christian Just War on Retribution**

Luban’s rejection of retribution as a just cause for war, like the general contemporary consensus about self-defence as the only legitimate just cause, contrasts markedly with one

particular reading of the classical Christian account.<sup>11</sup> In what follows, this understanding of the just war will be presented in conversation with the current consensus position.<sup>12</sup> As Midgley (1975, 43) notes, St Thomas generally received the traditional Christian teaching of the just war and gave it a systematic formulation. St Thomas largely developed his theory of just war as the right of an injured state to wage war in order to heal a violation of justice and with the goal of protecting the common good (1975, 22). Aquinas thus effectively distinguished between two forms of just war, war as defence of the common good and war as punishment. During his days, the common use of the term for war (*bellum*) referred to any internal or external use of force by a sovereign authority. Private uses of force (*duellum*), however, could not rise to the level of war (Johnson 2014, 31). Consequently, while sovereign authorities could wage war against individuals, individuals did not have this right against the political community.

### *The Criterion of Just Cause*

St Thomas (ST, II-II, q. 40, a. 1) defines just cause as follows: “Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault.” Thus, for Aquinas, war aimed “to restore a peace that has been disrupted (or threatened) by a particularly egregious wrong” (Reichberg 2017, 9). In the words of an influential commentator of St Thomas, just war served the function of “vindicative justice” (Vanderpol 1919, 250). It does not surprise then, as Johnson (2014, 30-31) notes, that Aquinas did not even list the self-defence rationale in his discussion of just war as he considered the right of self-defence as an inherent right of both individuals and states.

While the retributionist reading of Aquinas has historically been the supreme one (Reichberg 2017, 150), the liability reading introduced by de Vitoria and elaborated on by de Molina is today the dominant take in just war debate. For example, analytical philosophers working in the field of just war advocate a liability reading of the use of force in self-defence

and discount a desert-based account. McMahan, for example, explicitly distinguishes his moral liability account from an account based on moral culpability. In particular, he (2009, 8) points to the difference between the instrumental and non-instrumental nature of the concepts:

Desert is noninstrumental. If a person deserves to be harmed, there is a moral reason for harming him that is independent of the further consequences of harming him.

Giving him what he deserves is an end in itself. Although a deserved harm is bad for the person who suffers it, it is, from an impersonal point of view, intrinsically *good*.

By contrast, a person is liable to be harmed only if harming him will serve some further purpose – for example, if it will prevent him from unjustly harming someone, deter him (or perhaps others) from further wrongdoing, or compensate a victim of his prior wrongdoing. The goal is internal to the liability, in the sense that there is no liability except in relation to some goal that can be achieved by harming a person.

Resulting from the instrumental nature of liability, McMahan (2009, 9) stresses that the requirement of necessity is inherent to it. Consequently, he arrives at the limitation of just cause for war to self-defence by following his liability reading. In contrast, moral culpability, McMahan argues, is not ruled by necessity “since the value of a person’s getting what he deserves is not instrumental and hence is not necessary for anything beyond itself.”

### ***Aquinas’s Punitive Just Cause***

As Luban (2012, 304) points out, punishment is a concept that goes beyond retribution and includes ideas like deterrence and rehabilitation which, interestingly, have been assimilated into the contemporary understanding of self-defence. Aquinas, too, as Finnis (1998, 279) notes, had a place for these rationales in his general theory of punishment. However, while the use of lethal force might, for example, also be imagined for deterrence purposes, this article, more narrowly, concentrates on the retributionist aspect of punishment as it had been the “core” (Murphy 2012, 178) of Aquinas’s account of punishment. As Calvert (1992, 272-273)

argues, St Thomas's account shows all main features of retributivism: Aquinas holds generally that a crime deserves to be punished and in order for that punishment to be just, a crime must actually have taken place and the criminal suspect must have committed the misdeed. In addition, the wrongdoer must have been a responsible agent at the time he committed the crime. These last two aspects are supposed to ensure that only the guilty are punished. Crucially, St Thomas also holds that besides the magnitude of the crime, the "degree of sinfulness," measured as the amount of voluntariness by which the crime was committed by the perpetrator, must be taken into consideration when it comes to deciding which penalty to impose (1992, 272). Furthermore, Aquinas's account of retribution argues that crime and punishment must be proportionate, meaning "that less serious crimes receive less severe penalties and that more serious crimes receive more severe penalties" (1992, 273). Last but not least, Aquinas follows retributive theories in the assumption that a crime caused an imbalance in the order of justice which a justly imposed punishment aims to correct. Aquinas's thought about punishment is the result of his natural law approach, the approach he arguably perfected and that still flourishes in the social thought of the Catholic Church (Feser and Bessette 2017, 12). Directly following from natural law's metaphysics of the good natural law theorists consider retribution "not only *a* legitimate end of punishment," but "the *fundamental* end" (2017, 46).

Having pointed out St Thomas's retributive idea of punishment, once punishment takes the form of lethal action, inevitably the parallel with the death penalty comes to mind. And, in fact, Aquinas's just war has been compared to the imposition of the death penalty executed by the sovereign as part of her function as judge who has been instituted by God. For example, Finnis (1998, 285-286), although he himself rejects Aquinas's thinking in this regard, argues that the Doctor of the Church "highlights the analogy with punishment – capital punishment – and downplays, without eliminating, the analogy with private defence or of self or others. Just as capital punishment involves the *intent* to kill, so too [he thinks] does



waging war as ruler, general, or soldier.” Murphy (2012, 177), even more directly, argues that, for the Angelic Doctor, “killing in war derives its justification from the specifically public authority of the state to kill convicted criminals.” Undergirding the parallel between capital punishment and war is Aquinas’s understanding of sovereign authority. As Beestermöller (1990, 71-72) notes, only through her function as superior judge does the sovereign have the right to make judgements about the justice or injustice of acts which is the prerequisite of waging war licitly. In St Thomas’s (ST, II-II, q. 66, a. 8) own words: “As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice—either by fighting against the enemy, or against the citizens, by punishing evil-doers: and whatever is taken by violence of this kind is not the spoils of robbery, since it is not contrary to justice.” Moreover, with regard to the sovereign’s authority to employ lethal force Aquinas (ST, II-II, q. 64, a. 5) holds that: “One who exercises public authority may lawfully put to death an evil-doer, since he can pass judgment on him.”

Importantly, as Calvert (1992, 261) notes, Aquinas’s thinking on the death penalty does not constitute a consistent account. However, it seems to be the case that, according to Calvert’s interpretation, St Thomas does not see the death penalty as a cure all. While he believes “that some people are incapable of reform, and that such people pose too great a danger to public well-being to be permitted to live” (1992, 279), his overall concern is not the imposition of punishment as an end in itself. Rather, for Aquinas, retributionism is subordinate to the public or individual good (1992, 266-269). As a practical consequence, St Thomas can imagine less severe penalties in cases where the death penalty endangers the commonweal or where individuals are repentant. Hence, Aquinas’s natural law approach toward the death penalty distinguishes between its justness in principle and prudential considerations regarding whether the punishment should actually be executed.

### *The Criterion of Right Intention*

The criterion of right intention, as Whetham (2011, 72) notes, does not “necessarily sit well with us today” as it might be considered abstract and subjective due to its “internal character.” The classical understanding holds that intention in war “is revealed by the concrete war aims sought as goals in a war, and by the actions undertaken to realize these goals. Right intention, therefore, gives concrete shape to the condition of just cause” (Boyle 2003, 164). For Aquinas, right conduct during war is inherently connected to the “virtuousness of its purpose” and to the virtuousness “of those who fought in accordance with that purpose” (Johnson 1999, 50). This virtue ethics approach implies restrictions on conduct in war, but Aquinas did not develop detailed rules as, for example, were present in canon law or the code of chivalry. For Aquinas, as Cole (1999, 59) notes, “the virtues are those dispositional character traits that allow us to act rightly.” Confronting situations that require an immediate response, it is crucial that a person’s passions are correctly ordered in accordance with the virtues. When the training in virtuous behaviour succeeds, it becomes natural for the virtuous person to subject her quick reactions to habit, not instinct (1999, 59-62). If a person’s soul is rightly ordered through the virtues, if, in other words, one’s soul is at peace, one’s actions will naturally serve the common good (Gorman 2010a, 252). Given that St Thomas was first and foremost a theologian, his just war thinking cannot be separated from his Christian faith. Thus, Aquinas distinguishes between the cardinal virtues of justice, prudence, fortitude and temperance, and the theological virtues of faith, hope, and charity.<sup>13</sup> The most basic difference between these two types of virtue is that the cardinal virtues provide the necessary foundation for human action on earth, for imperfect happiness, while the theological virtues point mankind to its supernatural end of beatitude, or perfect happiness (Schockenhoff 2002, 244). For the purpose of this article the cardinal virtue of prudence and the theological virtue of charity are the most important.<sup>14</sup> Prudence St Thomas (ST, II-II, q. 47, a. 2) defines as “right reason applied to action.” With regard to the just war, this cardinal virtue “is required whenever a moral

decision is made, and it is especially important for political and military leaders who must make complicated ethical decisions in times of war, taking into account all the dangers of action or inaction and trying to find the best course of action given the circumstances” (Gorman 2010a, 253). Having said that, the cardinal virtues like prudence are transcended by the theological virtues as they lead human beings to their final end which is unity with God (2010a, 255). In Pope’s (2002, 50) words: “The deepening of our humanity proceeds through the graced process of becoming more and more like God, in whose image we have been created.” The most important theological virtue in this process is the virtue of charity. It is through charity that human beings can accomplish the final goal of their existence and it is the only virtue that continues to exist in heaven (2002, 38). For Aquinas (ST, I-II, q. 62, a. 4), “Charity is the mother and root of the virtues, inasmuch as it is the form of them all.” In other words, charity is the “capstone virtue of the ethical life since it perfects and completes all of the other virtues” (Gorman 2010a, 256). Relevant to questions about when to refrain from using force although it would in principle be justified, “The primary act of charity gives rise to the virtue of mercy, a kind of sympathy or compassion, which is understood as the greatest of the virtues that unites a person with a neighbor” (McCarthy 2011, 282). Importantly, St Thomas ranked the discussion of just war under considerations of charity. As a result, his discussion of the just war, as all of his ethics, is finally directed toward the endpoint of unity with God, to life after death.<sup>15</sup> Having said that, however, taking divine charity as the “necessary lodestar” (Gorman 2010b, 61) of human action does not deny the necessity of meting out justice during mankind’s time on earth. “As for Christians that endpoint is the eternal happiness of God’s kingdom, the telos of earthly just war reasoning has to be an approximation of that kingdom imagined as peace on earth. Working towards that goal may at times justify the use of lethal force as the just war doctrine acknowledges. ... However, affirming the necessity of force in the temporal realm must not lead to a forgetfulness about the final goal which is to overcome violence” (Braun 2018, 67-68). Put differently, Aquinas’s

thinking on temporal government must be seen as an “interim ethic” (Weigel 1987, 358) in which government takes on the responsibility for establishing and maintaining the natural goods of earthly life, thus providing the basis for human beings so that they can strive for their supernatural perfection.

Taking the virtue of charity as the “lodestar” has arguably manifested itself in the evolution of the just war. For example, consider the Catholic just war doctrine which is indebted to St Thomas’s thinking. The change in Catholic teaching from a “presumption against injustice” towards a “presumption against war,” which Johnson (1996) criticises as breaking with the just war tradition, might in fact be considered as an, arguably praiseworthy (Hehir 2000, 33), alteration of Church teaching based on the theological virtue of charity. McCarthy (2011, 298) considers this development of Catholic Social Teaching as a consequence of a “re-appropriation of Thomistic virtue ethics in the past century and at Vatican II.” While the core of Aquinas’s natural law based just war has arguably never been abandoned, modern popes have opted to emphasise prudential and charitable concerns through acting as “minister of peace” (Reichberg 2012, 1080). Until 2nd of August 2018, when Pope Francis announced a radical break with prior Church teaching, a similar pattern could be detected with regard capital punishment. Modern popes up to Francis, often publicly perceived as opposed to the death penalty, did not rule out the death penalty in principle (Feser and Bessette 2017). What they did, Feser and Bessette argue, is to emphasise prudential concerns which seemingly advise against executing this type of punishment. It seems that concerns for prudence, as well as charity were behind this distancing from the death penalty when, for example, Pope Francis (2015), at the time still following his immediate predecessors’ thinking, stated that “The death penalty is contrary to the meaning of *humanitas* and to divine mercy, which must be models for human justice.” In a later speech, Francis (2017) explicitly spoke of “the primacy of mercy over justice.” This quote, in fact, perfectly illustrates how the theological virtue of charity, in its form of mercy, shapes the

cardinal virtues like, in this case, justice. As Dulles (2001, 34) succinctly summarises: “In practice, then, a delicate balance between justice and mercy must be maintained. The State’s primary responsibility is for justice, although it may at times temper justice with mercy.”

These two debates within Catholicism are directly relevant to the issue of war as retribution and how it relates to the policy of targeted killing. As will be argued in the next section, while there is just cause for the retributive targeted killing of culpable unjust individuals in principle such operations must still meet the right intention test in order to be just.

### **Targeted Killing as Retribution**

Turning to the contemporary moral issue of retributive war against culpable unjust individuals it seems that from a natural law perspective, retribution, in addition to self-defence, remains a licit just cause in principle.<sup>16</sup> In his rejection of war as punishment Luban (2012, 308) rejects as “absurd” what he calls the “Augustine Formula” which holds that war as punishment can be seen as parallel to “a father’s loving punishment of his errant son.” Furthermore, he argues that the Christian idea of war as punishment is built around a “judicial analogy” (2012, 309) which “likens warfare to a judicial proceeding that metes out punishment” (2012, 310).

Starting the reflection about the contemporary terrorist threat it must be noted that the “judicial analogy” which Luban rejects has historically been a much debated issue, also within the Christian just war. Francisco de Vitoria, for example, argued that it would be very difficult indeed for states to arrive at an objective judgement about their own and their opponent’s just cause. Vitoria’s solution was to argue for what Johnson (1975, 20-21) has called a state of “simultaneous ostensible justice” which, while acknowledging the difficulty of acting as one’s own judge, pleaded for an assumed just cause on both sides. Having said that, however, while there might be prudential reason to deny the, although in principle justified, “judicial analogy” for state conduct, these considerations do not seem to apply to war between sovereign authorities and private individuals. Based on the classical Christian

understanding, only sovereign authorities could wage war. Private individuals were denied the use of force, except in self-defence, because they could appeal to their sovereign whose task it was to maintain and re-establish justice. Applied to Islamist terrorists this means that, even if terrorists had just cause, they could not wage war because they inevitably fail the authority test. They would have to make their case before the responsible authority rather than taking up the sword themselves. It is here that the “Augustine formula,” even today, seems to make sense. It is the state as sovereign authority which, like a father, has the responsibility to punish the wrongdoing of those individuals who commit crimes within the political community entrusted to it.<sup>17</sup> Terrorists operating from within a state’s territory, no matter if they are citizens or not, commit acts of injustice which the ruling authority is obliged to stop and punish. Regarding terrorism, the “judicial analogy” also makes sense. The terrorist, like the criminal who is taken to court for her wrongdoing must take responsibility for her misdeeds. Interestingly, Luban seems to agree that the rejection of the “Augustinian formula” as well as that of the “judicial analogy” only applies to conduct between sovereign authorities.

Evidently, the punishment theory of just cause declined with the consolidation of the nation-state system, because it seems inconsistent with the theory of sovereign equality. One corollary of this point of view is that the sovereignty objection to the punishment theory of just cause does not apply when the adversary is a nonstate actor. Thus, the sovereignty objection leaves open the possibility of resurrecting the punishment theory in the War on Terror or other asymmetrical wars against militants and nonstate organizations, at least if the states of these militants and nonstate organizations consent to outsiders using force on their territory, as Pakistan and Yemen have reportedly consented to U.S. drones strikes. (2012, 316)

An obvious problem that arises with “bringing terrorists to justice” is the contemporary phenomenon of a “regime of non-state responsibility” (Heinze 2011, 1080) in which states are

either unable or unwilling to prosecute terrorists operating within their territory. Put differently, does the “punishment theory of just cause” justify a state who suffered from a terrorist’s wrongdoing to employ retributive force in the country in which she is hiding? Luban, as cited above, seems to allow for retributive action only if the third country consents. Thought through, the US, in the case of Osama bin Laden, would not have been justified in acting against al-Qaeda’s leader on retributive grounds without first having been granted permission by Islamabad. Arguably, given the likelihood that the Pakistani government knew about bin Laden’s whereabouts asking for permission would have greatly endangered the re-establishment of a state of justice which bin Laden’s past wrongdoing had disrupted. Crucially, seen from the particular Christian perspective this article follows the consent issue does not conflict with the retributive just cause criterion. As St Augustine (qtd. in Reichberg, Syse and Begby 2011, 82) puts it: “As a rule just wars are defined as those which avenge injuries, if some nation or state against whom one is waging war has neglected to punish a wrong committed by its citizens or to return something that was wrongfully taken.” Having quoted the Bishop of Hippo, Luban (2012, 308-309) notes that Aquinas’s “broad version drops Augustine’s restriction of punitive war to cases of state-tolerated private wrongdoing.” However, in contrast to what Luban seems to suggest, it is doubtful that Aquinas broke with Augustine on this issue. Rather, Augustine’s argument seems perfectly in line with Aquinas’s thinking about the ruler’s responsibility for the common good. It is likely that Aquinas did not explicitly mention this rationale because he took it for granted. For St Thomas, in cases when a sovereign authority is unable or unwilling to meet its responsibility to maintain or re-establish a state of justice, as was arguably the case with Islamabad in the bin Laden case, its borders, depending on the severity of the injustice committed, can provide no insurmountable protection from outside intervention. A further relevant aspect as far as the criterion of just cause is concerned is that from a natural law perspective the punishment must be proportionate to the terrorist’s wrongdoing. Arguably, given Osama bin Laden’s

responsibility for the death of thousands of innocent people on 9/11, any punishment other than the death penalty would seem out of proportion. Having said that, however, it goes without saying that the argument that bin Laden deserved the death penalty in principle does not mean that all terrorists are similarly culpable. Rather, retributive punishment must be measured according to a terrorist's individual culpability. In order to make that determination, based on the Thomistic conceptualisation of the sovereign as judge, a trial in absentia could be held in cases alleged terrorists actively seek to flee from prosecution.<sup>18</sup> If the wrongdoers, then, after having been sentenced, continue to hide they should be considered as unwilling to reform. To sum up, then, the principle of just cause, from a retributive Thomistic point of view, allows in principle for the targeted killing of culpable unjust individuals who seek to evade prosecution. Furthermore, against the Westphalian paradigm, a state's borders cannot function as unbridgeable protection from outside intervention.

### ***Right Intention***

Having established that, in principle, the retributive targeted killing of culpable unjust individuals is morally defensible does not yet answer the question whether such punitive action should be carried out. In particular, prudential considerations seem to stand against retributive targeted killing such as the likelihood of an outbreak of war between the wronged party and the country on whose territory the operation would take place.<sup>19</sup> While abstaining from the operation would allow for a situation of injustice to continue, namely that the culpable unjust individual would not be punished, the likely killing and destruction of a war between two sovereign authorities cautions against military action. Let us again refer to the bin Laden raid for practical illustration. Depending on one's reading, there are two possible interpretations of Pakistan's behaviour with regard to bin Laden. Either Islamabad did not know that bin Laden was hiding in Abbottabad or it was unwilling to prosecute him. Now despite some serious diplomatic irritation in the aftermath of bin Laden's demise it seems that



there was never a danger that the operation would trigger a broader conflict between the United States and Pakistan. The main reason for this seems to have been the fact that bin Laden was an internationally prosecuted culpable unjust individual rather than, for example, a member of Pakistan's military or political class. Of course, one issue that immediately arises with such an argument is the objection that Pakistan was by far the lesser military power compared to the US. Some might argue that, had Pakistan be the US's equal, the threat of war would have loomed larger in the aftermath of the night time raid. Consequently, such action is likely to take place only in third world countries which cannot afford taking the risk of confronting the great power which carries out the punitive military action. In Williams's words (2006, 130): "The strongest defence of the Westphalian border lies in its role in the nexus of rules and norms of interstate behaviour that aim to restrain the uses of violence in international relations. ... The fear of abuse of relaxed rules by the powerful to pursue expansionary or hegemonic wars; the fear of the opening of 'domestic' politics to violent intrusion by outsiders allowing cultural and religious divisions contained within the Westphalian structure to once again be a *casus belli*; the fear of a slippery slope to the Hobbesian abyss of the war of all against all motivates this defence." And in fact, it seems that the targeted killing of Islamist terrorists has taken place in weak states only. In response, the argument should be that such concerns cannot be discarded out of hand. None of the countries in which the US has carried out targeted killings could have risked going to war with Washington. However, this concern does not affect the judgement that culpable unjust terrorists who hide in these countries deserve punishment and are either supported by these host countries or they fail to meet their obligation of bringing the terrorists to justice. When the danger of war between the intervening party and the host country is remote it seems reasonable to conclude that allowing for retributive targeted killing in such cases is morally licit based on prudential grounds. Having said that, the preferable outcome would be that

states belonging to the unable or unwilling category take care of their responsibilities and prosecute hiding terrorists themselves.

In addition to the “sovereignty objection” Luban (2012, 318) identifies the “biased judgment objection” which, he asserts, “holds regardless of whether the adversary is a state or nonstate actor. In either case, the state concludes that it has been injured and that its injurer must be punished; and an injured party can never be trusted to draw this conclusion impartially.” After taking a closer look, however, Luban’s argument seems too harsh. Of course, Luban is correct that, in order to arrive at a just verdict, retribution, not vengeance, must be the rationale. While the temptation of vengeance may be difficult to resist, particularly in light of grave wrongdoing such as terrorist attacks, it nonetheless seems possible with the support of the moral virtues which help rule out “vengeful rage” (Luban 2012, 323). Besides the prudential concerns which warn against the possible negative side effects of justified retributive targeted killing of culpable unjust individuals to a wider war between sovereign authorities the virtue of charity and its derivative of mercy also have a role to play in regulating retributive targeted killing. As noted above, arguing that retribution can be a legitimate just cause for targeted killing, that culpable unjust individuals, depending on their guilt, may deserve the death penalty in principle does not mean that this type of punishment should be executed. Flowing from mercy, whenever it is reasonably possible to capture culpable unjust individuals doing so must be a matter of first resort. If captured, individuals who on natural law grounds deserve the death penalty should be subjected to life imprisonment instead of capital punishment. Consequently, in case Hersh’s (2016) account of the bin Laden operation is true, bin Laden as unarmed and gravely ill prisoner of the Pakistani ISI should have been captured, not killed. The reason for this is that the modern popes are right that the death penalty, while justified in principle, is opposed to the virtue of mercy. For an additional practical illustration consider the recent opinion piece (Foley et al, 2018) written by parents of American citizens who were brutally killed by members of the so-called Islamic

State for the sole reason of being Americans. Two of the perpetrators, Alexandra Kotey and El Shafee Elsheikh, have been captured and the question has arisen how to deal with them. From a natural law perspective, the two terrorists arguably deserve the death penalty as the only proportionate punishment for their grave wrongdoing. As the parents describe their misdeeds: “Just as the Sept. 11 attacks was a horrific assault on our country, the public beheadings of Jim, Steven and Peter were a deliberate, defiant assault on all of us; so was the torture by other fanatics that Kayla endured before her death.” Given the brutality their children had to suffer it would at least feel understandable if the parents showed a desire to inflict vengeance on the terrorists, the type of gut reaction Luban fears. However, the parents forcefully reject the passion of vengeance in pleading against the death penalty based on what seem to be both prudential and charitable grounds. In terms of prudence, they want to avoid awarding the terrorists a kind of martyr status as a result of being subjected to the death penalty. Instead, the parents make a plea for a fair and open legal trial which would then punish the terrorists to life in prison. As they put it: “When crimes like these are made public, victims like us can be heard and begin to heal. The accused will hear how their crimes have destroyed others, and perhaps even begin to repent. And we can hope that justice will put an end to such crimes against humanity.” In terms of charity, the parents effectively re-emphasise the contemporary papal argument that the death penalty is no longer in sync with today’s understanding of the highest virtue. “The Islamic State wants to intimidate us and lure us into a similar hatred of them. But we must be true to our children’s commitment to humanity.”

Judging from what has been argued so far is it then that retributive targeted killing is a theoretical option only? The answer must be no although the question cannot be answered easily given the circumstances of capture missions. There is reason to argue that the risk soldiers must take in capturing individuals such as Kotey and Elsheikh is minimal. If there is credible reason to believe that soldiers, as just combatants, may be harmed there is no moral obligation for them to take this risk.<sup>20</sup> In other words, assuming the sovereign authority had

made a reasonable assumption they would resist capture and had it been possible to take out Osama bin Laden, or the two Islamic state fighters, with a drone strike or other riskless means such lethal action would have been justified on moral grounds. It is here that modern weaponry with its ever improving precision can address Luban's concern that war is too blunt an instrument to inflict retribution. Crucially, however, flowing from the moral culpability account, the culpable unjust terrorists alone would have been targetable. From a retributive Thomistic perspective, as it was only them whose culpability had been determined, retributive targeted killing would not have allowed an air strike which may have killed or harmed other innocent individuals. In cases where it is impossible to strike at the culpable unjust individual without harming others the use of force cannot be justified morally as a means of just punishment. Even the grave state of injustice which the terrorists in our examples caused through their wrongdoing cannot justify the shedding of innocent blood on retributive grounds. Interestingly, Luban seems to accept this strictly circumscribed justification for retributive targeted killing. While he, as presented above, generally rejects war on retributive grounds as indiscriminate, he seems to allow for targeted killing as a discriminating exception to the rule: "More concretely, using war to visit retribution on another state seldom means punishing guilty elements within a state through carefully targeted violence against them as individuals. Operations such as the killing of Osama bin Laden by the United States are the rare exceptions" (2012, 326). Given these very strict limitations for retributive targeted killing occasions in which such action is morally justifiable will be rare. However, following a retributive reading of Aquinas, punitive targeted killing can be morally justifiable.

### **Capital Punishment, War, and Contemporary Catholic Just War Thinking**

In the light of a very recent development in Catholic Social Teaching an interesting question arises with regard to the historical parallel between the death penalty and war: Does the Catholic just war require an update now that Pope Francis does no longer object to the death

penalty on prudential and charitable grounds as his immediate predecessors used to do, but rules out this form of punishment as a matter of principle?<sup>21</sup> Inevitably, a decision of this magnitude has caused mixed reactions within a Church that has long been divided between reformers and traditionalists.<sup>22</sup> At first look, the answer to the question raised above might be that, given the close connection between the two forms of violence, a change in doctrine on the death penalty necessarily requires a change to the teaching of just war, too. Having said that, however, as Reichberg (2012, 1096) notes, no modern pope since at least Pius XII has advocated the conceptualisation of war as a means to inflict punishment on an unjust adversary. Likewise, taking a look at the Catechism's treatment of just war (§2307-2317) the emphasis of the rationale of self-defence as just cause for war is immediately apparent. In addition, the first "condition for legitimate defense" reads as follows: "the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;" (§2309). There thus seems to be a focus on objective wrongdoing and, moreover, one is struck by the absence of any reference to the adversary's subjective guilt. As a result, rather than being in need of changing the Catechism as a consequence of the death penalty decision the Church seems to have already adopted a liability account to defensive harm for which important neo-Scholastics such as de Vitoria and de Molina paved the way by focusing on objective wrongdoing rather than culpability. Interestingly and ironically perhaps, the official Catholic just war thus exhibits curious parallels with revisionist just war theorists such as McMahan. As a result, opposing the death penalty in principle seems irreconcilable with the punitive reading of Aquinas's just war this article has followed, but is in line with the other camp of the Thomistic just war which advocates a liability-based theory of just war.<sup>23</sup> As far as the policy of targeted killing is concerned abandoning the analogy between the death penalty and war necessarily rules out the use of targeted killing as a means of retribution, no matter how much it would be circumscribed. Targeted killings would only be justifiable in cases the targets have made themselves liable to defensive harm.

## Conclusion

Contemporary just war thinking overwhelmingly rejects the retributive rationale for war, solely allowing for the just cause of self-defence. Seen from one particular reading of the Thomistic just war, however, retribution, at least in principle, remains a licit just cause for war. Importantly, whether such wars should actually be fought is a different matter. As this article has argued there are good prudential reasons to deny retribution as a just cause for war between states. Having said that, the concerns which advise against the retributive just cause for war between states do not apply to the war between states and non-state actors in the same way. This article has demonstrated that while there is, as with states, just cause for retribution in principle against culpable unjust individuals, retributive targeted killing can also pass the right intention test when it comes to culpable unjust individuals. Building on a Thomistic virtue ethics approach this article has argued that, while retributive targeted killing can be morally defensible, such action must be subject to very strict criteria.

## Notes

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<sup>1</sup> The origins of the Christian just war are commonly traced back to St Augustine. The Bishop of Hippo's thinking about war, however, consists of ad-hoc remarks only. It was St Thomas Aquinas who, several centuries later, systematised the Christian just war. This article, when speaking of the classical Christian just war, refers to the Thomistic account which is built around a natural law approach.

<sup>2</sup> As will be pointed out in greater detail later it is important to note at this point that while Thomistic just war thinkers generally embraced the idea of punishment there was no consensus about the question whether desert should be a just cause for war.

<sup>3</sup> The classical point of reference for this understanding was Rom 13: 3-4. "For rulers are not a cause of fear to good conduct, but to evil. Do you wish to have no fear of authority? Then

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do what is good and you will receive approval from it, for it is a servant of God for your good. But if you do evil, be afraid, for it does not bear the sword without purpose; it is the servant of God to inflict wrath on the evildoer.”

<sup>4</sup> This is not to say that before Westphalia and the Enlightenment the Christian just war was all about retribution and punishment and, then, that conceptualisation was abruptly abandoned. However, the Westphalian emphasis of self-defence constituted a significant shift.

<sup>5</sup> For a book-length narrative of the change in the understanding of sovereignty see Johnson (2014).

<sup>6</sup> Catholic Social Teaching was at the forefront of this development. For a discussion of modern popes’ emphasis of prudential reasoning vis-à-vis the issue of just cause see Reichberg (2012).

<sup>7</sup> See, for example, the volume edited by Heinze and Steele (2009).

<sup>8</sup> In this regard, there seems to be agreement even between Walzerians and their revisionist critics in that the threat of Islamist terrorism sits uneasily between war and law enforcement. See, for example, Walzer (2016, 13) and McMahan (2012, 155).

<sup>9</sup> It goes without saying that such an argument invites the criticism of anachronistic reasoning. Beestermöller (1990, 25), for example, rightly notes that the medieval conceptualisation of the “state” was very different and invites misinterpretation vis-à-vis our contemporary understanding. However, with due caution, it seems that despite those major differences it is still possible to draw conclusions from St Thomas’s conceptualisation of authority, especially with regard to today’s non-state terrorist actors.

<sup>10</sup> Walzer’s just war analysis starts from the framework of international law and, at times, argues for exceptions to the “legalist paradigm.” Like the UN framework, Walzer denies the just cause of retribution to individual states. As he (2015, 62) puts it himself: “The conception of just war as an act of punishment is very old, though neither the procedures nor the forms of punishment have ever been firmly established in customary or positive international law. Nor

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are its purposes entirely clear: to exact retribution, to deter other states, to restrain or reform this one?”

<sup>11</sup> Importantly, the particular reading of St Thomas this article follows is not the only Thomistic interpretation of just war. As Reichberg (2017, 142-172) points out, St Thomas’s formulation of just cause historically led to two clashing interpretations. One, most influentially advocated by Thomas Cajetan, considers a just war as an instrument of retribution flowing from desert; as “an instrument of punishment, just war supposes subjective guilt on the part of the wrongful belligerent.” The other, originating with Francisco de Vitoria and suggested by Luis de Molina, imagines a just war in terms of liability, as “a means of overturning an objective wrong, just war prescind[s] from determinations of subjective guilt” (2017, x).

<sup>12</sup> It should be noted that this consensus includes most contemporary Christian just war thinkers. Among the few voices, besides Johnson, who accept a, strictly circumscribed, just cause of retribution are Biggar (2013) and O’Donovan (2003).

<sup>13</sup> St Thomas’s account of virtue ethics has recently been rediscovered for the just war. Reichberg (2017, 67-110), for example, provides an innovative interpretation of Thomistic right intention based on the virtues of military prudence and battlefield courage.

<sup>14</sup> Importantly, this is not to say that the other virtues are insignificant. Aquinas operated from the doctrine of the unity of the virtues which holds that for true moral action, all the virtues must be exhibited.

<sup>15</sup> Admittedly, this was not the main reason why St Thomas discussed war in the question on charity. Rather, as Reichberg (2017, ix) notes, it was the waging of unjust wars as sin against the highest virtue which lead to his treatment of war in that section.

<sup>16</sup> The following discussion has in mind only those cases where terrorists seek to evade prosecution by hiding in third countries which are either unable or unwilling to prosecute them.



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<sup>17</sup> As noted earlier, classical thinkers, in contrast to today's cosmopolitan theorists (see Fabre 2008, 969), rejected the idea that individuals could wage war. The reason for this rejection was that the "public monopoly of the use of force" was considered to be "a fundamental step in any process of pacification, and securing that monopoly is a precondition of civilized society" (Coates 2016, 141).

<sup>18</sup> With regard to targeted killing, Emery and Brunstetter (2016) have recently suggested the idea of a trial in absentia although their account is hard to reconcile with the retributive Thomistic just war as the two authors only allow for the use of force in self-defence.

<sup>19</sup> While the question of war seems to be the most important one there are further prudential considerations decision-makers will have to grapple with before undertaking a retributive targeted killing. A non-comprehensive list of such further prudential tests would include the weakening of alliances and, for example, in the case of Pakistan, tribal loyalties. Moreover, public fear and the possibility of a backlash against the intervening state must be calculated.

<sup>20</sup> St Thomas, in contrast to contemporary Walzerian just war theorists, did not advocate a general moral equality of combatants. For a discussion of this issue see Reichberg (2017, 223-256).

<sup>21</sup> Francis (as cited in Ladaria 2018) asked for the following revision of the Catechism: "no matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person."

<sup>22</sup> On one side of the debate one finds supporters such as Ivereigh (2018) who defends Francis's decision as in line with prior Church teaching. On the other, the pope's critics have been outspoken against what they see as a position that contradicts two millennia of Church teaching. For example, in an appeal to the College of Cardinals (Arkes et al. 2018), forty-five scholars and clergy asked them to correct the pope regarding this "scandal."

<sup>23</sup> It is noteworthy that, despite Francis's decision, Catholic Social Teaching allows for Catholics to continue to argue for the legitimacy of the death penalty in principle as well as

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retributive war. The then Cardinal Joseph Ratzinger (2004) in his position as prefect for the Congregation of the Doctrine of the Faith illustrated this point as follows: “Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities to seek peace, not war, and to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia.” Relatedly, as Rowlands (2018) points out, a future successor will not be bound by Francis’s decision. It may well be that a future pope will opt to return to the traditional doctrinal position.

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