

ARTICLE:OUR CAUSE IS JUST: AN ANALYSIS OF OPERATION IRAQI FREEDOM UNDER INTERNATIONAL LAW AND THE JUST WAR DOCTRINE

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Text

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Introduction

On March 18, 2003, the United States launched Operation Iraqi Freedom which was intended to disarm Iraq, free its people, and defend the world from the grave danger posed by Iraq. ¹ President George W. Bush argued that the United States was acting in self-defense to protect the lives of innocents from weapons of mass destruction, as well as in a humanitarian intervention to liberate the Iraqi people from the brutal tyranny of Saddam Hussein. ² Those at home and abroad criticized and condemned the decision to invade Iraq and dismantle the Hussein regime. Members of the Catholic hierarchy, including Pope John Paul II, urged caution in the months leading up to the invasion and have since criticized the United States for its use of armed force. ³ These statements have either explicitly or **[*66]** implicitly raised the question of whether the use of force was justified under the Catholic Church's teaching regarding the moral justification for waging war - the "just war" doctrine.

This article will examine the justifications advanced in support of Operation Iraqi Freedom in light of the Catholic Church's just war teachings. In so doing, this article will demonstrate that the launching of Operation Iraqi Freedom was justified under international law and was consistent with the Catholic Church's just war doctrine.

¹ President's Address to the Nation on Iraq (Mar. 19, 2003), 39 Weekly Comp. Pres. Doc. 329, 342 (Mar. 24, 2003).

² President's Address to the Nation on Iraq (Mar. 17, 2003), 39 Weekly Comp. Pres. Doc. 329, 338-39 (Mar. 24, 2003) [hereinafter President's Address, Mar. 17, 2003].

³ Pope John Paul II, The Primacy of Natural Law in International Relations, Address to the Diplomatic Corps Accredited to the Holy See (Jan. 13, 2003), in 48 The Pope Speaks 144, 146 (2003). See also Larry B. Stammer, Catholic Bishops Oppose a Unilateral War on Iraq, L.A. Times, Sept. 18, 2002, at 6; Cardinal Ratzinger ... U.S. War on Iraq Not Morally Justified, Wanderer, Oct. 3, 2002, at 1.

Section I discusses the Catholic Church's just war doctrine. It begins with an explanation of the Church's traditional understanding of just war as taught by Augustine and Aquinas. The section concludes by articulating the position of the Catechism of the Catholic Church, the most recent, comprehensive, and authoritative statement of the Catholic Church's teaching on just war.

Section II discusses the requirements for the use of force as found in customary or traditional international law and in the language of the United Nations Charter. It examines in detail two particular justifications advanced for the use of force in international law: the notion of anticipatory or preemptive self-defense and humanitarian intervention.

Section III evaluates how the United States fulfilled the requirements of just war - according to both the Catholic just war doctrine and international law - in launching Operation Iraqi Freedom. The United States had a just cause both in exercising its right to preemptive self-defense and in protecting the Iraqi people from massive human rights violations. In addition, the United States was a competent authority to wage war, and did so only as a last resort.

I. The "Just War" Doctrine

The just war doctrine is the Catholic Church's teaching concerning the moral justification for war.⁴ Originally articulated by St. Augustine and further developed by St. Thomas Aquinas and others, [*67] the just war doctrine is an attempt to develop a coherent theory concerning just war and provides a framework for determining when force is justified. Although the doctrine establishes a presumption in favor of peace and against war, it also recognizes that force may have to be used for the sake of preserving peace and protecting human dignity and human rights.

The just war doctrine reflects the classical Catholic perspective regarding the necessity that politics serve moral ends, and it advances the concept of war as a form of politics, which must serve some moral end.⁵ In this regard, the just war doctrine reflects the moral judgment that the state, having a monopoly on coercive power and use of force, has the obligation to defend the common good.⁶

In discussing war, Augustine did not concern himself with the outward effects of combat so much as with the interior motivations: to wit, hatred, bloodlust, vindictiveness, and ambition. According to Augustine, when those with these motivations pose a threat to the common good, a just man, acting under the authority of law, could repel them by force, so long as he himself refrains from such motivations. As such, Augustine focused on the necessity that a legitimate authority wage war and only with a just cause.⁷

In discussing just cause, Augustine emphasized peace as the natural order, and stated that a sovereign should undertake war only to promote a more just peace.⁸ In addition to the cause of peace, Augustine approved of warfare to punish evil nations, and even to conquer them; by depriving an evil nation of its liberty, a just sovereign could therefore deprive that nation of its liberty to engage in evil.⁹ Moreover, a sovereign could wage war only

⁴ The classical focus of the just war doctrine, as well as the focus of this paper, is *jus ad bellum* (the just cause needed for war) rather than *jus in bello* (the justice of acts in the context of war). Because the tactics a nation uses in war vary from case to case, the requirement of *jus in bello*, regarding the means by which a nation should prosecute a war, need not detain us here. Such a requirement is impossible to consider in the abstract, whatever the facts giving rise to war, and one can only discuss *jus in bello* upon an examination of the nation's actual conduct during the war. See generally Catechism of the Catholic Church PP 2309-14 (2d ed. 1997).

⁵ George Weigel, *The Just War Tradition and the World After September 11*, *Logos*, Summer 2002, at 13, 21.

⁶ *Id.* at 23.

⁷ Saint Augustine, *Contra Faustum Manichaeum*, Book XXII PP 74-78.

⁸ Saint Augustine, *The City of God*, Book XIX, ch. 12 (Marcus Dods trans., Modern Library ed., Random House 1993).

when such action was necessary to accomplish the previously mentioned objective of building peace through self-defense, punishment of evil, or recovery of wrongfully taken possessions.¹⁰

[*68] St. Thomas Aquinas further refined the just war doctrine, providing his own formulation of the theory. Under the Augustinian and Thomistic just war tradition, only a competent authority, charged with the protection of the common good, may wage war. Also, a just cause must exist. Finally, in deciding to wage war an authority must act with right intent, to promote good or avoid evil, avoiding the inappropriate interior motives, such as hatred, bloodlust, vindictiveness, and ambition.¹¹

According to scholar Fr. Edward T. Oakes, S.J., analysis under the just war theory is only required with respect to wars not waged in self-defense. Oakes argues that wars of self-defense are always just and need no justification. Only other wars, non-defensive wars, need justification and, therefore, a just war theory to distinguish them from unjust wars. Thus, according to Oakes, St. Thomas Aquinas only contemplated offensive, not defensive wars, when devising his just war theory.¹²

More recently, in *Gaudium et Spes*, the Second Vatican Council (Vatican II) urged all nations to minimize the horrors of war, but the Council recognized that, absent the existence of an authority capable of preventing war, nations retain the right and duty to wage war to protect the common good. The Council stressed, however, that nations should resort to war only after having exhausted all other peaceful means.¹³

Most recently, the Catechism of the Catholic Church discusses just war doctrine. The Catechism summarizes the discussion of just war, echoing the requirements first enunciated by Augustine and Aquinas and reemphasized in *Gaudium et Spes*. As such, the Catechism reflects the most recent, comprehensive, and authoritative statement of the Catholic Church's teaching in this regard. The Catechism begins by reiterating Vatican II in stating that a competent authority **[*69]** should wage war in self-defense and only after all peaceful means have failed. The Catechism then proceeds to outline four additional considerations of a more prudential nature. First, the damage the nation or community of nations has suffered or will suffer must be lasting, grave, and certain. Second, all other means of settling the matter must have proven ineffective or impractical. Third, a serious chance of success must exist. Finally, warfare must not perpetrate greater evils than those the nation seeks to prevent or resolve. Determination of whether these factors have been satisfied remains the responsibility of the one charged with the care of the common good - the state.¹⁴

⁹ Saint Augustine, 3 Letters, in *The Fathers of the Church* 36, 46-47 (Wilfrid Parsons, S.N.D. trans., 1953). Another instance in which St. Augustine affirmed the justice of war concerned war executed by divine mandate. Saint Augustine, *supra* note 7, Book XXII P 74.

¹⁰ Saint Augustine, 4 Letters, in *The Fathers of the Church* 266, 269 (Wilfrid Parsons, S.N.D. trans., 1953).

¹¹ Thomas Aquinas, *Summa Theologica*, Part II-II, Question 40, Article 1 (Fathers of the English Dominican Province trans., Christian Classics 2d ed. 1981).

¹² Edward T. Oakes, S.J., *The Fog of Just War*, The Bridge, Spring 2003, at 11-12.

¹³ Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] P 79 (1965), reprinted in *The Sixteen Documents of Vatican II* 513, 599-601 (Nat'l Catholic Welfare Conf. trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*]. Regarding *jus in bello* considerations, Vatican II stressed that the initiation of war does not render licit all activities undertaken during the course of combat. Specifically, states should take measures to minimize civilian casualties, should discriminate between military and civilian targets, and should refrain absolutely from employing weapons of mass destruction. *Id.* PP 79-80. In addition, Vatican II called for an end to the arms race and the establishment of an international authority capable of preventing war. *Id.* PP 81-82.

¹⁴ Catechism of the Catholic Church, *supra* note 4, PP 2309-10. The Catechism also discusses *jus in bello* considerations, noting that the justice of a war does not render all means of prosecuting the conflict licit. In particular, the Catechism condemns mistreatment of non-combatants, prisoners, and wounded soldiers, as well as genocide and the indiscriminate targeting of areas that include civilians. *Id.* PP 2313-14.

II. International Law and the Use of Force

The Catholic Church's just war doctrine is consistent with international law requirements regarding the legitimate use of force. This is most apparent with respect to the United Nations (UN) Charter's encouragement that disputes be resolved by peaceful means,¹⁵ its prohibition of aggression, and its validation of self-defense as a justifying principle.¹⁶

Under the UN Charter, the United States and other member states have agreed to refrain from the threat or use of force against the territorial integrity or the political independence of any other state, or in any other manner inconsistent with the purposes of the UN.¹⁷ The UN Charter further provides, however, that this prohibition does not [*70] impair the inherent right of individual self-defense if an armed attack occurs.¹⁸

Thus, under the UN Charter, a prerequisite to the exercise of the right of self-defense is an act that constitutes an "armed attack." "Armed attack" has been broadly interpreted to include circumstances where "military personnel, citizens, commerce, and property" have been attacked.¹⁹ Accordingly, the United States has an inherent right to defend itself, and its citizens, personnel, and property, against armed attacks. If the United States has not been subjected to an "armed attack," then no right of self-defense exists.²⁰

The use of force in self-defense is permissible only if such force is preceded by actual necessity and the responding force is proportional to the initial attack.²¹ Traditionally, self-defense is justified only when the necessity for action is imminent; it is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."²² Consequently, like the Catholic Church's *jus ad bellum* requirements for a just war, necessity under international law requires imminent danger and that peaceful means, if available, be exhausted prior to exercising the right of self-defense.

One could argue that once an attack has occurred the necessity for response expires since the imminence of the danger has waned and further response would constitute an unlawful reprisal or retaliation. Thus, a delayed response might be considered unlawful. If, however, evidence indicates that additional imminent attacks are planned or that the present attack is part of a continuing threat, military response to preempt and deter renewed

¹⁵ U.N. Charter art. 2, para. 3. See also *id.* art. 33. This requirement is similar to the Church's requirement that all peaceful means be exhausted prior to the use of force. See Catechism of the Catholic Church, *supra* note 14 and accompanying text.

¹⁶ U.N. Charter art. 2, para. 4. See also *id.* art. 51. UN General Assembly Resolution 3314 recommends the following definition of aggression: "The use of armed force by a State against the sovereignty, territorial integrity or political independence of any other State, or in any other manner inconsistent with the Charter of the United Nations ..." G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 143, U.N. Doc. A/9619/Corr. 1 (1974). Moreover, Resolution 3314 indicates that the first use of armed force in contravention of the UN Charter is *prima facie* evidence of an act of aggression. *Id.* This prohibition of aggression is consistent with the Catholic Church's recognition that "defensive" wars are justified. See Oakes, *supra* note 12 and accompanying text.

¹⁷ U.N. Charter art. 2, para. 4.

¹⁸ *Id.* art. 51.

¹⁹ Abraham D. Sofaer, The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense, [126 Mil. L. Rev. 89, 96 \(1989\)](#).

²⁰ It is important to note, however, that not all uses of force qualify as "armed attacks," as evinced by an International Court of Justice opinion. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27) (concluding that only a substantial military attack, and not isolated armed incidents, rises to the level of an "armed attack").

²¹ Lt. Cmdr. Micheal F. Lohr, JAGC, USN, Legal Analysis of United States Military Responses to State-Sponsored International Terrorism, 34 *Naval L. Rev.* 1, 16-17 (1985).

²² *Id.* (quoting a letter from Secretary of State Daniel Webster to Henry S. Fox (Apr. 24, 1841), in 29 *British and Foreign State Papers* 1129, 1138 (1840-1841)).

assaults would be justified.²³ In no way should international law be construed to limit measures reasonably considered necessary to prevent or deter unlawful attacks.

[*71] The second limitation on the right to self-defense, proportionality, refers not to the justification for the action, but to the targets, means, and methods of the acting state. Traditionally, international law viewed proportionality as that amount of force necessary to obviate the immediate threat without disproportionate collateral damage or unnecessary suffering.²⁴ As such, proportionality raises similar considerations to the Catholic Church's *ius in bello* requirement.

Under international law, a state is not normally justified in using force against another state absent an actual or imminent attack. Some, however, have suggested an exception to this general prohibition thereby permitting limited, temporary incursions into the territory of another state to act against threats emanating from it.²⁵ Thus, a limited, temporary incursion into the territory of another state that does not threaten its "territorial integrity" or "political independence" may be justified under some circumstances. For example, a nation that permits the use of its territory as a staging area for terrorist attacks cannot expect to insulate its territory from proportionate measures of self-defense.

In summary, according to international law, a nation may respond forcibly in self-defense to an armed attack launched by another state. This response must be timely, proportionate to the attack, and discriminate in its application. A nation may also take forcible counter-measures to prevent or deter an armed attack that is imminent or that is part of a continuing threat. Finally, a nation may engage in limited, temporary incursions to neutralize an actual threat.

A. "Anticipatory" or "Preemptive" Self-Defense

An additional justification advanced for the use of force that is important to an analysis of Operation Iraqi Freedom is the concept of anticipatory self-defense. Under this concept, nations hold a limited right to act against a perceived threat before being subject to an actual armed attack, as a literal reading of Article 51 of the UN Charter would seem to require. Although the UN Charter does not specifically address whether a right to anticipatory self-defense exists outside of Article 51, proponents of anticipatory self-defense believe **[*72]** that such a right exists under traditional or customary international law. These scholars note that "the UN Charter did not eliminate the right of self-defense under customary international law, or confine its scope to the express terms of Article 51."²⁶

Adherents to this position include the United Kingdom and the United States who "have consistently maintained that the right of self-defense also applies when an armed attack has not yet taken place but is imminent."²⁷ This concept is not new as it dates back to the 1837 Caroline incident when the United States attacked and destroyed a ship used by Canadian rebels. United States Secretary of State Daniel Webster's explanation for the attack has long been regarded as a definitive statement of the right of anticipatory self-defense. Webster argued that the United States need not await an actual attack, but could act in anticipation of a threatened armed attack, provided

²³ [A] State whose territory or citizens are subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks." U.N. SCOR, 41st Sess., 265th mtg. at 112-13, U.N. Doc. S/PV.2655 (1986) (statement of Vernon Walters, U.S. Ambassador to the United Nations).

²⁴ Dep't of the Army, Field Manual 27-10: The Law of Land Warfare P 41 (1956).

²⁵ In *Nicaragua v. United States*, the International Court of Justice left open the question of whether the use of force, falling short of an armed attack, could be countered by limited measures that also involve the use of force. *Military and Paramilitary Activities*, (*Nicar. v. U.S.*), 1986 I.C.J. at 107.

²⁶ Leo Van den Hole, *Anticipatory Self-Defense Under International Law*, [19 Am. U. Int'l L. Rev. 69, 94](#) (citing *Military and Paramilitary Activities* (*Nicar. v. U.S.*), 1986 I.C.J. at 347 (Schwebel, J., dissenting)).

²⁷ Christopher Greenwood, *International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, [4 San Diego Int'l L. J. 7, 12 \(2003\)](#).

that there was "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." ²⁸ A limited right to act against a perceived threat before being subject to an actual attack thus was recognized.

Although anticipatory self-defense arguably falls within traditional notions of self-defense, some have called for the adoption of a new norm that would better address terrorism and the changing nature of modern military action. ²⁹ Similarly, some scholars distinguish between "anticipatory" and "preemptive" self-defense. To them, anticipatory self-defense is best understood to describe military action against an imminent attack and such use of force is justified under traditional notions of self-defense. Preemptive self-defense, on the other hand, is arguably better employed to describe the use of force against a more remote, yet significant threat. ³⁰

[*73] To the Bush administration, however, "preemptive" self-defense is merely an adaptation of the doctrine of anticipatory self-defense necessitated by the modern world's threats and adversaries.

For centuries, international law recognized that nations need not suffer attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat - most often a visible mobilization of armies, navies, and air forces preparing for attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction - weapons that can be easily concealed, delivered covertly, and used without warning... .

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. ³¹

Thus, to the Bush administration, the doctrine of "preemptive" self-defense is merely an adaptation of the long-recognized doctrine of "anticipatory" self-defense. Technological advances that permit terrorists and rogue states to inflict grave injury, particularly through the use of weapons of mass destruction, necessitated this adaptation. Accordingly, preemptive self-defense would justify armed response to a perceived threat that, although less imminent than massing forces, poses a significant threat to national security.

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B. Humanitarian Intervention and the Use of Force

A final justification under international law for the use of force that bears on the question of the legitimacy of Operation Iraqi Freedom is the doctrine of "humanitarian intervention." This doctrine is invoked by some to justify "armed intervention by the United Nations, a coalition of outside states, or a single outside state, into another state to prevent widespread human rights violations or a massive humanitarian crisis." ³² Generally, humanitarian

²⁸ Id. at 13 (quoting a letter from Secretary of State Daniel Webster to Henry S. Fox (Apr. 24, 1841), in 29 *British and Foreign State Papers* 1129, 1138 (1857) (citations omitted)).

²⁹ See, e.g., Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense, and Other Responses*, 11 *Cardozo J. Int'l & Comp. L.* 1, 38-39 (2003); Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, [34 *Case W. Res. J. Int'l L.* 1, 8-9 \(2002\)](#).

³⁰ Greenwood, *supra* note 27, at 9.

³¹ National Security Council, *The National Security Strategy of the United States of America* 15 (2002) (emphasis added), available at <http://www.whitehouse.gov/nsc/nss.pdf> (on file with the Ave Maria Law Review).

intervention describes incidents where a regime is perpetrating humanitarian crimes against its own people, and other nations intervene to prevent the regime from doing harm. Similarly, the Catholic just war tradition recognizes the potential necessity of force to preserve a more just peace, promoting the common good, and protecting human dignity and human rights.³³

The legitimacy of humanitarian intervention as a justification under international law for the use of force is debatable. As noted above, under the UN Charter, members agree not to use force against the territorial integrity or the political independence of any other state.³⁴ An exception to this prohibition arises if a state is attacked, in which case that state enjoys the right to self-defense.³⁵ Clearly, humanitarian intervention does not fall within the category of self-defense.

Under Chapter VII of the UN Charter, however, "the Security Council may determine that the massive scale of violations of human rights or war crimes being committed within a particular nation constitutes a threat to international peace and security and may authorize intervention to prevent the continuation of such abuses."³⁶ Supporters of this type of intervention claim that human rights atrocities threaten international peace because they could lead to military action with neighboring nations, or create a refugee problem.³⁷ Yet a strict reading of the UN Charter indicates that Chapter VII humanitarian interventions require the prior approval of [*75] the UN Security Council. Any use of force in the absence of such approval could not be justified as a UN-sanctioned humanitarian intervention. Instead, the use of force would have to be justified as a humanitarian intervention under customary international law.³⁸

III. Just War and Operation Iraqi Freedom

In analyzing the moral justifications for Operation Iraqi Freedom under the Catholic just war doctrine and its legitimacy under international law, this article will focus on the requirements of just cause, competent authority, and last resort. These requirements are in serious dispute with regard to Operation Iraqi Freedom. Two of the Catholic Church's just war requirements are not in question, and therefore will not be addressed by this article: the likelihood of success and the tactics used in waging war.

A. Just Cause

The distinction noted above between offensive and defensive wars remains an important distinction with respect to Operation Iraqi Freedom.³⁹ Operation Iraqi Freedom can be justified under either an offensive or defensive war theory. If Operation Iraqi Freedom were a classical "defensive war" then it would be considered justified under the just war theory and, therefore, a legitimate use of force under international law. The United States, however, has argued that it was not only acting in anticipatory self-defense to protect the lives of innocents from weapons of mass destruction, but also in a humanitarian intervention to liberate the Iraqi people from the brutal tyranny of Saddam

³² Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization*, 25 *Hous. J. Int'l L.* 99, 102-03 (2002).

³³ *Gaudium et Spes*, supra note 13, P 79.

³⁴ U.N. Charter art. 2, para. 4.

³⁵ *Id.* art. 51.

³⁶ Marcus, supra note 32, at 103 (explaining articles 39, 41, and 42 of the UN Charter).

³⁷ *Id.* at 104 (citing Louis Henkin et al., *International Law: Cases and Materials* 430 (3d ed. 1993)).

³⁸ The legitimacy of a customary right of humanitarian intervention outside the auspices of UN-sanctioned interventions has been the subject of much debate. See, e.g., Ian Brownlie, *Humanitarian Intervention*, in *Law and Civil War in the Modern World* 217 (John Norton Moore ed., 1974); Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, in *id.* at 229.

³⁹ See Oakes, supra note 12 and accompanying text.

Hussein and rebuild the devastated nation. To accomplish these ends, the United States sought the forcible disarmament of Iraq and a change of regime. ⁴⁰ Thus, the question remains as to whether the enunciated cause was a just cause.

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1. Anticipatory Self-Defense

In 1990, the UN Security Council adopted resolutions condemning Iraq's invasion of Kuwait and authorizing states to take all necessary action to bring an end to Iraq's aggression against Kuwait. ⁴¹ The 1991 cease-fire resolution continued these authorizations; it required Iraq to dismantle its offensive military capabilities including its weapons of mass destruction capabilities, and mandated inspections necessary to ensure compliance. ⁴² These and subsequent resolutions squarely placed the burden on Iraq to demonstrate compliance. Moreover, these resolutions authorized states to use all necessary means to enforce them if Iraq was found in material breach. ⁴³

Since 1991, Hussein has brazenly flouted the obligations imposed by the UN, most notably through his 1998 expulsion of UN weapons inspectors. In late 2002, the UN Security Council unanimously put him under edict to prove that he had carried out the obligations imposed by over a dozen UN Security Council Resolutions. ⁴⁴ Although the resolutions assigned to Iraq the burden of showing its weapons and demonstrating disarmament, Hussein provided no such proof. ⁴⁵ To the contrary, the UN weapons inspectors, dispatched to Iraq to ensure compliance with the resolutions and verify Hussein's professed disarmament, found ample evidence of violations. ⁴⁶

[*77] As such, going to war with Iraq arguably has nothing to do with "anticipatory" self-defense. Instead, such a war could be justified under international law and traditional just war doctrine as the lawful conclusion to the just war fought and won in 1991. Accordingly, military action against Hussein would not be dependent, as some advocates have claimed, ⁴⁷ upon demonstrating either a direct link to the 9/11 al-Qaida terrorist attack or to an actual attack

⁴⁰ George Weigel, Just War and Pre-emption: Three Questions, The Tidings Online (Oct. 4, 2002), at <http://www.the-tidings.com/2002/1004/difference> text.htm (on file with the Ave Maria Law Review).

⁴¹ S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/PV.2933 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/PV.2963 (1990).

⁴² S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/PV.2978 (1991); S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc. S/PV.2981 (1991).

⁴³ See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/PV.2981 (1991); S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg.; U.N. Doc. S/PV.3004 (1991); S.C. Res. 715, 46th Sess., 3012th mtg., U.N. Doc. S/PV.3012 (1991); S.C. Res. 1284, U.N. SCOR, 54th Sess., 4084th mtg., U.N. Doc. S/RES/1284 (1999).

⁴⁴ S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/PV.4644 (2002).

⁴⁵ President's State of the Union Address, 39 Weekly Comp. Pres. Doc. 109, 114 (Feb. 2, 2003).

⁴⁶ Id. In 1999, the UN found that Hussein possessed 25,000 liters of anthrax, a quantity sufficient to kill millions of people. In addition, Hussein possessed enough material to manufacture in excess of 38,000 liters of botulinum toxin -- also sufficient to kill millions of people. Moreover, American intelligence indicated Hussein retained the capabilities of manufacturing in excess of 500 tons of sarin, mustard, and VX nerve agent. Furthermore, despite intelligence findings that Hussein possessed 30,000 munitions capable of deploying chemical weapons, inspectors discovered only sixteen. Additionally, Iraqi defectors revealed that Hussein had mobile biological weapons labs, capable of rapid motion that would facilitate concealment. Moreover, the International Atomic Energy Agency (IAEA) established that Hussein had an advanced nuclear weapons program, researching various means to enrich uranium for weapons. In addition, American intelligence has found that Hussein has sought other materials necessary for the production of such weapons. At no time has Hussein accounted for his weapons; neither has the Iraqi dictator proven their destruction. Intelligence indicated that Hussein had consistently engaged in a course of mendacity, concealing documents, tampering with evidence, and intimidating witnesses. Hussein had blocked aerial surveillance of weapons sites, and substituted intelligence operatives for some of the scientists the UN inspectors needed to interview. Id.

against the United States as required by traditional notions of self-defense.⁴⁸ This is not, however, the justification advanced by the United States. Instead, the United States has relied on the doctrines of anticipatory self-defense and humanitarian intervention.

As noted above, under the UN Charter, members have agreed to refrain from the threat or use of force. The Charter further provides, however, that this does not impair the inherent right of self-defense. Traditionally, the use of force in self-defense is only permissible if it is preceded by actual necessity. In the past, such necessity required imminent danger and that peaceful means, if available, be exhausted prior to exercising the right. As noted above, however, doctrinal evolution has recognized the concept of "anticipatory self-defense,"⁴⁹ and its Bush administration adaptation, "preemptive self-defense." The doctrine of anticipatory self-defense becomes increasingly important in this age of weapons of mass destruction. The devastating potential of such weapons, the swiftness of their delivery, and their covert delivery capability (e.g., suitcase bombs, vials of toxic chemical or biological agents, infected persons) makes waiting for a first strike suicide, not self-defense. Allowing such weapons in the hands of a leader with a history of reckless aggression and the actual use of weapons of mass destruction, with an apparent intent to do so **[*78]** again, would be a breach of President Bush's obligation to the American people.⁵⁰

Before the war that drove him from power, Saddam Hussein had a history of developing and employing weapons of mass destruction.⁵¹ During the Iraq-Iran War of the 1980s, Hussein's use of chemical weapons gave the country a decisive advantage, preventing Iraq from being overrun by the numerically superior Iranian army.⁵² Furthermore, Hussein ruthlessly employed chemical weapons against Kurdish civilians, killing untold thousands.⁵³ After its experiences of the 1980s, Iraq did not abandon its quest to attain weapons of mass destruction, but merely shifted tactics, perfecting its expertise so as to one day rebuild its arsenal with more sophisticated weapons with greater lethality.⁵⁴ Thus, the real threat did not consist of actual weapons of mass destruction, but the technical expertise necessary to manufacture such weapons quickly, coupled with the willingness to use such weapons, and the possibility that terrorist groups, such as al-Qaida, could benefit from the Iraqi program.

Since the initiation of hostilities, further information has emerged with regard to the Iraqi weapons of mass destruction.⁵⁵ Most notably, **[*79]** although not the "smoking gun" evidence of actual weapons for which some

⁴⁷ See Letter from Bishop Wilton D. Gregory, President, U.S. Conference of Catholic Bishops, to George W. Bush, President of the United States (Sept. 13, 2002), in 32 *Origins* 16 (2002).

⁴⁸ Mark S. Latkovic, S.T.D., *Just War Theory, Catholic Morality, & the Response to International Terrorism: Addendum on War with Iraq* 9-10 (Mar. 26, 2003) (unpublished manuscript), available at <http://www.aodonline.org/aodonlineimages/SHMS/Faculty/LatkovicMark/CatholicSocialTeaching/JustWarTheoryandTerrorism.pdf> (on file with the Ave Maria Law Review).

⁴⁹ See George Weigel, *Moral Clarity in a Time of War*, *First Things*, Jan. 2003, at 20, 22, 24-25.

⁵⁰ *Id.* at 24.

⁵¹ Rolf Ekeus, *Iraq's Real Weapons Threat*, *Wash. Post*, June 29, 2003, at B7.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ On March 31, 2003, U.S. Central Command confirmed that, in a raid near Tallil airfield, southwest of An Nasiriyah, the 1st Marine Expeditionary Force uncovered a large weapons cache, including ammunition, chemical decontamination equipment, chemical suits, and unidentified artillery munitions. Brigadier General Vincent Brooks, CENTCOM Operation Iraqi Freedom Briefing (Mar. 31, 2003), at <http://www.centcom.mil/CENTCOMNews/Transcripts/20030335.htm> (on file with the Ave Maria Law Review). On April 11, 2003, Coalition forces confirmed they had uncovered evidence of radioactive material, possibly plutonium, beneath the al-Tuwaitha nuclear reactor south of Baghdad. This discovery took place shortly after the 101st Airborne Division uncovered eleven shipping containers of lab equipment at a chemical plant in Karbala, including chemical protective gear,

have called, Pentagon weapons inspector David Kay reported discovery of "dozens of WMD-related program activities and significant amounts of equipment that Iraq concealed from the United Nations."⁵⁶ Such activities and equipment included: clandestine laboratories containing equipment subject to UN monitoring and capable of chemical and biological weapons research; a prison laboratory possibly used in human testing of biological weapons; concealed reference strains of, and research on, biological organisms; and undeclared unmanned aerial vehicles and missiles capable of delivering weapons of mass destruction.⁵⁷

More recently, however, Kay reported that continuing efforts in Iraq have failed to reveal any actual weapons of mass destruction, and that stockpiles of such weapons probably did not exist at the time the United States launched Operation Iraqi Freedom.⁵⁸ Kay opined that a failure of pre-war intelligence resulted in the conclusion that Iraq possessed weapons of mass destruction, but he found no indications that the Bush administration pressured intelligence analysts to exaggerate the threat.⁵⁹ Importantly, despite the apparent [*80] intelligence failure regarding the possession of actual weapons of mass destruction, Kay continues to believe that the Hussein regime posed a real threat to international peace and security, and that the world is safer with the change in regime.⁶⁰

These recent revelations do not, however, completely undermine the moral justification for going to war and do not render the war unjust. At the time the United States launched Operation Iraqi Freedom, the United Nations and much of the world community shared the belief that Iraq possessed weapons of mass destruction or such a capability. The Clinton administration and perhaps Hussein himself also shared this belief.⁶¹ Prior to the war, Iraq

grenades, and ammunition. Iraqi scientist Gazi George maintained that one could definitely refine such material for a radiation bomb. David Albright, with the IAEA, suggested the possibility of a booby trap, given the dangerously high, even lethal, levels of radioactivity. Although unexpected, the discovery did not provide conclusive evidence of Hussein's weapons of mass destruction program. Carl Cameron & Major Garrett, Weapons-Grade Plutonium Possibly Found at Iraqi Nuke Complex, Fox News (Apr. 11, 2003), at <http://www.foxnews.com/story/0,2933,83821,00.html> (on file with the Ave Maria Law Review). The most damaging information comes from Dr. Khidir Hamza - of late, the nuclear weapons chief to Saddam Hussein, and presently assisting the Coalition rebuilding effort in his native country - who confirms Bush's allegations concerning the purchase of uranium from Niger. Last autumn, Hamza stated that Iraq had recently received shipments from Africa of spent fuel rods from a Russian nuclear reactor. Moreover, Iraq had been processing 1.3 tons of low-grade uranium, possibly from Brazil. Hamza maintains that Hussein had extracted literally tons of uranium from phosphate stores in northern Iraq. According to German intelligence, Iraq had sufficient uranium supplies for three nuclear weapons. The late Iraqi regime had been assiduously refining uranium over an extended period of time, all for the purpose of developing nuclear weapons. Moreover, two months prior to Bush's State of the Union Address, Amir al-Saadi, of late, an advisor to Saddam Hussein, told the Detroit Free Press of shipments of uranium from Niger in the 1980s. In his recent book, Hamza discusses how Iraq's nuclear weapons program remained massive and well-funded, on the verge of developing a short-range nuclear missile. The Iraqi nuclear weapons program employed over 12,000 people, including 2,000 engineers at the peak years of 1993 and 1994. In the late 1980s, expenditures on the bomb exceeded ten billion dollars. Saddam's Bombmaker Backs Bush on Iraqi Nuclear Threat (Aug. 6, 2003), at <http://www.newsmax.com/showinside.shtml?a=2003/8/6/00310> (on file with the Ave Maria Law Review). The evidence already unearthed also includes progress reports, records of rewards Hussein gave to scientists for major breakthroughs, and audiotapes of interviews. Pentagon officials and Arabic translators continue to comb through 7[fr1/2] miles of documents, either seized from Iraqi government buildings, or turned over by cooperative Iraqi civilians. Pentagon Bombshell: U.S. Uncovers WMD Document "Mother Lode" (July 16, 2003), at <http://www.newsmax.com/showinside.shtml?a=2003/7/16/164802> (on file with the Ave Maria Law Review).

⁵⁶ David Kay, Statement on the Interim Progress Report on the Activities of the Iraq Survey Group (ISG) Before the House Permanent Select Committee on Intelligence, the House Committee on Appropriations, Subcommittee on Defense, and the Senate Select Committee on Intelligence (Oct. 2, 2003), available at <http://intelligence.house.gov/PDF/KayStatement100203.pdf> (on file with the Ave Maria Law Review).

⁵⁷ Id.

⁵⁸ Walter Pincus & Dana Milbank, Kay Backs Outside Probe of Iraq Data: Ex-Inspector Again Says Forbidden Arms Probably Didn't Exist, Wash. Post, Jan. 29, 2004, at A1.

⁵⁹ Id.

⁶⁰ Id.

repeatedly refused to cooperate with UN weapons inspectors and failed to demonstrate its compliance with the disarmament requirements imposed by the UN Security Council. Although sound intelligence is of significant importance in justifying preemptive actions, preemptive action in this case appears justified by the reasonable and apparently honest belief that Iraq possessed weapons of mass destruction capabilities and posed a threat to peace and security.

2. Humanitarian Intervention

In addition to disarming Iraq of its weapons of mass destruction capabilities, Operation Iraqi Freedom was justified as a necessary humanitarian intervention. Although the just war tradition has not specifically addressed humanitarian intervention as a valid *causa bellum*, such a factor arguably remains consistent with the overarching principles articulated by Augustine and Aquinas that one goes to war as an act of charity, to promote good and avert evil. [*81] Furthermore, on December 5, 1992, Pope John Paul II discussed humanitarian intervention as a duty of justice, particularly in instances of imminent or actual genocide, as well as mass starvation resulting from political upheaval or ethnic conflict.⁶²

The history of Hussein's tyranny demonstrates the necessity of intervention. Almost immediately upon assuming power in 1979, Hussein launched an eight-year protracted war against Iran that cost millions of lives. Moreover, when ethnic minorities, such as the Kurds, rebelled against Hussein's tyranny, the dictator responded with weapons of mass destruction. In 1990, a dispute over oil culminated in the Iraqi invasion of Kuwait. During the subsequent Persian Gulf War, Iraq employed scorched-earth tactics against Coalition forces, including setting the oil fields afire, causing massive ecological damage. In the wake of the war, Hussein brutally suppressed Kurdish and Shiite uprisings in northern and southern Iraq, respectively, and would have committed further atrocities if not for the UN establishment and enforcement of the "no-fly zones."⁶³

During the Iraq-Iran War and the Persian Gulf War, the Iraqi infrastructure sustained extensive damage. The subsequent sanctions rendered Iraq unable to rebuild much of that damage. Reportedly, the sanctions led to the deaths of 567,000 children.⁶⁴ Iraq's education and health care systems, once the best in the Third World, suffered. In a society that once prided itself on efficient and honest administration, corruption, graft, and crime had become rampant.⁶⁵ Furthermore, Hussein manipulated the sanctions so that political opponents and weak segments of the populace had to endure the majority of the sanctions' negative effects, and that the military, and other important supporters, suffered comparatively less.⁶⁶ Indifferent to the suffering of the Iraqi people, Hussein persisted in a course of action that rendered such sanctions necessary.⁶⁷

⁶¹ See U.S. Rep. Henry J. Hyde, Commentary: Delivering Ourselves from Evil; Bush Is Laying the Foundation for a Comprehensive Root-and-Branch Approach to the Mortal Danger of the Proliferation of Weapons of Mass Destruction, Chi. Trib., Feb. 20, 2004, at C25 ("Every intelligence agency - along with the United Nations, Saddam Hussein's own generals and even many of today's critics - believed that the Iraqi regime possessed weapons of mass destruction prior to last year's invasion by coalition forces."); Voices Abroad: On Haiti, Iran and Flawed Intelligence on Iraq, Houston Chron., Feb. 14, 2004, at A40 (citing The Press (Christchurch, N.Z.), Feb. 7, 2004) ("Everyone, from United Nations Secretary-General Kofi Annan down, believed it."); Opinion: President Owes No Apology for War; If Clinton Had Invaded Iraq, Democrats Would Have Cheered, L.A. Times, Feb. 1, 2004, at M5 ("Virtually every intelligence agency in the Western world thought the weapons were there, as did the U.N. inspection team."); see also Anthony H. Cordesman & Ahmed S. Hashim, Iraq: Sanctions and Beyond 290-329 (1997) (containing a detailed analysis and description of Iraq's weapons of mass destruction).

⁶² See Weigel, *supra* note 5, at 28-29.

⁶³ See Paul A. Gigot, Editorial, A Culture on Our Conscience, Wall St. J., July 21, 2003, at A10.

⁶⁴ See Robert A. Pape, Why Economic Sanctions Do Not Work, Int'l Security, Fall 1997, at 90, 110.

⁶⁵ See Cordesman & Hashim, *supra* note 61, at 144.

⁶⁶ See *id.* at 136, 146, 218.

⁶⁷ See *id.* at 9-10, 127, 147-50, 232.

In addition to a depraved indifference to the suffering of his people, Hussein contributed to their suffering with tyrannical [*82] brutality. ⁶⁸ So great were the brutalities of Hussein and his family that the Iraqi people eagerly anticipated the coming of war. Instead of greeting news of possible peace and a deal between Hussein and the world community with joy and relief, the Iraqis actually received such news with anger. Living in constant fear of Hussein's tyranny, the Iraqis eagerly, even impatiently, awaited the coming of the American bombs that would signal the beginning of liberation and a new hope. Bearing no love for the Americans, the Iraqis have invested a great trust in Coalition forces, believing that the liberators would bomb selectively, assaying to avoid civilian casualties; moreover, even if some civilians died in the war, the rest would live to see the dawn of hope in an Iraq free of Ba'ath tyranny. ⁶⁹ Some [*83] Iraqis, incredulous that so-called "human shields" ⁷⁰ and other peace advocates would undertake their mission to Iraq out of sincerity, cynically wondered how much Hussein had paid such activists. Some human shields and other peace activists who entered Iraq altered their anti-war views after candid discussions with the Iraqi people and became outspoken advocates of Hussein's overthrow. ⁷¹

Despite complaints about a lack of security and electrical power (particularly in Baghdad) as well as high unemployment and a lack of communication on the part of the Coalition Authority, the Iraqis generally do not support hostile action against the Americans. Such violence that has occurred has primarily been limited to a small portion of Iraqi territory, the so-called "Sunni Triangle" that contains parts of Baghdad. Elsewhere, the Iraqis accept,

⁶⁸ An article aptly titled "Horror Stories" summarizes the various brutalities Hussein inflicted on the people of Iraq. Officials of the Ba'ath regime would consistently mutilate, amputate, and apply electric shock to especially sensitive parts of a victim's anatomy. Hussein's officials used electric drills to bore holes in the members and torsos of victims. Regime officials would torture children in the presence of their parents, and vice versa. Crucifixion remained a frequently applied punishment under the Ba'ath regime. Hussein's officials beat their victims savagely, crushing skulls, breaking bones, and disfiguring faces. Sometimes, Ba'athist officials killed victims by placing them alive in acid baths. Regime officials would hang victims from rotating ceiling fans, beating them with pipes. The rape of women remained a common occurrence. One eyewitness account discusses how Hussein's officials tortured a woman by forcing her to eat her own flesh, slice by slice, until death relieved her of the task. In addition, Iraqi officials suspended victims from ceilings, beating and dismembering them with axes. During Congressional hearings, survivors described death marches and massacres executed as part of Hussein's systematic campaign of genocide against the Kurds. Ba'athist officials frequently poisoned the food or gassed funerals. Hussein's officials forced victims to eat their own excrement. Ba'athist officials put victims on public display, hanging bodies from nooses in residential neighborhoods for all passers-by, including children, to see. Regime officials used photographs of victims to torment and intimidate family members. During the course of his regime, Hussein's officials "disappeared" untold numbers of Iraqi citizens. Only with the discovery of mass graves by Coalition forces did many Iraqis learn the true fate of their missing loved ones. The Ba'athist regime, likened to the Third Reich, killed two million Iraqis. Moreover, like the Nazis, Hussein's regime methodically maintained records providing detailed documentation of such atrocities. Victims of Hussein's hideous rule have expressed gratitude toward President Bush for his liberation of their people, while neighboring Arab nations remained passive in the face of such atrocities. Timothy W. Maier, Horror Stories, Insight, May 13-26, 2003, at 18. The brutalities of Hussein and his family did not end with genocide and political repression. Hussein's sons also employed brutality for personal reasons. Uday, the eldest, abducted and raped beautiful women. When he tired of his victims, he would kill them. One account describes how Uday refrained from feeding his Dobermans for two weeks before having one of his rape victims stripped and lathered with honey, and setting the dogs upon her. The Dobermans, of course, tore the woman to bloody shreds. Jack Kelly, Tempering the Task, Wash. Times, July 26, 2003, at A10.

⁶⁹ Rev. Ken Joseph, Jr., I Was Wrong, at <http://assyrianchristians.com/i> was wrong mar 26 03. htm (on file at Ave Maria Law Review).

⁷⁰ In the weeks and months leading up to Operation Iraqi Freedom, a number of individuals entered Iraq and volunteered to place themselves at potential target sites under the belief that their presence would either immunize the target from attack or, if attacked, public outrage over the collateral death of or injury to the "innocent" civilian would prevent or limit further attacks. Daniel Pepper, I Was a Nauve Fool to Be a Human Shield for Saddam, Sunday Telegraph (London), Mar. 23, 2003, at 25.

⁷¹ Id.

even welcome, the Coalition presence. ⁷² Overall, the Iraqis appear to have embraced the prospect of freedom and a just society. ⁷³

Having liberated Iraq from the brutality of Hussein and his family, the U.S.-led coalition has done much to alleviate the situation in the war-torn country including providing food, water, clothes, and medicine; rebuilding roads and other infrastructure; establishing hospital facilities; and rebuilding the judicial, financial, educational, [*84] health care, sanitation, and municipal systems. ⁷⁴ These humanitarian benefits could only be accomplished by the entry of the United States into the conflict.

B. Competent Authority

Another criterion of just war, competent authority, remains a topic of debate. Many opponents of the war, both within the Church and without, have noted that the UN has not given its approval for action against Hussein's regime, claiming that such approval is a prerequisite for a just war. ⁷⁵

In September 2002, Bishop Wilton Gregory, President of the United States Conference of Catholic Bishops (USCCB), claimed that the "moral credibility" of an armed attack by the United States against Iraq depended on

⁷² Amir Taheri, *The Real Iraq*, N.Y. Post, July 17, 2003, available at <http://www.nypost.com/postopinion/opedcolumnists/774.htm> (on file with the Ave Maria Law Review). Although Iraq has not fully recovered, Taheri reminds readers of the recent vicissitudes of the nation and its people, and indicates the lack of famine, the plethora of food in bazaars, and the stabilized prices of food. Most hospitals have revived, along with eighty-five percent of primary and secondary schools and all universities save two. Rather than any mass exodus, many Iraqis have actually returned to their homes having left under pressure from the late regime, benefiting the building industry immensely. In June, the Iranian Red Crescent recorded the repatriation of 10,000 refugees. For the first time in a half-century, Iraq remains free from political persecution of any kind, and everyone retains a right to express his opinions. Telecommunications, previously regarded as a threat to the security of the regime, abounds. Although problems persist, many Iraqis retain perspective. "After we have aired our grievances we remember the essential point: Saddam is gone," says Baghdad geologist Mohsen Saleh. "A man who is cured of cancer does not complain about a common cold." *Id.*

⁷³ Lawrence Di Rita, Special Assistant to the Secretary of Defense, & Emad Dhia, Director of the Iraqi Reconstruction and Development Council, Briefing on Post-War Developments in Iraq (July 7, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030707-0341.html> (on file with the Ave Maria Law Review).

⁷⁴ See, e.g., Lt. Col. Mark Brown, Civil Affairs Winning the Hearts and Minds in Western Iraq, United States Central Command, Public Affairs Office (May 6, 2003), available at http://www.centcom.mil/CentcomNews/Stories/05_03/6.htm (on file with the Ave Maria Law Review); Spc. Petersi Liu, Medics Leave Legacy of Caring for Iraqi Civilians, United States Central Command, Public Affairs Office (June 9, 2003), available at http://www.centcom.mil/CentcomNews/Stories/06_03/9.htm (on file with the Ave Maria Law Review); Video-teleconference with Maj. Gen. Ray Odierno, Commander, U.S. Army's 4th Infantry Division, in Baghdad, Iraq (June 18, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030618-0281.html> (on file with the Ave Maria Law Review); Press Release, United States Central Command, Coalition and Iraqis Team Up for Humanitarian Efforts (July 22, 2003), available at http://www.centcom.mil/CENTCOMNews/news_release.asp?NewsRelease=20030766.txt (on file with the Ave Maria Law Review); Press Release, United States Central Command, Coalition Forces Improve Quality of Life in Mosul (July 22, 2003), available at http://www.centcom.mil/CENTCOMNews/news_release.asp?NewsRelease=20030773.txt (on file with the Ave Maria Law Review); CNN Live Special Edition: Lt. General Ricardo Sanchez Press Conference (CNN television broadcast, July 23, 2003) (transcript on file with the Ave Maria Law Review); News Conference on Dept. of Defense Efforts to Help Rebuild the Iraqi Health System with Dr. William Winkenwerder, Assistant Secretary of Defense for Health Affairs, (July 25, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030725-0457.html> (on file with the Ave Maria Law Review); CNN Late Edition with Wolf Blitzer: Interview with Lt. Gen. Ricardo Sanchez (CNN television broadcast, July 27, 2003) (transcript available at <http://www.cnn.com/transcripts/0307/27/le.00.html>) (on file with the Ave Maria Law Review); Press Release, United States Central Command, Task Force Ironhorse Engineers Help Iraqi Town (Aug. 7, 2003), available at http://www.centcom.mil/CENTCOMNews/news_release.asp?NewsRelease=20030815.txt (on file with the Ave Maria Law Review); see also Taheri, *supra* note 72.

⁷⁵ See Robert P. George, *Just War In Iraq* (Jan. 10, 2003), at <http://www.ird-renew.org/News/News.cfm?ID=548&c=4> (on file with the Ave Maria Law Review).

"some form of international sanction." ⁷⁶ Two months later, the USCCB issued a statement, largely reiterating **[*85]** Bishop Gregory's position. ⁷⁷ On February 26, 2003, Bishop Gregory questioned the "moral legitimacy of any pre-emptive, unilateral use of military force," and called on the United States to "work through the United Nations to contain, deter and disarm Iraq." ⁷⁸

As noted above, however, the decision to go to war is a prudential one that the Catholic Church's teaching leaves in the hands of those who have the responsibility - the duty - to defend and care for the common good. Under the Church's teaching, it is they who are in the best position to make such decisions because they are the ones with the necessary information. ⁷⁹ As such, in articulating the just war doctrine, the Catholic Church provides a framework for those in positions of political leadership. Even Bishop Gregory and the USCCB acknowledge that their pronouncements reflected prudential judgments, on which people of goodwill could disagree and recognize that that ultimate responsibility remained with the government. ⁸⁰

As noted by Catholic historian George Weigel, the just war tradition is not based on a "presumption against violence"; rather, the tradition begins with the presumption that public authority is under a strict moral obligation to defend the security of those for whom it has assumed responsibility. ⁸¹ Thus, the tradition first looks to whether the war is to be waged by competent authority. In this case, the President, acting as Commander-in-Chief, is the competent authority responsible for the security of the United States. ⁸²

As noted above, many opponents of war have noted that the UN has not given its approval for action against Hussein's regime, regarding such approval as a prerequisite for a just war. ⁸³ Such a **[*86]** supranational authority used to arbitrate disputes, be it the Pope, the United Nations, or a disinterested third party, must remain objective.

Unfortunately, the UN does not satisfy this objectivity requirement. ⁸⁴ The Security Council remained deeply divided over the war in Iraq, and each side evinced strong partisanship. Among the permanent members of the Security Council, one side consists entirely of belligerents: Great Britain and the United States; while the other side - France, Russia, and China - have lucrative trade relations with Iraq. ⁸⁵ With vested interests on both sides of the

⁷⁶ Gregory, *supra* note 47.

⁷⁷ U.S. Conference of Catholic Bishops, Statement on Iraq (Nov. 13, 2002), in 32 *Origins* 24, 406-08 (2002).

⁷⁸ Bishop Wilton D. Gregory, President, U.S. Conference of Catholic Bishops, Statement on Iraq (Feb. 26, 2002), in 32 *Origins* 39, 643 (2003).

⁷⁹ See Larry Witham, What Makes a War Just?: Christian Ethicists Send Bush "Yellow Light", *Wash. Times*, Sept. 26, 2002, at A2.

⁸⁰ Gregory, *supra* note 78, at 643; Gregory, *supra* note 47, at 263.

⁸¹ Weigel, *supra* note 5, at 22-23.

⁸² Interestingly, although not a Catholic, President Bush looked to the Church's just war tradition in deciding to pursue al-Qaida with armed force and to launch Operation Iraqi Freedom. See Zenit News Agency, Father Richard Neuhaus on the Iraqi Crisis (Mar. 3, 2003), available at <http://www.zenit.org/english/visualizza.phtml?sid=32497> (Code: ZE03031021) (on file with the Ave Maria Law Review).

⁸³ George, *supra* note 75.

⁸⁴ See Anthony Clark Arend, The United Nations and the New World Order, *81 Geo. L.J.* 491, 507 (1993) ("In sum, during most of its existence, the United Nations has attempted to play a neutral role, although it has not always been successful in carrying out this function.").

⁸⁵ See Evelyn Iritani, The World: Iraq Fights Back with Commerce: Facing Threat of War, Hussein's Government Signs Lucrative Contracts, Especially with Nations that Oppose the U.S.-Led Effort to Oust the Regime, *L.A. Times*, Nov. 11, 2002, at 1; Richard Beeston, Foreigners Flock in as Saddam Mocks Sanctions, *Times (London)*, Nov. 2, 2000, at Overseas News; see also Cordesman & Hashim, *supra* note 61, at 206-08. Through 1991, the then-USSR, France, and China remained the chief

debate in the Security Council, it is uncertain whether the UN could serve as an unbiased arbiter capable of treating the conflict in an objective manner.

In addition, the UN has no enforcement mechanism. Without a superior authority that can enforce international law and therefore allay the fears of nation-states, these nation-states remain left to their own devices.⁸⁶ Absent a supranational body with enforcement powers, the world remains in a state of international anarchy.

Moreover, the UN arguably lacks the moral authority necessary to act as a neutral and detached arbiter of international disputes, and the Catholic Church should avoid giving it moral legitimacy by claiming otherwise. The UN embraces a number of positions contrary to the [*87] Catholic faith,⁸⁷ including its support for the sexual rights of children and for "reproductive rights" as a remedy to overpopulation and as a basic human right. Indeed, only with the intervention of a coalition of nations, including the Vatican, did the UN decline to define abortion as a fundamental right.⁸⁸

Hussein's flagrant violations of numerous UN resolutions and the UN Security Council's failure to address these violations severely diminish the UN's moral authority. There exists a striking resemblance, to which current British politician Winston S. Churchill has alluded, between the Iraqi flouting of UN resolutions for better than a decade, and the flouting of the international will by the future Axis states of Nazi Germany, Fascist Italy, and Imperial Japan during the 1930s. As the League of Nations continually ignored the aggressive moves of these countries, the UN ignored Hussein's defiance. As the lack of resolve on the part of the League of Nations allowed the Axis Powers to engage in a pattern of aggression that eventually resulted in World War II, the weakness of the UN, had it prevailed, would have eventually lead to tragic results in the Middle East.⁸⁹

While critics of the United States claim that the competent authority for waging an international war is the UN, this cannot be the case. The UN is not sufficiently objective so as to make an unbiased decision. In addition, it has no adequate enforcement [*88] mechanism, nor can it be a competent moral authority. The President of the United

exporters of weapons to Iraq, contributing, respectively, 57%, 13%, and 12% of the Iraqi total. Stockholm International Peace Research Institute, Iraq 1973-2002 (Aug. 8, 2003), at [http://projects.sipri.se/armstrade/Trnd](http://projects.sipri.se/armstrade/Trnd%20Iraq%20Imps%2073-02.pdf) Ind IRQ Imps 73-02.pdf) (on file with the Ave Maria Law Review). Media reports indicate collaboration between Russian and Iraqi intelligence leading up to the war, including Russia's passing sensitive information to Iraq and providing Iraqi officials with information that would allow them to obtain visas fraudulently and even hire assassins. David Harrison, Revealed: Russia Spied on Blair for Saddam, London Telegraph, Apr. 13, 2003, available at <http://www.opinion.telegraph.co.uk/news/main.jhtml;jsessionid=YT33K430X0QWJQFIQMGSFGGAVCBQWIV0?xml=/news/2003/04/13/wrus13.xml> (on file with the Ave Maria Law Review). In 2000, Russia violated UN resolutions prohibiting unauthorized flights into Iraq; subsequently, other nations, including France, emulated Russia's illegal flights into Iraq. Kenneth M. Pollack, *The Threatening Storm: The Case for Invading Iraq* 217 (2002).

⁸⁶ Weigel, *supra* note 5, at 32.

⁸⁷ See generally Douglas A. Sylva, *The United Nations Population Fund: Assault on the World's People* (2002), available at <http://www.c-fam.org/pdfs/unfund.pdf> (on file with the Ave Maria Law Review); Douglas A. Sylva, Kofi Annan Calls Abortion Group "Shining Example" for World, Mar. 5, 2004, at [http://www.c-fam.org/FAX/Volume 7/faxv7n11.html](http://www.c-fam.org/FAX/Volume%207/faxv7n11.html) (on file with the Ave Maria Law Review); Douglas A. Sylva, UN Population Fund Permanently Loses \$ 56 Million in US Funding, Jan. 30, 2004 ("The money represents the amount the US has withheld from UNFPA over the past two years because of UNFPA's participation in coercive abortions in China."), at [http://www.c-fam.org/FAX/Volume 7/faxv7n6.html](http://www.c-fam.org/FAX/Volume%207/faxv7n6.html) (on file with the Ave Maria Law Review).

⁸⁸ See Catholic Family and Human Rights Institute, *UN Child Summit Negotiations Stymied Over Adolescent Abortion*, May 3, 2003, at [http://www.c-fam.org/FAX/Volume 5/faxv5n19.html](http://www.c-fam.org/FAX/Volume%205/faxv5n19.html) (on file with the Ave Maria Law Review); Catholic Family and Human Rights Institute, *Tempers Flare as Child Summit Negotiations Go Down to Wire*, May 10, 2002 ("The United States, the Holy See and Muslim countries including Sudan, Iran and Pakistan, have remained steadfast in their unwillingness to accept language that promotes abortion."), at [http://www.c-fam.org/FAX/Volume 5/faxv5n20.html](http://www.c-fam.org/FAX/Volume%205/faxv5n20.html) (on file with the Ave Maria Law Review); Catholic Family and Human Rights Institute, *Vatican's UN Observer Promoted to Post in Rome*, Oct. 11, 2002 ("The Holy See banded with Muslim countries to defeat attempts to proclaim abortion a human right."), at [http://www.c-fam.org/FAX/Volume 5/faxv5n42.html](http://www.c-fam.org/FAX/Volume%205/faxv5n42.html) (on file with the Ave Maria Law Review).

⁸⁹ Winston S. Churchill, *My Grandfather Invented Iraq*, Wall St. J., Mar. 10, 2003, at A18.

States, as Commander-in-Chief, is entrusted with the duty to protect America's citizens and is a competent authority in waging Operation Iraqi Freedom.

C. Last Resort

As noted previously, the just war doctrine also requires that war be an act of last resort. Just prior to the initiation of hostilities, Pope John Paul II, while recognizing the legitimacy of the cause,⁹⁰ expressed strong reservations about the use of force to resolve the ongoing dispute. He reminded the world that war constitutes an extreme measure, and nations should only resort to it after exhausting peaceful means. The Pope expressed grave doubts as to the fulfillment of that condition.⁹¹ Similarly, Cardinal Pio Laghi, Papal Envoy to the United States, stated that, although Iraq must disarm, any action taken against the Hussein regime must involve the United Nations and must be the last resort.⁹²

As noted above, determining whether the United States has exhausted all peaceful means of removing the threat posed by the Hussein regime requires the application of the prudential judgment of those in authority - in this case, the President acting with the concurrence of the U.S. Congress. In applying this judgment, it is important not to consider "last resort" in overly simplistic mathematical terms. As noted by George Weigel, "the 'last' in last resort can mean 'only, <?extend ascii 146> in circumstances where there is a plausible reason to believe that nonmilitary [(e.g., legal, diplomatic, economic)] actions are unavailable or unavailing."⁹³

As for rogue states developing or deploying weapons of mass destruction, a developed just war tradition would recognize that here, too, last resort cannot be understood mathematically, as the **[*89]** terminal point of a lengthy series of nonmilitary alternatives. Can we not say that last resort has been satisfied in those cases when a rogue state has made plain, by its conduct, that it holds international law in contempt and that no diplomatic solution to the threat it poses is likely, and when it can be demonstrated that the threat the rogue state poses is intensifying?⁹⁴

In response to this rhetorical question, Weigel argues that we can and must view the last resort criterion as satisfied under such circumstances.⁹⁵ If so, the United States has satisfied this criterion with respect to Iraq. The United States resorted to twelve years of diplomacy, numerous UN Security Council resolutions, hundreds of weapons inspections, and an unprecedented forty-eight-hour notice prior to launching Operation Iraqi Freedom.⁹⁶ Clearly, further diplomatic efforts would have proven futile, leaving the use of force as the only remaining reasonable alternative.

Conclusion

⁹⁰ Pope John Paul II, Angelus Message (Mar. 16, 2002) ("The political leaders of Baghdad certainly have the urgent duty to collaborate fully with the international community to eliminate every reason for armed intervention."), available at http://www.vatican.va/holy_father/john_paul_ii/angelus/2003/documents/hf_jpii_ang_20030316_en.html (on file with the Ave Maria Law Review).

⁹¹ Id.

⁹² Statement of Cardinal Pio Laghi, Special Envoy of John Paul II, to President Bush (Mar. 5, 2003), available at http://www.vatican.va/holy_father/special_features/peace/documents/peace_20030306_card-laghi-usa-meeting_en.html (on file with the Ave Maria Law Review).

⁹³ Weigel, *supra* note 49, at 26.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ President's Address, Mar. 17, 2003, *supra* note 2.

The decision to go to war is a difficult decision. It remains, however, an exercise of prudential judgment, and such decisions ultimately rest with the political leaders of nations.⁹⁷ It is notable that, despite his opposition to the war and contrary to many secular and religious media reports, the Pope did not explicitly condemn the war as immoral or contrary to the just war tradition.⁹⁸ This reluctance seems appropriate.

The proper role of religious leaders and public intellectuals is to do everything to clarify the moral issues at stake in a time of war, while recognizing that what we might call the "charism of responsibility" lies elsewhere - with duly constituted public authorities, who are more fully informed about the relevant facts and who must bear the weight of responsible decision-making and governance.⁹⁹

[*90] Operation Iraqi Freedom was made legal under international law according to traditional notions of "anticipatory" or "preemptive" self-defense, as well as under the authority of existing United Nations resolutions in place and consistently violated by Iraq since the conclusion of the 1991 Persian Gulf War.¹⁰⁰

The above analysis indicates that the threat posed by the Hussein regime was real, that our cause was just, and that further diplomatic action would have proven futile. Had the United States dismissed the threat Hussein's regime posed, many more innocents could have suffered. If the Iraqi dictator fully realized his ambitions of developing weapons of mass destruction, then history would look unfavorably upon our leaders for failing in their duty to avert such a tragedy. Moreover, even if the United States erred in assessing the gravity of the threat from the Iraqi regime, the war liberated the Iraqi people from a brutal despotic tyrant, serving a humanitarian purpose. Such a result should mitigate any error President Bush may have made in assessing the necessity of waging war.¹⁰¹

In fact, real peace, the "tranquility of order" spoken of in the Catechism,¹⁰² presupposes - requires - victory over tyrants such as Hussein.

The peace of order is ... under grave threat when vicious, aggressive regimes acquire weapons of mass destruction - weapons that we must assume, on the basis of their treatment of their own citizens, these regimes will not hesitate to use against others. That is why there is a moral obligation to ensure that this lethal combination of irrational and aggressive regimes, weapons of mass destruction, and credible delivery systems does not go unchallenged. That is why there is a moral obligation to rid the world of this threat to the peace and security of all. Peace, rightly understood, demands it.¹⁰³

While faithful a Catholic must accept the Church's moral teaching as binding on his or her conscience, the Church leaves room for debate and disagreement as to how that teaching applies under particular circumstances - specifically whether a particular war **[*91]** satisfies the just war criteria.¹⁰⁴ Although people of goodwill can differ on the morality of any war,¹⁰⁵ a strong case for war with Iraq existed when the war was launched.

⁹⁷ Douglas W. Kmiec, The War Is Just, Nat'l Rev. Online (Mar. 7, 2003), at <http://www.nationalreview.com/comment/comment-kmiec030703.asp> (on file with the Ave Maria Law Review).

⁹⁸ Rev. Michael P. Orsi, Is War Against Iraq Moral?, Detroit News, Mar. 30, 2003, at 15A.

⁹⁹ Weigel, supra note 49, at 27.

¹⁰⁰ Latkovic, supra note 48, at 9-10.

¹⁰¹ See 149 Cong. Rec. H7059, H7060 (July 17, 2003) (address by the Right Honorable Tony Blair, Prime Minister of the United Kingdom).

¹⁰² Catechism of the Catholic Church, supra note 4, P 2304.

¹⁰³ Weigel, supra note 49, at 24.

¹⁰⁴ See Deal Hudson, War Drums, Crisis Mag. e-Letter (Oct. 10, 2002), available at http://catholic.org/featured/print_news.php?ID=78 (on file with the Ave Maria Law Review).

¹⁰⁵ Gregory, supra note 47; see also, Witham, supra note 79.

Once at war, our focus must shift to the jus in bello considerations related to the just waging of war and ensuring that war is fought in a manner that minimizes noncombatant casualties. Finally, as the cessation of hostilities approaches, the international community must work to ensure a just and lasting peace free of retaliation and vindictiveness.

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