

# JUST WAR THEORY, INTERNATIONAL LAW, AND THE WAR IN IRAQ

*Ronald J. Rychlak<sup>†</sup>*

*Peace is not an independent good, but a resultant and derivative that pre-supposes and calls for an antecedent good which is none other than order, justice, and harmony of things.<sup>1</sup>*

- Pope Paul VI's 1966 Christmas message

## INTRODUCTION

The 2003 military attack on Saddam Hussein's regime in Iraq brought forth a new level of interest in just war theory. Depending on how one reads various agreements and resolutions, it was *possible* to justify an invasion of Iraq under international law. The United Nations Security Council, however, refused to pass a new authorization for military action, which meant that an attack on Iraq *might* violate international law.

The leadership of the United States and Great Britain thought that an invasion was justified, even necessary. Leaders from Germany, France, and many other nations felt that such an act was neither necessary nor appropriate. With such a split of opinion, people began looking for a recognized authority to approve or disapprove of military action.

---

<sup>†</sup> MDLA Professor of Law, Associate Dean for Academic Affairs, the University of Mississippi School of Law; B.A., Wabash College; J.D., Vanderbilt University. Rychlak is the author of *Hitler, the War, and the Pope* and serves as an advisor to the Holy See's mission to the United Nations. He would like to thank the National Center for Justice and the Rule of Law for support, particularly with regard to the study of criminal matters and the International Criminal Court.

1. Archbishop H. E. Cardinal, *The Contribution of the Holy See to World Peace in the Areas of Diplomacy, Development and Ecumenism*, in *THE VATICAN AND WORLD PEACE* 79, 121 (Francis Sweeney, S.J. ed., 1970) (quoting Pope Paul VI, 1966 Christmas message).

Many commentators argued that it was necessary either to obtain the support of the United Nations or to build an international coalition of nations. Others looked to churches for endorsement. People on both sides of the debate cited Christian teaching on just war theory. Unfortunately, that teaching had been presented in so many formulations that it was difficult to find agreement on how the theory applied to this situation.

In order to apply the just war theory to the modern world, it is wise first to trace that doctrine back to its origins, focusing on how and why it has developed over the centuries. It is particularly important to evaluate new ideas that are brought about by developments in weaponry and weapon delivery systems. It is also appropriate to consider recently proposed developments in just war thinking that take into consideration the new threats posed to the modern world by terrorists and terrorist nations.

When just war theory is properly understood, one is led to the conclusion that the authority to make the final decision to go to war rests with national sovereigns. They have the obligation to protect their citizenry from outside threats. For that reason, they must determine when war is just. Alternative institutions, like the United Nations, the Church, or an international tribunal, are not necessarily superior decision-makers, and they may even be less qualified to fill this role due to political or pastoral reasons.

This is not to say that churches and international organizations have no role to play. Religious and political advisors can help identify the factors that should be considered by the sovereign, but they cannot be expected to give authoritative determinations when it comes to advance approval of military actions. Similarly, they cannot authoritatively determine when a given war would be unjust. History, and perhaps an international court, will one day evaluate the sovereign's decisions, but that will have to be an after-the-fact determination.

In recognizing that national leaders have to make the decisions about war and peace, it is also necessary to give them the discretion to fully assess the situation. The efforts of the twentieth century to reduce the just war decision to "a set of rigorous conditions which must be met"<sup>2</sup> is a flawed, legalistic way of looking at the just war

---

2. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE: A PASTORAL LETTER ON WAR AND PEACE* ¶ 83 (1983) [hereinafter *CHALLENGE OF PEACE*].

doctrine. At some point in the process, that legalistic approach must give way to the “art” of politics. This requires the application of practical reason to the question of the common good, not the application of mechanistic legalism.

## I. JUST WAR THEORY

Philosophers have long recognized that war is not in itself unjust.<sup>3</sup> Under certain conditions, war can even be virtuous.<sup>4</sup> The just war theory helps guide society and its leaders “to the pursuit of noble ends” in delimiting the causes that justify war and by restricting the conduct of military operations during war.<sup>5</sup>

War may always represent a failure of mankind, but it is not always wrong to fight in a war.<sup>6</sup> Over the course of this nation’s history, war brought about American independence, maintained the Union, ended slavery, stopped Hitler’s aggression, ended the Holocaust, liberated Kuwait, and brought Saddam Hussein’s reign of terror to an end.<sup>7</sup>

3. Aristotle wrote: “[We] make war that we may live in peace.” ARISTOTLE, *THE NICOMACHEAN ETHICS*, Book X, ch. 7 (David Ross trans., Oxford Univ. Press rev. ed. 1984). War itself can be defined as “a state of conflict between two or more sovereign nations carried on by force of arms.” 1 JOHN A. MCHUGH, O.P. & CHARLES J. CALLAN, O.P., *MORAL THEOLOGY: A COMPLETE COURSE 545* (1929). Insofar as war is a *state of conflict*, it does not encompass passing conflicts such as a border skirmish or momentary dispute. *Id.* War also involves sovereign nations, which rules out civil wars, riots, or fights against an individual or group. *Id.* Such an action—or at least one side of such activity—could, of course, be “just.” It would not, however, be just *war*.

4. “As the months went by and Adolph Hitler overwhelmed country after country in Europe, it became clear to me that I was far from being a pacifist and was becoming increasingly convinced that we had a positive moral duty to try to stop Hitler.” James O’Gara, *Why I Went to War*, U.S. CATHOLIC, May 1992, at 56, 56, *quoted in* Bernard Casserly, *Just War Stories*, COLUMBIA, July 2003, at 6, 6.

5. Michael M. Uhlmann, *The Use and Abuse of Just-War Theory*, CLAREMONT REV. BOOKS, Summer 2003, at 10, 10.

6. “All citizens and all governments are obliged to work for the avoidance of war.” CATECHISM OF THE CATHOLIC CHURCH ¶ 2308 (2d ed. 1997). Working for peace, however, does not exclude military means under narrowly defined conditions. “Within the just-war tradition, there is a common moral presumption *for* justice as well as a recognition that all war is terrible. But there are times when justice demands the use of force as a response to violence, hatred, and injustice.” Jean Bethke Elshtain, *A Just War?*, BOSTON GLOBE, Oct. 6, 2002, at H1. Moreover, this view is not limited to Christianity. *See* John Kelsay, *Osama bin Laden and the Just Conduct of War*, AMERICA, Oct. 8, 2001, at 25, 26 (“In Islam, as in Christianity and Judaism, there is a long history of discussion concerning the morally legitimate use of military force.”).

7. This is but a short list. It might also be noted that the *threat* of war brought down the Berlin Wall, caused the Soviet Union to dissolve, and kept missiles out of Cuba. *See, e.g.*, ANN COULTER, *TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM* 248

The earliest Christians seem to have been divided about whether a Christian could take part in war.<sup>8</sup> It was not until the fourth century

---

(2003) (“War ended slavery, fascism, Soviet totalitarianism, but other than that, it has a limited repertoire.”); Uhlmann, *supra* note 5, at 11 (“Had President Reagan followed [religious pacifists’] recommendations, we might still be negotiating with the masters of the Kremlin. It was precisely Reagan’s departure from the traditional ‘nuclear-disarmament’ model so favored by his predecessors (and by the bishops) that brought the USSR to its knees.”).

8. Tertullian (160-220 A.D.), for instance, at one point expressed a pacifist viewpoint,

But how will a *Christian man* war, nay, how will he serve even in peace, without a sword, which the Lord has taken away? For albeit soldiers had come unto John, and had received the formula of their rule; albeit, likewise, a centurion had believed; *still* the Lord afterward, in disarming Peter, [disarmed] every soldier [thereafter].

TERTULLIAN, ON IDOLATRY, ch. xix (Rev. S. Thelwall trans.), *reprinted in* 3 THE ANTE-NICENE FATHERS 61, 73 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. 1963) (n.d.). Later, however, he declared to the pagans that: “We [Christians] sail with you, and *fight* with you, and till the ground with you; and in like manner we unite with you in your traffickings.” TERTULLIAN, THE APOLOGY, ch. xlii (Rev. S. Thelwall trans.), *reprinted in* 3 THE ANTE-NICENE FATHERS 17, 49 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. 1963) (n.d.) (emphasis added). He even related a miracle from the writings of Marcus Aurelius in which a “Germanic drought was removed by the rains obtained through the prayers of the Christians who chanced to be fighting under him.” 3 *id.* ch. v, at 22. Similarly, Lactantius (240-320 A.D.) took a pacifist stance early in his writing career. See LACTANTIUS, THE DIVINE INSTITUTES, Book VI, ch. xx (Rev. William Fletcher trans.), *reprinted in* 7 THE ANTE-NICENE FATHERS 162, 187 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. n.d.) (n.d.). Later, however, Lactantius praised Constantine’s military skill and his victory over the pagan Maxentius. See LACTANTIUS, OF THE MANNER IN WHICH THE PERSECUTORS DIED, ch. xlv (Rev. William Fletcher trans.), *reprinted in* 7 THE ANTE-NICENE FATHERS 301, 318 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. n.d.) (n.d.).

The Greek Christian writer Origen (185-254 A.D.) instructed his readers that Christians were not permitted to take part in war,

[T]o those who inquire of us whence we come, or who is our founder, we reply that we are come, agreeably to the counsels of Jesus, to “cut down our hostile and insolent ‘wordy’ swords into ploughshares, and to convert into pruning-hooks the spears formerly employed in war.” For we no longer take up “sword against nation,” nor do we “learn war any more,” having become children of peace, for the sake of Jesus, who is our leader.

ORIGEN, ORIGEN AGAINST CELSUS, Book V, ch. xxxiii (Rev. Frederick Crombie trans.), *reprinted in* 4 THE ANTE-NICENE FATHERS 395, 558 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. 1956) (n.d.) (footnotes omitted). On the other hand, there is a great deal of evidence showing that Christians did indeed serve in the military at this time. For example, Clement of Alexandria (150-215 A.D.) wrote,

Practise husbandry, we say, if you are a husbandman; but while you till your fields, know God. Sail the sea, you who are devoted to navigation, yet call the whilst on the heavenly Pilot. Has knowledge [of God] taken hold of you while engaged in military service? Listen to the commander, who orders what is right.

CLEMENT OF ALEXANDRIA, EXHORTATION TO THE HEATHEN, ch. x, *reprinted in* 2 THE ANTE-NICENE FATHERS 163, 200 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. 1962) (n.d.).

that St. Augustine set forth the case that the use of force was sometimes necessary to restrain evil.<sup>9</sup> He explained that war may be legitimately waged in an effort to secure peace,

It is therefore with the desire for peace that wars are waged, even by those who take pleasure in exercising their warlike nature in command and battle. And hence it is obvious that peace is the end sought for by war. . . . For even they who intentionally interrupt the peace in which they are living have no hatred of peace, but only wish it changed into a peace that suits them better. They do not, therefore, wish to have no peace, but only one more to their mind.<sup>10</sup>

When done neither with revenge nor pleasure, but in the defense of one's country against invading enemies, St. Augustine saw war as not only excusable, but even commendable.<sup>11</sup> In such a war, men fight not for personal reasons, but out of Christian charity for the preservation of others.<sup>12</sup>

Developing the just war doctrine some nine centuries later, St. Thomas Aquinas wrote that "[t]rue religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good."<sup>13</sup> For a war to be considered peacemaking, it had to meet Aquinas' three conditions for a just war:

---

9. Most authors agree that "St. Augustine was the originator of the just war theory." R. A. McCormick, *Morality of War*, in 14 NEW CATHOLIC ENCYCLOPEDIA 802, 803 (1967). See also Uhlmann, *supra* note 5, at 10 ("The just-war concept traces its roots to ancient Hebraic and Stoic thought, but its specifically Christian lineage begins with St. Augustine's argument in Book XIX of *The City of God*"). See generally Frederick H. Russell, *War, in AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 875, 875-76* (Allan D. Fitzgerald, O.S.A. et al. eds., 1999) (describing St. Augustine's views on war).

10. SAINT AUGUSTINE, *THE CITY OF GOD*, Book XIX, ch. 12 (Marcus Dods trans., Modern Library ed., Random House 1993).

11. See *id.*; Russell, *supra* note 9, at 875; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE HARVEST OF JUSTICE IS SOWN IN PEACE: A REFLECTION OF THE NATIONAL CONFERENCE OF BISHOPS ON THE TENTH ANNIVERSARY OF THE CHALLENGE OF PEACE* 16 (1993) [hereinafter *HARVEST OF JUSTICE*] (discussing "St. Augustine's classic case: love may require force to protect the innocent").

12. See SAINT AUGUSTINE, *supra* note 10; Russell, *supra* note 9, at 875. Augustine's justifications for war "are based on Cicero and other Roman thinkers . . . [with] Manichaean and Neoplatonic influences." RONALD G. MUSTO, *THE CATHOLIC PEACE TRADITION* 48 (1986).

13. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II-II, Question 40, Article 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter *SUMMA THEOLOGICA*].

1. War must be declared and waged by the lawful authority of a sovereign entity.<sup>14</sup>
2. War must be truly necessary for the achievement of a just cause (such as defense against an unjust attack, recovery of something unjustly taken, or punishment of unjust aggression).<sup>15</sup>
3. War must be fought subjectively with the right intention, to arrive at a just peace, a just order of things, giving each nation its due (not for greed, cruelty, etc.).<sup>16</sup>

Aquinas explained that “those who are attacked, should be attacked because they deserve it on account of some fault.”<sup>17</sup>

Regarding the first condition, Aquinas emphasized that rulers of nations had the obligation to maintain peace and to provide for the security of the citizens.<sup>18</sup> Drawing on St. Paul’s Epistle to the Romans,<sup>19</sup> he argued that it was the duty of those in charge of a society’s well-being to protect it from external enemies.<sup>20</sup> This obligation gave them (and only them) the right to declare war.<sup>21</sup> Those subject to the sovereign were obligated to assist in the effort unless the ruler commanded something against the divine law.<sup>22</sup>

14. *Id.* See also W. V. O’Brien, *War*, in 14 NEW CATHOLIC ENCYCLOPEDIA 795, 796 (1967) (“The first condition has become relatively unimportant because private warfare is no longer a major problem.”).

15. SUMMA THEOLOGICA, *supra* note 13, Part II-II, Question 40, Article 1.

16. *Id.*

17. *Id.*

18. *Id.*

19. See *Romans* 13:1-7.

20. SUMMA THEOLOGICA, *supra* note 13, Part II-II, Question 40, Article 1.

21. St. Augustine thought that the ability to resort to violence was restricted to governmental leaders, not individual Christians. See, e.g., Russell, *supra* note 9, at 875; SUMMA THEOLOGICA, *supra* note 13, Part II-II, Question 40, Article 1; Uhlmann, *supra* note 5, at 10.

22. In his discussion concerning the nature of law, Aquinas argues that human laws, those made by the sovereign, are normally binding on men in conscience. However, a human law may command something against the divine law. In that case, “[i]t is never permissible” to obey a human law that is contrary to the divine law. SUMMA THEOLOGICA, *supra* note 13, Part I-II, Question 96, Article 4. Cf. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6, ¶ 2310 (“Public authorities, in this case, have the right and duty to impose on citizens the obligations necessary for national defense.”). However, a teaching from *Gaudium et Spes*, reaffirmed in the Catechism, provides, “[I]t seems right that laws make humane provisions for the case of those who for reasons of conscience refuse to bear arms, provided however, that they agree to serve the human community in some other way.” Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 79 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 600 (Nat’l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*]. See also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6,

In the sixteenth and seventeenth centuries, Spanish Scholastics Francisco de Vitoria and Francisco Suárez, S.J., refined just war theory by identifying two categories of actions that might justifiably provoke a nation to war: an armed attack, or other injurious actions (generally defined as infringements of a right).<sup>23</sup>

A military response to an armed attack would be a defensive war, which needed “no special moral justification” because it had been forced upon that nation.<sup>24</sup> For a non-defensive military action,

---

¶ 2311. Conscientious objectors have used this to argue that Catholics do not owe a duty to fight for the state. That conclusion, however, does not necessarily follow from the text. While the text does call upon governments to respect the rights of conscientious objectors, it gives no indications that lay Catholics should be included in this group. It could apply only to traditional Mennonites or Quakers, for whom the state should make provisions. In his Christmas address of 1956, Pope Pius XII said,

If, therefore, a body representative of the people and a government—both having been chosen by free elections—in a moment of extreme danger decide, by legitimate instruments of internal and external policy, on defensive precautions, and carry out the plans which they consider necessary, they do not act immorally; so that a Catholic citizen cannot invoke his own conscience in order to refuse to serve and fulfill those duties the law imposes.

Pope Pius XII, Broadcast to the World (Dec. 23, 1956), in *THE POPE SPEAKS: THE TEACHINGS OF POPE PIUS XII*, at 325, 327 (Michael Chinigo ed., 1957). See also McCormick, *supra* note 9, at 804 (reaffirming the notion that “[c]onscientious objection is morally indefensible.”). But cf. Michael Griffin, *The Soldiers Came Asking*, AMERICA, June 23-30, 2003, at 8 (urging chaplains and bishops to instruct soldiers that they have the right to refuse participation).

23. McCormick, *supra* note 9, at 803. Suárez recognized that the denial by one prince, “without reasonable cause, of the common rights of nations, such as the right of transit over highways [or] trading in common,” constituted a just cause for war. FRANCISCO SUÁREZ, S.J., ON FAITH, HOPE, AND CHARITY (1621), *reprinted in* 2 *THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS* 817 (James Brown Scott ed., Gwladys L. Williams et al. trans., William S. Hein & Co. 1995). See also Theodor Meron, *Editorial Comments: Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AM. J. INT’L L. 110, 112-13 (1991). Other influential just war figures from this era include: Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1704), Christian Wolff (1679-1754), and Emerich de Vattel (1714-1767).

24. McCormick, *supra* note 9, at 803. See also *id.* at 804 (“[A]mong the goods of humanity ‘there are some of such importance for the human community that their defense against an unjust aggression is without doubt fully justified.’”) (citation omitted). Bronwen McShea, *A Retreat from Justice?: Tradition, Catholic Ambivalence, and America’s New War*, HARVARD SALIENT, Oct. 11, 2001, at 7 (discussing arguments by Vitoria and Suárez concerning “defensive war”). Of course,

[T]he line between defensive and offensive war cannot be as easily drawn as it might seem. The aggressor is not always the nation that fires first, for a nation may be maneuvered into a position in which it is compelled to surrender its independence if it does not resort to arms.

THOMAS P. NEILL, *THE COMMON GOOD: CHRISTIAN DEMOCRACY AND AMERICAN NATIONAL PROBLEMS* 593 (Ross J. S. Hoffman ed., rev. ed. 1962) (1956).

however, in addition to Aquinas' three traditional requirements for a just war, Vitoria and Suárez added two new conditions: (1) the war must be fought as a last resort,<sup>25</sup> and (2) the war must be fought in a proper manner, i.e., without killing the innocent.<sup>26</sup> This second factor evolved into a second "prong" of the just war analysis, known as *jus in bello*, as opposed to the decision to go to war, known as *jus ad bellum*.<sup>27</sup>

World War II, with the advent of atomic capabilities and the associated threats to civilian populations, led to further developments in just war theory, and some observers even wondered whether it remained a viable doctrine.<sup>28</sup> Following the end of that war, Pope Pius XII explained,

---

25. McCormick, *supra* note 9, at 803. "To be morally justifiable war must be the last resort (*ultima ratio*)." *Id.* at 804. Some commentators have argued that the "last resort" is a "metaphysical concept that is never really achieved, because another effort to avert war can always be attempted." The Pew Forum on Religion & Public Life, *Just War Tradition*, at <http://pewforum.org/just-war> (on file with the Ave Maria Law Review) [hereinafter *Just War Tradition*] (quoting Michael Walzer, *Iraq and Just War: A Symposium* (Sept. 30, 2002), at <http://pewforum.org/events/index.php?EventID=36> (on file with the Ave Maria Law Review)). From this it follows that "[f]irst strikes can occasionally be justified before the moment of imminent attack, if we have reached the point of 'sufficient threat.'" William Galston, *Perils of Preemptive War*, AM. PROSPECT, Sept. 23, 2002, at 22, 24 (quoting MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 81 (1977) [hereinafter WALZER, JUST AND UNJUST WARS]). "This concept has three dimensions: 'a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.'" Galston, *supra*, at 24. See also M.D. Harmon, Editorial, *Just War Theory Getting Major Workout on Iraq: Do the Conclusions of Religious Leaders Outweigh Those of Politicians?*, PORTLAND PRESS HERALD, Mar. 17, 2003, at 7A. Harmon, summarizing the position of George Weigel, stated that "a 'last resort' can become the 'only resort' when a society finds itself 'in circumstances where there is plausible reason to believe that nonmilitary actions are unavailable or unavailing.'" (quoting George Weigel, *Moral Clarity in a Time of War*, FIRST THINGS, Jan. 2003, at 20, 26). Harmon, *supra*.

26. McCormick, *supra* note 9, at 803. See also *Gaudium et Spes*, *supra* note 22, ¶ 80 ("Any act of war aimed indiscriminately at the destruction of entire cities of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation.").

27. For an overview of the history of the terms *jus ad bellum* and *jus in bello*, see Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT'L REV. RED CROSS 553 (1997).

28. Recently, one commentator suggested that the Church's just war teaching "is going the way of its teaching on the death penalty: a practical rejection of violence as a viable solution to problems. . . . Joaquín Navarro-Valls, the Vatican spokesperson, commented that the conditions of just warfare are now 'practically nonexistent.'" Griffin, *supra* note 22, at 10 (citations omitted). See also Uhlmann, *supra* note 5, at 11 ("Archbishop Martino [president of the Pontifical Council for Justice and Peace], for example, strongly implied that just-war principles are being modified in a manner analogous to the Church's recent reevaluation of the morality of capital punishment."); Drew Christiansen, *Whither the 'Just War'?*, AMERICA, Mar. 24, 2003, at 7,

If a generation has ever had to appreciate in the depths of its conscience the call: “War on war,” it is certainly the present generation.

It has passed through an ocean of blood and tears wider and deeper than mankind has ever before encountered. It has lived through indescribable atrocities so intensely that the recollection of their horrors must remain stamped in its memory and even in the deepest recesses of its soul as the picture of hell against which anyone who cherishes a sense of humanity desires more than anything else to close the door forever.<sup>29</sup>

Nevertheless, Pius XII rejected a weakness that would accept peace at any price.<sup>30</sup> He set forth his “definition of a just war” in his 1948 Christmas message,<sup>31</sup> explaining,

The nation which is threatened by or is the victim of an unjust aggressor cannot remain passively indifferent if it wishes to think or act in a Christian spirit, nor in such cases can the family of peoples behave as mere spectators by maintaining an attitude of impassive neutrality.<sup>32</sup>

Pius XII also spoke of the past damage brought about by indifference to wars of aggression and how this created a feeling of insecurity among nations.<sup>33</sup> Such an attitude brought no advantage to peaceful nations. Instead, it encouraged “authors and promoters of aggression.”<sup>34</sup>

While some commentators have suggested that modern warfare has rendered the concept of a just war obsolete, the Catholic Church—which has repeatedly counseled peace over the past century—has never gone that far. Just nations will always need to make decisions about how to respond to evil. Unless all nations are to surrender to

---

10-11 (quoting Martino on this point, and noting that the Jesuit journal *La Civiltà Cattolica* has also called for abandonment of the doctrine).

29. THE MIND OF PIUS XII 97 (Robert C. Pollock ed., 1955).

30. Pius XII “did not praise war. He blessed his people, not kingdoms or states. But it was also true that he never wavered in his opposition to any form of totalitarianism and its godless absorption of individuals into a mass.” KATHERINE BURTON, WITNESS OF THE LIGHT: THE LIFE OF POPE PIUS XII 154 (1958).

31. *Id.* at 206.

32. *Id.* (quoting Pius XII, 1948 Christmas message).

33. *Id.*

34. *Id.* (quoting Pius XII, 1948 Christmas message).

aggressive tyrants, military action will sometimes be necessary. After all, just *war* theory presupposes that *wars* will be fought.<sup>35</sup>

In 1965, the Second Vatican Council, in *Gaudium et Spes*, cautioned that modern weapons “can inflict massive and indiscriminate destruction, thus going far beyond the bounds of legitimate defense.”<sup>36</sup> On the other hand, the just war doctrine was not abrogated. The Council upheld “the right of a nation to defend itself, by a discriminate and proportionate use of force as a last resort.”<sup>37</sup> The Council discussed several just war concepts,

1. War is permissible only after all efforts toward peace have failed.
2. Government leaders have the duty to protect the common good.
3. A right intention rules out using force to oppress other nations.

---

35. Norman Vincent Peale, one of the most-respected American churchmen of the twentieth century, explained his Christian viewpoint in the foreword to a 1942 book about anti-Nazi German minister Martin Niemoeller,

Occasionally we hear people say that the Church should have nothing to do with this war. We all hate war. As Christians, how could we do otherwise? After reading this book, however, if we have not previously realized it, we will be convinced that there is an evil more virulent even than war, and against that evil we must set our face. We must do more than admire Niemoeller and pay tribute to his greatness. The evil thing against which he fights must be destroyed. This demon must be exorcized from human society. We frequently talk about loving our Christian brothers in all lands, and we do love them; but how can we love them and not do all in our power to set them free?

Norman Vincent Peale, *Foreword* to LEO STEIN, *HITLER CAME FOR NIEMOELLER: THE NAZI WAR AGAINST RELIGION* 7, 8 (Pelican Publ'g Co. 2003) (1942). The title, of course, is a play on Niemoeller's famous verse,

In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up.

CHARLES COLSON, *KINGDOMS IN CONFLICT* 125 (1987) (attributed to Martin Niemoeller).

36. *Gaudium et Spes*, *supra* note 22, ¶ 80. In the fifth chapter of this document, the Second Vatican Council dealt with questions pertaining to peace and the community of nations. *Id.* ¶¶ 77-93. War is regarded as a set of circumstances which must be completely abolished. *See id.* ¶¶ 81-82. However, one cannot deny a government the “right to legitimate defense once every means of peaceful settlement has been exhausted.” *Id.* ¶ 79.

37. Brian Wicker, *War and the Nuclear Dilemma*, in *MODERN CATHOLICISM: VATICAN II AND AFTER* 303, 303 (Adrian Hastings ed., 1991). *See also Gaudium et Spes*, *supra* note 22, ¶ 79.

4. Even during war, some actions remain off-limits.
5. Indiscriminate killing of the innocent is prohibited.<sup>38</sup>

None of these concepts set forth in *Gaudium et Spes* were truly new developments in just war thinking.<sup>39</sup> That document, however, was read in conjunction with Pope John XXIII's 1963 encyclical *Pacem in Terris*, which stated that "in an age such as ours which prides itself on its atomic energy it is contrary to reason to hold that war is now a suitable way to restore rights which have been violated."<sup>40</sup> Together, *Gaudium et Spes* and *Pacem in Terris* seemed to indicate that nuclear disarmament was a moral necessity and that any serious effort to disarm would eventually require a "critical reevaluation of the nation-state structure—in the direction of some new form of international governance."<sup>41</sup>

In 1983, the U.S. Catholic bishops drew on these two teachings and attempted a step in the direction of nuclear disarmament with their pastoral letter on war and peace, *The Challenge of Peace: God's Promise and Our Response*.<sup>42</sup> Concerned about the potential destructive power of modern weapons,<sup>43</sup> the bishops began their

38. *Gaudium et Spes*, *supra* note 22, ¶¶ 79-80. "Any act of war aimed indiscriminately at the destruction of entire cities of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation." *Id.* ¶ 80.

39. These concepts first can be found in the writings of St. Augustine, Aquinas, Vitoria and Suárez. *See infra* pp. 5-10.

40. Pope John XXIII, *Pacem in Terris* [*Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty*] ¶ 127 (St. Paul ed. 1963) [hereinafter *Pacem in Terris*].

41. Uhlmann, *supra* note 5, at 11. *See also* JOHN C. BENNETT & HARVEY SEIFERT, U.S. FOREIGN POLICY AND CHRISTIAN ETHICS 88-92 (1977) (considering the relevance of just war theory in light of modern nation-states and lack of international structures). At other times in history, Catholic teaching declared churches, clerics, and common people as immune from attack (the Council of Chanoux, 988), prohibited war on certain days of the year (Council of Clermont, 1095), and prohibited weapons including the long bow and the cross bow (Lateran Council, 1139). O'Brien, *supra* note 14, at 796.

42. CHALLENGE OF PEACE, *supra* note 2. For an interesting discussion of the drafting of *The Challenge of Peace*, see NAT HENTOFF, JOHN CARDINAL O'CONNOR: AT THE STORM CENTER OF A CHANGING AMERICAN CATHOLIC CHURCH 58-67 (1988).

43. *See* CHALLENGE OF PEACE, *supra* note 2, ¶ 101.

Indeed, if the kind of weapons now stocked in the arsenals of the great powers were to be employed to the fullest, the result would be the almost complete reciprocal slaughter of one side by the others not to speak of the widespread devastation that would follow in the world and the deadly after effects resulting from the use of such weapons.

analysis with the presumption that Christians should do no harm to their neighbors.<sup>44</sup> They viewed just war teaching as having evolved as an effort to prevent war and said that it established “a set of rigorous conditions which must be met if the decision to go to war is to be morally permissible.”<sup>45</sup> The bishops said that “total war” as it could be waged in the modern age “would be a monstrously disproportionate response to aggression on the part of any nation.”<sup>46</sup> As such, they concluded that modern war, if it could ever be justified,<sup>47</sup> must always be limited.<sup>48</sup>

---

*Id.* (quoting *Gaudium et Spes*, *supra* note 22, ¶ 80). At the same time, the bishops concluded that nuclear deterrence may be morally acceptable as long as it is limited to deterring nuclear use by others; sufficiency, not nuclear superiority, is its goal; and it is used as a step on the way toward progressive disarmament. This conclusion was renewed in 1993. See HARVEST OF JUSTICE, *supra* note 11, at 12-14.

44. CHALLENGE OF PEACE, *supra* note 2, ¶ 80.

45. *Id.* at ¶ 83. The bishops identified the following requirements for a just war: (1) Just Cause, (2) Competent Authority, (3) Comparative Justice, (4) Right Intention, (5) Last Resort, (6) Probability of Success, and (7) Proportionality. Those criteria (*jus ad bellum*), taken as a whole, must be satisfied in order to overcome the strong presumption against the use of force. In addition, the following moral standards (*jus in bello*) apply to the conduct of the war: (8) Noncombatant Immunity, (9) Proportionality, and (10) Right Intention. *Id.* ¶¶ 85-110.

46. *Id.* ¶ 103. During 1983, at least four Catholic hierarchies, the German (April), the United States (May), the Irish (July), and the French (November), published detailed statements on the relation of Christian reasoning to questions of peace and war in the nuclear era. The Dutch bishops also made a statement on this issue. See OUT OF JUSTICE, PEACE: JOINT PASTORAL LETTER OF THE WEST GERMAN BISHOPS; WINNING THE PEACE: JOINT PASTORAL LETTER OF THE FRENCH BISHOPS 9 (James V. Schall, S.J. ed., 1984).

47. Some commentators have argued that certain U.S. bishops “have reduced the just war teaching to de facto pacifism, placing the threshold for just war so absurdly high no set of facts could meet it. . . . Wars can be just. But the American bishops are rapidly turning it into the unjust war teaching.” Harmon, *supra* note 25 (quoting George Neumayr, *Michael Novak at the Stake*, AM. SPECTATOR (Feb. 12, 2003), at [http://www.spectator.org/dsp\\_article.asp?art\\_id=5031](http://www.spectator.org/dsp_article.asp?art_id=5031) (on file with the Ave Maria Law Review)). See also GEORGE WEIGEL, TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE 395 (1987) (voicing similar concerns); McCormick, *supra* note 9, at 803 (describing one commentator’s argument that there “no longer [is] any just war theory, because these popes [Pope Pius XII and Pope John XXIII] have withdrawn the right of war in the situations to which these tests or conditions had references”).

48. CHALLENGE OF PEACE, *supra* note 2, ¶ 93.

Even when the stringent conditions which justify resort to war are met, the conduct of war . . . remains subject to continuous scrutiny in light of two principles which have special significance today precisely because of the destructive capability of modern technological warfare. These principles are proportionality and discrimination. . . . [T]oday it becomes increasingly difficult to make a decision to use any kind of armed force, however limited initially in intention and in the destructive power of the weapons employed, without facing at least the possibility of escalation to broader, or even total, war and to the use of weapons of horrendous destructive potential.

Today, the result of 1600 years of Catholic just war tradition is found in a complex set of criteria that governs both moral justifications for going to war (*jus ad bellum*) and the appropriate way to wage war once it has begun (*jus in bello*).<sup>49</sup> Individually, each

---

*Id.* ¶ 101. In 1993, the U.S. Catholic bishops renewed their call for peacemaking. Reasserting the “presumption against the use of force,” they summarized Catholic teaching, outlined in the *Challenge of Peace*, as follows:

- 1) In situations of conflict, our constant commitment ought to be, as far as possible, to strive for justice through nonviolent means.
- 2) But, when sustained attempts at nonviolent action fail to protect the innocent against fundamental injustice, then legitimate political authorities are permitted as a last resort to employ limited force to rescue the innocent and establish justice.

HARVEST OF JUSTICE, *supra* note 11, at 4.

49. The *Catechism of the Catholic Church* incorporates these teachings, and under a section entitled “Safeguarding Peace,” it provides:

2308 All citizens and all governments are obliged to work for the avoidance of war.

However, “as long as the danger of war persists and there is no international authority with the necessary competence and power, governments cannot be denied the right of lawful self-defense, once all peace efforts have failed.”

2309 The strict conditions for *legitimate defense by military force* require rigorous consideration. The gravity of such a decision makes it subject to rigorous conditions of moral legitimacy. At one and the same time:

- the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
- all other means of putting an end to it must have been shown to be impractical or ineffective;
- there must be serious prospects of success;
- the use of arms must not produce evils and disorders graver than the evil to be eliminated. . . .

2313 Non-combatants, wounded soldiers, and prisoners must be respected and treated humanely.

Actions deliberately contrary to the law of nations and to its universal principles are crimes, as are the orders that command such actions. Blind obedience does not suffice to excuse those who carry them out. Thus the extermination of a people, nation, or ethnic minority must be condemned as a mortal sin. One is morally bound to resist orders that command genocide.

2314 “Every act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man, which merits firm and unequivocal condemnation.” A danger of modern warfare is that it provides the opportunity to those who possess modern scientific weapons—especially atomic, biological, or chemical weapons—to commit such crimes.

CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6, ¶¶ 2308-14 (footnotes omitted).

of the factors that goes into the just war analysis is certainly an important consideration for national leaders as they make decisions about war and peace. If, however, these factors are read as “a set of rigorous conditions which must be met if the decision to go to war is to be morally permissible,”<sup>50</sup> then they serve almost as a Christian prohibition of war, as some had argued before the time of St. Augustine.<sup>51</sup> If they are read in that manner, the just war concept disappears because there virtually can never be such a war.<sup>52</sup> Of course, war itself would not end without complete capitulation to evil tyrants.

## II. NEWLY-PROPOSED DEVELOPMENTS IN JUST WAR THINKING

In the modern era, terrorist nations and new weaponry have again changed the just war equation. New weapons and easier systems of delivery have created a situation where nations can be threatened even though there has been no amassing of troops. Devastation can take place without a significant military presence.<sup>53</sup> In deciding whether to lead a nation into war under these circumstances, it is only reasonable to consider the danger presented by the threatening nation or regime.

---

50. CHALLENGE OF PEACE, *supra* note 2, ¶ 83.

51. See *supra* note 8 and accompanying text. The classic pacifist position is expressed in *The Schleithem Confession* of 1527, which defined early Anabaptism. THE SCHLEITHEIM CONFESSION 5 (John H. Yoder ed. & trans., Herald Press 1977) (1527). The sixth article provides:

[It] is asked concerning the sword: whether the Christian should be a magistrate if he is chosen thereto. This is answered thus: Christ was to be made king, but He fled and did not discern the ordinance of His Father. Thus we should also do as He did and follow after Him, and we shall not walk in darkness. . . . He Himself further forbids the violence of the sword when He says: “the princes of this world lord it over them etc., but among you it shall not be so.”

*Id.* at 15 (footnote omitted) (quoting *Matthew* 20:25).

52. See McCormick, *supra* note 9, at 803 (stating that according to at least one commentator, “there is no longer any just war theory, because these popes [Pius XII and John XXIII] have withdrawn the right of war in the situations to which these tests or conditions had references, i.e., offensive war”).

53. Michael Novak explained, “Were such an attack to come, it would come *without imminent threat*, without having been signaled by movement of conventional arms, without advance warning of any kind.” Michael Novak, “*Asymmetrical Warfare*” & *Just War*, NAT’L REV. ONLINE (Feb. 10, 2003), at <http://www.nationalreview.com/novak/novak021003.asp> (on file with the Ave Maria Law Review).

Although many earlier just war writings, especially the U.S. bishops' 1983 pastoral letter,<sup>54</sup> focused on the weapons without paying particular attention to the bearer of such weapons, some commentators have addressed the significance of the regime possessing the weaponry.<sup>55</sup> Just war theorist (and papal biographer) George Weigel has put together a very strong case suggesting that the danger presented by a given regime must become part of the just war determination. Some nations are more threatening than others:

[I]t makes little moral sense to suggest that the United States must wait until a North Korea or Iraq or Iran actually launches a ballistic missile tipped with a nuclear, biological, or chemical weapon of mass destruction before we can legitimately do something about it. Can we not say that, in the hands of certain kinds of states, the mere possession of weapons of mass destruction constitutes an aggression—or, at the very least, an aggression-waiting-to-happen?<sup>56</sup>

Weigel calls this new consideration the “regime factor,” and he notes that it is particularly important in this day and age of weapons of mass destruction.<sup>57</sup> Such weapons are “not aggressions-waiting-to-

54. CHALLENGE OF PEACE, *supra* note 2.

55. For example, Michael Uhlmann commented on the future of the just war tradition,

A just-war teaching that is incapable of dealing effectively and decisively with the likes of Saddam Hussein is a teaching that will not long command the attention of serious statesmen interested in preserving peace. If it fails to accommodate just-war principles to the threat of Islamic terrorism, the Catholic Church will yield the international stage to well-meant or cowardly pacifists on the one hand, and on the other to men who think that talk of *tranquillitas ordinis* is so much pious twaddle. That is precisely the dilemma that just war was designed to prevent.

Uhlmann, *supra* note 5, at 12.

56. George Weigel, *Pope John XXIII Lecture: The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689, 707 (2002). Jean Bethke Elshtain, writing in the context of Iraq, put it as follows:

As for the question of whether Iraq poses a “real and certain danger,” it bears notice that an imminent threat does not necessarily mean one that is just around the corner. It may refer, instead, to murderous capabilities an outlaw regime is in the process of developing. If one can make a strong case that the use of such capabilities is highly likely, then the just war caution against “intervening” may be overridden.

Elshtain, *supra* note 6 (referencing CHALLENGE OF PEACE, *supra* note 2, ¶ 86).

57. Weigel, *supra* note 56, at 707-08. The German bishops, in their statement on Iraq, took the regime into consideration:

A state which repeatedly broke the peace with its neighbour countries and a government which did not shrink from using brutal violence against [its] own people

happen when they are possessed by stable, law-abiding states. No Frenchman goes to bed nervous about Great Britain's nuclear weapons, and no sane Mexican or Canadian worries about a preemptive nuclear attack from the United States."<sup>58</sup> On the other hand, when such weapons are possessed by nations that are unstable or led by tyrants, they become very significant threats.<sup>59</sup>

Weigel finds a consideration of the regime crucial to the moral analysis. In particular,

preemptive military action to deny the rogue state that kind of destructive capacity [from weapons of mass destruction] would not, in my judgment, contravene the "defense against aggression" concept of just cause. Indeed, it would do precisely the opposite, by giving the concept of "defense against aggression" real traction in the world we must live in, and transform.<sup>60</sup>

The difficulty with this development in just war thinking, of course, is that someone will have to decide which nations actually pose a threat

---

represent[s] a threat to the international order which the international community must not ignore. This is all the more true for a regime that obviously endeavours to obtain weapons of mass destruction.

Zenit News Agency, *German Bishops' Statement on Iraq Conflict: Following Meeting in Wurzburg* (Jan. 22, 2003), available at <http://www.zenit.org/English/visualizza.phtml?sid=30323> (Code: ZE03012225) (on file with the Ave Maria Law Review). The German bishops also stated that a "preventive war would violate ethical standards." *Id.*

58. Weigel, *supra* note 56, at 708. See also O'Brien, *supra* note 14, at 801 (stating that the cause of conflict in modern times is the division between the Communist world and the free world).

59. See Weigel, *supra* note 56, at 708 ("Every sane Israeli, on the other hand, is deeply concerned about the possibility of an Iraq or Iran with nuclear weapons and medium-range ballistic missiles.").

60. Weigel, *supra* note 25, at 25. Speaking more bluntly, U.S. Ambassador to the Holy See Jim Nicholson asked, "If we knew on Sept. 10 what was going to happen on Sept. 11, would we not have been justified in taking some action against that?" Christiansen, *supra* note 28, at 7. To the argument that preemptive military action "violates the principle of sovereignty and risks a global descent into chaos," Weigel responds:

[T]he post-Westphalian notions of state equality and sovereign immunity assume at least a minimum of acquiescence to minimal international norms of order. Today's rogue states cannot, on the basis of their behavior, be granted that assumption. Therefore, they have forfeited that immunity. The "regime factor" is determinative, in these extreme instances.

Weigel, *supra* note 25, at 25. Weigel also notes that just war theory can be applied to "al-Qaeda and similar networks [which] function like states." *Id.* See also Weigel, *supra* note 56, at 708.

merely by possessing weapons of mass destruction.<sup>61</sup> That does not mean, however, that all subjectivity must be removed from the just war equation, since many of the previously identified factors in just war theory are subjective.<sup>62</sup>

Moreover, even when there is disagreement about other factors, there is often fairly broad-based consensus regarding the regime itself. Perhaps nowhere in history was this better illustrated than in the years leading up to World War II. There was significant disagreement about how to deal with Hitler. Chamberlain thought that he had assured “peace in our time” because he obtained the German chancellor’s signature on an agreement.<sup>63</sup> History now regards that as a serious miscalculation. Churchill, who wanted to directly confront Hitler, seems to have had better insight. Both British leaders, however, well understood that the Nazi regime was a serious threat to world peace. More recently, few opponents of the Iraq War attempted to defend Saddam Hussein’s regime.

When there is general consensus about a particular regime, it is only reasonable to include that factor in the equation of whether to go to war. Moreover, when such a regime is about to become a threat due to the acquisition of weapons that create the possibility of first-strike devastation, consideration of the regime factor becomes virtually mandatory.

Weigel also takes a different starting point than do some other just war theorists. He asserts that “[t]he claim that a ‘presumption against violence’ is at the root of the just war tradition cannot be sustained historically or theologically.”<sup>64</sup> As he notes, this assertion is less an innovation than a return to the original understanding of just war theory going back to St. Augustine:

[T]hose scholars, activists, and religious leaders who claim that the just war tradition “begins” with a “presumption against war” or a

61. As one observer put it, “Who gets to decide what constitutes a ‘rogue state?’” Andy Nowicki, Letter to the Editor, *Just War Tradition Today*, FIRST THINGS, Apr. 2003, at 2, 3.

62. See *infra* Part II.

63. See B.H. LIDDELL HART, *HISTORY OF THE SECOND WORLD WAR* 6 (1970).

64. Weigel, *supra* note 56, at 704. Weigel’s phrase “presumption against violence” is similar to the U.S. bishops’ expression “presumption against war” in the *Challenge of Peace. CHALLENGE OF PEACE*, *supra* note 2, ¶ 70. See also JAMES TURNER JOHNSON, *MORALITY AND CONTEMPORARY WARFARE* (1999) (arguing that the presumption against force is an innovation that impedes the restoration of justice). *But see* CHALLENGE OF PEACE, *supra* note 2, ¶ 80 (stating that the just war theory “begins with the presumption which binds all Christians: we should do no harm to our neighbors”).

“presumption against violence” are quite simply mistaken. It does not begin there, and it never did begin there. To suggest otherwise is not merely a matter of misreading intellectual history (although it is surely that). To suggest that the just war tradition begins with a “presumption against violence” inverts the structure of moral analysis in ways that inevitably lead to dubious moral judgments and distorted perceptions of political reality.<sup>65</sup>

Similarly, noted just war historian James Turner Johnson has argued that the just war tradition begins with the classic moral judgment that “the sovereign has a moral duty to pursue the public good, even at the risk of his own life.”<sup>66</sup> In other words, the theory “starts with a ‘presumption for justice,’ not a ‘presumption against violence.’”<sup>67</sup>

Citizens of a nation are entitled to protection from external as well as internal threats.<sup>68</sup> If leaders determine that the nation must resort

---

65. Weigel, *supra* note 25, at 22. In developing this argument, Weigel expressly addressed the 1983 statement by the American bishops, and he found it lacking:

The “presumption against violence” and its distortion of the just war way of thinking can also lead to serious misreadings of world politics. One such misreading, precisely from this intellectual source, may be found in the 1983 U.S. bishops’ pastoral letter, “The Challenge of Peace” (TCOP). TCOP was deeply influenced by the emphasis laid on questions of *in bello* proportionality and discrimination because of the threat of nuclear war. No doubt these were important issues. But when that emphasis drove the moral analysis, as it did in TCOP, the result was a distorted picture of reality and a set of moral judgments that contributed little to wise statecraft.

*Id.* at 23 (citing CHALLENGE OF PEACE, *supra* note 2). See also George Weigel, *The Morality of War*, COMMENTARY, July-Aug. 2003, at 50, 54 [hereinafter *The Morality of War*]; Novak, *supra* note 53 (reporting that in the view of St. Augustine and Aquinas, “just war does not ‘begin with a presumption against violence,’ but rather with a presumption that addresses first the duties of public authorities to charity and justice and, second, that takes seriously a sinful world in which injustice and violence against the innocent will continue for all time”); Zenit News Agency, *Father Richard Neuhaus on the Iraqi Crisis: Editor in Chief of First Things Points to Disarmament as a Just Cause* (Mar. 10, 2003) (stating that “[h]eads of government who are convinced of the correctness of that judgment [that force is necessary to protect the innocent] would be criminally negligent and in violation of their solemn oath to protect their people if they did not act to remove such a threat”), available at <http://www.zenit.org/English/visualizza.phtml?sid=32497> (Code: ZE03031021) (on file with the Ave Maria Law Review).

66. Paul J. Griffiths & George Weigel, *Just War: An Exchange*, FIRST THINGS, Apr. 2002, at 31, 34. Weigel also notes that this “is why Thomas Aquinas located his just war discussion in the *Summa* [*Theologica*] within his treatise on charity.” *Id.*

67. *Id.*

68. The American public overwhelmingly supported military action against Iraq in 2002. COULTER, *supra* note 7, at 219 (reviewing several news organization polls of the American public from the first six months of 2002). The polls indicated support of a U.S. invasion of Iraq ranging

to protective arms, the just war theory permits them to do just that. As the *Catechism of the Catholic Church* provides:

Legitimate defense can be not only a right but a grave duty for one who is responsible for the lives of others. The defense of the common good requires that an unjust aggressor be rendered unable to cause harm. For this reason, those who legitimately hold authority also have the right to use arms to repel aggressors against the civil community entrusted to their responsibility.<sup>69</sup>

Indeed, if leaders fail to protect their citizens because they seek to avoid war at all cost, they essentially reject the very concept of just war as it has traditionally existed. After all, just war *is* war.

While discussing the obligations that the sovereign owes to its subjects, particularly in light of the “regime factor,” it only makes sense to take into consideration *both* regimes. In other words, in the context of the American aspect of the invasion of Iraq, one also must consider the particular capabilities and obligations of the American “regime.” One commentator discussed the consideration of America’s responsibilities:

Here America’s responsibility as the world’s great superpower comes in to play. We look back, as we should, with shame at our inaction (and that of the international community) while Bosnian Muslims and Rwandan Tutsis were being slaughtered. In violation of the just war framework, the cries of the innocent went unheard or unheeded. Of course, no administration can protect all Americans everywhere at every point in time. No country or international body can protect all civilians everywhere at every point in time from being preyed upon by the ruthless. That is utopian, and the just war tradition cautions against such utopianism and overreach. But it also insists that those who have the power to stop the mass killing of innocents may well be obliged to do so. . . .

Our great power brings with it a solemn responsibility. That responsibility isn’t limited to protecting the citizens of the United States alone.<sup>70</sup>

---

from 72 percent in the ABC News-*Washington Post* Poll to a low of 57 percent in an NBC News-*Wall Street Journal* Poll. *Id.*

69. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6, ¶ 2265.

70. Elshtain, *supra* note 6. *See also* HARVEST OF JUSTICE, *supra* note 11, at 11 (noting the special obligations of citizens in a powerful nation like the United States).

Failure of a nation to consider its particular role in the world scheme is unthinkable. By its very nature, each country *must* consider its abilities and obligations before engaging in a military action. American leaders must (and automatically *do*) consider factors that would never occur to the President of Mexico or the Canadian Prime Minister. Consideration of the regime factor fits well into the just war tradition.

### III. THE ROLE OF THE UNITED NATIONS IN CONTEMPORARY JUST WAR DECISION-MAKING<sup>71</sup>

At the end of the Gulf War in 1991, Saddam Hussein's Iraqi regime accepted United Nations Resolution 678, which authorized the UN-led coalition of forces to liberate Kuwait and to restore international peace and security in the area.<sup>72</sup> Under the terms of this resolution, Iraq formally agreed to rid itself of weapons of mass destruction and to prove this to UN inspectors.<sup>73</sup> In his January 27, 2003, report to the UN Security Council, Weapons Inspector Hans Blix made it clear that Iraq had not fully cooperated with the inspections.<sup>74</sup>

Following the September 11, 2001, attack on the United States, there was a heightened sense of fear and readiness to respond than had existed in this nation for many years.<sup>75</sup> Iraq was suspected of

71. Much recent just war thinking has been put in the context of the situation in Iraq. In many cases, such contextual thinking taints the analysis. Just war thinking, however, must always be placed in context. The very doctrine is based upon weighing various factors that will vary from one situation to the next. Because of that, the doctrine does not lend itself to the legislative form into which theorists have tried to force it over the past century.

72. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1991).

73. *Id.*

74. U.N. SCOR, 58th Sess., 4692nd mtg., U.N. Doc. S/PV.4692 (prov. ed. 2003). *See also* George Weigel, *Just War Tradition Today*, FIRST THINGS, Apr. 2003, at 2, 4 (responding to various letters written in response to his article *Moral Clarity in a Time of War*, *supra* note 25, at 20, Weigel noted that the task of the UN weapons inspectors was not to find weapons, "but to verify that Iraq had disarmed itself of weapons of mass destruction").

75. *See* Editorial, *A Just War?*, AMERICA, Oct. 8, 2001, at 3, 3 (stating that "[T]he terrorists' attacks violated almost every principle of the just war theory."). The new willingness of Americans to fight was exemplified in the lyrics to a hit song performed by country artist Toby Keith:

Now this nation that I love / Has fallen under attack / A mighty sucker punch came flyin' in / From somewhere in the back / Soon as we could see clearly / Through our big black eye / Man, we lit up your world / Like the Fourth of July

[Chorus] Hey Uncle Sam put your name / At the top of his list / And the Statue of Liberty / Started shakin' her fist / And the eagle will fly / And there's gonna be hell / When you hear Mother Freedom / Start ringin' her bell / And it'll feel like the

having sponsored terrorism and was thought to be trying to expand its nuclear capabilities. Along with Iran and North Korea, President Bush identified Iraq as part of “an axis of evil.”<sup>76</sup> There even seemed to be some evidence that Osama bin Laden’s group, al-Qaida, which was responsible for the attack of September 11, 2001, had connections with Iraq.<sup>77</sup>

---

whole wide world / Is rainin’ down on you / Brought to you courtesy / Of the Red,  
White and Blue

TOBY KEITH, *Courtesy of the Red, White and Blue (The Angry American)*, on UNLEASHED (DreamWorks Records 2002). The United Nations also “responded with renewed efforts by the Ad Hoc Committee on Terrorism to pursue legal actions against terrorism.” Robert John Araujo, S.J., *A Judicial Response to Terrorism: The Status of Military Commissions Under Domestic and International Law*, 11 TUL. J. OF INT’L & COMP. L. 117, 119 (2003).

76. GEORGE W. BUSH, STATE OF THE UNION MESSAGE (Jan. 29, 2002), in H.R. DOC. NO. 107-157, at 3 (2002), reprinted in 2002 U.S.C.C.A.N. D3, D5. In his State of the Union Address of January 29, 2002, President Bush said:

[B]ut we know their true nature. North Korea is a regime arming with missiles and weapons of mass destruction, while starving its citizens.

Iran aggressively pursues these weapons and exports terror, while an unelected few repress the Iranian people’s hope for freedom.

Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade. This is a regime that has already used poison gas to murder thousands of its own citizens—leaving the bodies of mothers huddled over their dead children. This is a regime that agreed to international inspections—then kicked out the inspectors. This is a regime that has something to hide from the civilized world.

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.

*Id.*

77. Secretary of State Powell said that members of a group affiliated with Abu Musab Zarqawi, who had contacts with al-Qaida, had been operating freely in Baghdad for eight months. U.N. SCOR, 58th Sess., 4701st mtg. at 14-15, U.N. Doc. S/PV.4701 (prov. ed. 2003). See also Stephen F. Hayes, *Saddam’s al Qaeda Connection*, WKLY. STANDARD, Sept. 1-Sept. 8, 2003, at 29 (listing the evidence of a link between Saddam Hussein and al-Qaida). According to virtually all accounts, al-Qaida continued to present a significant threat to the United States. If Saddam Hussein possessed and developed these weapons of mass destruction, he could provide them to al-Qaida for use against the United States. Bill Haynes, *Just War Theory and Iraq*, American Center for Law and Justice, at [http://www.aclj.org/news/bibpers/020917\\_preemptive.asp](http://www.aclj.org/news/bibpers/020917_preemptive.asp) (on file with the Ave Maria Law Review). There was, of course, little controversy about the nation’s justification for a response against the terrorists. “By their actions, the terrorists have declared war on the United States, and we certainly have the right under the just-war theory to defend ourselves with military force.” AMERICA, *supra* note 75, at 3.

In 2002, UN Resolution 1441 renewed the demand that Iraq abandon its pursuit of weapons of mass destruction and submit to unconditional inspections.<sup>78</sup> This resolution recalled Resolution 678<sup>79</sup> and referred to restoring international peace and security in the Middle East.<sup>80</sup> It declared that Iraq continued to be in material breach of Resolution 687 and that failure to comply with Resolution 1441 would constitute further material breach.<sup>81</sup>

When the Iraq regime failed to cooperate with weapons inspectors, the United States and Great Britain decided that it was time to act.<sup>82</sup> They presented their case for an invasion of Iraq to the UN Security Council.<sup>83</sup> It became clear, however, that France, as a

78. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002).

79. S.C. Res. 678, *supra* note 72.

80. S.C. Res. 1441, *supra* note 78, at 1.

81. *Id.* at 3. There was, therefore, a debate about whether further UN authorization was necessary before an invasion of Iraq. There is, of course, the bigger issue of whether UN approval is ever necessary for military action. That issue is more fully developed *infra* Part III.

82. Some commentators argued that UN and American forces were justified in disarming Saddam Hussein if he did not do so willingly. *See, e.g.*, Novak, *supra* note 53 (arguing that the 2003 mission "has nothing to do with any new theory of 'preventive war.' . . . [T]his war is a lawful conclusion to the just war fought and swiftly won in February, 1991."). Other commentators could find no justification for the use of military force:

Even if the Security Council authorises the use of force, it will still be illegal. In addition there is a body of opinion that not only would Blair and Bush be violating the UN charter by going to war but they may already be violating the Nuremberg charter of 1945 in their preparations for war.

Danny Lee, *Are Bush and Blair Breaking the Law?*, TIMES (London), Feb. 25, 2003 at 3, 3 (quoting Professor Nicholas Grief, a barrister and head of the School of Finance & Law at Bournemouth University, who joined a coalition of global lawyers that presented an appeal to the UN calling for force to be used against Iraq only as a last resort). *See also* John F. Kavanaugh, *Unjust War, Good Outcomes*, AMERICA, May 19, 2003, at 6, 6 ("It was unjust to go to war in Iraq. There was no imminent threat; there was no proper authority; and it was not a last resort.").

83. U.S. Secretary of State Colin Powell stated that there was a tie between Saddam Hussein's regime and Osama bin Laden's al-Qaida network:

But what I want to bring to your attention today is the potentially much more sinister nexus between Iraq and the Al Qaeda terrorist network, a nexus that combines classic terrorist organizations and modern methods of murder.

Iraq today harbours a deadly terrorist network headed by Abu Musab al-Zarqawi, an associate and collaborator of Osama bin Laden and his Al Qaeda lieutenants. . . .

Those helping to run that camp are Zarqawi lieutenants, operating in the northern Kurdish areas outside Saddam-Hussain-controlled Iraq. But Baghdad has an agent in the most senior levels of the radical organization, Ansar al-Islam, that controls this corner of Iraq. In 2000, this agent offered Al Qaeda safe haven in the region.

permanent member of the Security Council, would veto any further approval.<sup>84</sup> China, Russia, and Germany also seemed unlikely to support military action.<sup>85</sup> Accordingly, the U.S.-British coalition made the decision to go to war without renewed UN approval.<sup>86</sup> As American and British troops began preparations to invade Iraq, pundits had ample opportunity to consider the wisdom (and legality) of a “preemptive” attack by the United States against Iraq.<sup>87</sup>

---

U.N. SCOR, 58th Sess., 4701st mtg., *supra* note 77, at 14-15. See Associated Press, *Release of Specific Intelligence Rare*, CLARION-LEDGER, Feb. 6, 2003 (reviewing evidence from Powell’s presentation). See also COULTER, *supra* note 7, at 208 (detailing evidence of link between Iraq and al-Qaida).

84. See Karen DeYoung, *Powell Optimistic About U.N. Support; ‘Strong Chance’ Seen for Majority Backing*, WASH. POST, Mar. 10, 2003, at A1.

85. See *id.*

86. When the United States, Great Britain, and their allies went ahead with the invasion of Iraq without renewed approval from the Security Council, they (particularly President George W. Bush and Prime Minister Tony Blair) faced political criticism at home. See Michael Duffy & James Carney, *A Question of Trust*, TIME, July 21, 2003, at 22 (documenting the effect of the President’s decision to wage war on his administration’s reputation); Melissa Kite et al., *Labour Dissidents Deny Threat to Party Leader*, TIMES (London), Mar. 13, 2003, at 14 (reporting the existence of political dissatisfaction with Tony Blair). The UN, however, may have suffered a more serious blow to its prestige. By many accounts, its credibility was so seriously damaged that it is not today in a position to fulfill its potential as a peacemaker. Uhlmann, *supra* note 5, at 12 (The UN’s “internal structure, particularly the Security Council, reflects the status of forces in 1945, which is why (as the Iraqi confrontation shows to a fare-thee-well) it cannot effectively advance the cause of peace in 2003.”). See also COULTER, *supra* note 7, at 227 (U.S. Senator Joe Biden argued that if the U.S. did not get approval from the Security Council, it would “make a mockery of the efficacy of the U.N.”); John L. Allen, Jr., *Vatican: War Threatens U.N.’s Status*, NAT’L CATHOLIC REP., Mar. 21, 2003, at 3, 3 (Archbishop Renato Martino, prior to the war, said that war without UN approval could be a “near-fatal” blow to the organization’s prestige. Martino then went on to say, “the U.N. would suffer such a humiliating defeat that I don’t know if it would be able to recover.”); Roger Cohn, Editor’s Note, MOTHER JONES, July-Aug., 2003, at 4, 4 (stating that the Bush Administration’s decision to wage war on Iraq in the absence of UN approval and its open contempt for the organization has dealt a “stunning blow” to the UN). Of course, even before the war on Iraq, the UN had been unable to fulfill its promise. See David Rieff, *Goodbye, New World Order*, MOTHER JONES, July-Aug., 2003, at 37, 38 (“By any objective criterion, the world remained the same tragic place it had always been, as unredeemed by international law as it had been by religion, or Marxism, or liberal capitalism. . . . [M]any people still want to believe in the United Nations—though they’re becoming fewer and fewer in number.”). Perhaps no human entity will ever be able to assure peace. See HARVEST OF JUSTICE, *supra* note 11, at 3 (“We should never forget that peace is not merely something that we ourselves as creatures do and can accomplish, but it is, in the ultimate analysis, a gift and a grace from God.”).

87. See, e.g., NEILL, *supra* note 24.

Preventive war is impossible to justify morally. It assumes a knowledge of the future which no human being possesses. It assumes moreover, that war is inevitable and the only question is one of timing. In a certain sense preventive war is blasphemous in that human beings arrogate to themselves the powers and privileges of God Himself.

Many religious leaders and other commentators noted that the UN had not approved the action and suggested that UN approval must play a significant role in determining whether the use of force is legitimate.<sup>88</sup> The role of the UN, after all, is to build a safer and better world. Its aim is “to maintain international peace and security, to develop friendly relations among nations and to promote international economic and social co-operation.”<sup>89</sup>

---

*Id.* at 593. See also Barton L. Ingraham, Letter to the Editor, *Just War Tradition Today*, FIRST THINGS, Apr. 2003, at 2 (responding to, and disagreeing in part with, Weigel, *supra* note 25, which interpreted the Catholic doctrine of just warfare as supportive of a preemptive war if all other means of disarming Saddam’s regime fail); Zenit News Agency, *German Bishops’ Statement on Iraq Conflict: Following Meeting in Wurzburg* (Jan. 22, 2003) (stating that a “preventive war would violate ethical standards”), available at <http://www.zenit.org/English/visualizza.phtml?sid=30323> (Code: ZE03012225) (on file with the Ave Maria Law Review); Kelli Lackett, *Free to Disagree*, FORT COLLINS COLORADOAN, Apr. 3, 2003, at 10B (quoting papal spokesman Joaquín Navarro-Valls: “[the] concept of ‘preventive war’ is not found in the moral principles of just-war theory—not even if it is authorized by a vote of the United Nations”). But see Zenit News Agency, *Michael Novak Defends U.S. Position on Iraq: American Theologian Describes War as Defensive, Not Preventive* (Feb. 11, 2003) (quoting Novak: “it is morally obligatory for states to defend themselves from this threat”), available at <http://www.zenit.org/english/visualizza.phtml?sid=31267> (Code: ZE03021102) (on file with the Ave Maria Law Review). See generally WALZER, JUST AND UNJUST WARS, *supra* note 25 (arguing that a nation may preempt an imminent and grave attack by another nation).

88. See, e.g., Statement of Cardinal Pio Laghi, Special Envoy of John Paul II to President George Bush (Mar. 5, 2003), at [http://www.vatican.va/holy\\_father/special\\_features/peace/documents/peace\\_20030306\\_card-laghi-usa-meeting\\_en.html](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). Papal Envoy Cardinal Pio Laghi said that Iraq’s national obligation to disarm “must continue to be pursued within the framework of the United Nations.” *Id.* See also *Signs of the Times: Papal Envoy Meets Bush*, AMERICA, Mar. 17, 2003, at 4. In response to Cardinal Laghi’s argument that there must be “another way” to deal with Iraq, President Bush said that “all the ‘other ways’ had been tried and had not worked; anyone serious about disarmament of Iraq had to recognize that.” *The Morality of War*, *supra* note 65, at 50.

89. Cardinale, *supra* note 1, at 99. The United Nations also has a long history of support from the Catholic Church. Pope Pius XII showed deep interest in the UN at its outset, and urged support for in a 1947 allocution to the new Minister of El Salvador, Antonop Alvarez Vidaurre. Pope Pius XII, *Recibimos con Particular* (Oct. 28, 1947), in L’OSSERVATORE ROMANO, Oct. 29, 1947, at 1 (English summary published in AMERICA, Nov. 15, 1947, at 171). Later, he expressed the wish that “the United Nations become the full and faultless expression of this international solidarity for peace, erasing from its institutions and its statutes every vestige of its original which was of necessity a solidarity in war.” THE MIND OF PIUS XII, *supra* note 29, at 102 (quoting Pope Pius XII, 1948 Christmas message). See also THE POPE SPEAKS: THE TEACHINGS OF POPE PIUS XII, *supra* note 22, at 327-28 (listing several statements in support of the UN).

Pope John XXIII paved the way for official contact between the UN and the Holy See. See Cardinale, *supra* note 1, at 99. In his 1963 encyclical *Pacem in Terris*, John expressed the wish that the UN “may become ever more equal to the magnitude and nobility of its tasks.” *Pacem in Terris*, *supra* note 40, ¶ 145. “[T]he exigencies of man’s daily life, with his livelihood and education, and his general, temporal welfare and prosperity” were the concern of the Church no less than of the UN, which aimed to promote international and social cooperation. Pope John XXIII, *Mater et Magistra* [Encyclical Letter on Christianity and Social Progress] ¶ 3 (1961),

That raised the question of whether UN backing was necessary (or of significant importance) to the conclusion that a particular military action might be just. As just war theorist George Weigel phrased the issue (relating to the war with Iraq),

Must any legitimate military action be sanctioned by the U.N. Security Council? Or, if not that, then is the United States obliged, not simply as a matter of political prudence but as a matter of moral principle, to gain the agreement of allies (or, more broadly, “coalition partners”) to any use of armed force in response to terrorism, or any military action against aggressive regimes with weapons of mass destruction?<sup>90</sup>

---

reprinted in CLAUDIA CARLEN, I.H.M., *THE PAPAL ENCYCLICALS 1958-1981*, at 59, 59 (1981). See also O'Brien, *supra* note 14, at 801 (“Regardless of agreement over all of the details, the approach of Pope John XXIII in *Pacem in Terris* seems to be basically unchallengeable.”). On May 13, 1963, John XXIII sent Cardinal Suenens to speak to the United States Committee for the United Nations and to present a signed copy of *Pacem in Terris* to the Secretary General of the UN. Cardinale, *supra* note 1, at 99.

Pope Paul VI appointed a permanent observer of the Holy See to the United Nations on March 21, 1964. *Id.* at 97. Paul VI also spoke encouraging words to the General Assembly of the UN during his visit on October 4, 1965. *Id.* at 100. It was during this visit that he asserted his most determined appeal for world peace with the powerful words: “No more war; war never again.” *Id.* In speaking to the Members of the Diplomatic Corps on January 8, 1966, Paul VI stated, “For our part, we are ready to attempt all steps—even outside the generally accepted pastoral forms—every time we believe that the Church can usefully bring to world leaders the weight of her moral authority for the maintenance and progress of a just peace among men and peoples.” *Id.* at 97.

The attitude of Pope John Paul II towards the UN might be best understood by reviewing his address to the Fiftieth General Assembly, which took place in New York on October 5, 1995: “It was precisely outrages against human dignity which led the United Nations Organization to formulate, barely three years after its establishment, that *Universal Declaration of Human Rights* which remains one of the highest expressions of the human conscience of our time.” Pope John Paul II, Address of His Holiness Pope John Paul II to the General Assembly of the United Nations Organization (Oct. 5, 1995), in *THE VISIT OF HIS HOLINESS POPE JOHN PAUL II TO THE UNITED NATIONS* 37, 40 (1966). John Paul II then directed his remarks to the United Nations:

As we face these enormous challenges, how can we fail to acknowledge the role of the United Nations Organization? Fifty years after its founding, the need for such an Organization is even more obvious, but we also have a better understanding, on the basis of experience, that the effectiveness of this great instrument for harmonizing and coordinating international life depends on the international culture and ethic which it supports and expresses. The United Nations Organization needs to rise more and more above the cold status of an administrative institution and to become a moral centre where all the nations of the world feel at home and develop a shared awareness of being, as it were, a “family of nations.”

*Id.* at 54.

90. Weigel, *supra* note 56, at 712.

Despite the faith that many religious and political leaders have placed in the UN, its charter recognizes that nations have an inalienable right to self-defense.<sup>91</sup> This would suggest that the UN does not claim the authority to sanction the use of armed force when a nation has fallen under attack and is waging a defensive war.<sup>92</sup>

That leaves an open question regarding a non-defensive war. It is certainly true that a UN-backed consensus provides political support,<sup>93</sup> but that does not necessarily mean that the war is just. Similarly, failure to obtain UN support does not mean that a military action is unjust.<sup>94</sup> After all, the UN is essentially a political body, not a

91. The United Nations Charter explicitly reserves to sovereign nations “the inherent right of individual or collective self-defence” in the event of an armed attack. U.N. CHARTER art. 51. There is, of course, a question about when self-defense is necessary. In 1837, Daniel Webster, then Secretary of State, said that exceptions to the law of self-defense should be restricted to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” Galston, *supra* note 25 (quoting Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842) (citations omitted)).

92. Nor, frankly, is the UN in a position to provide the type of support that a nation like the United States would need in the post-September 11, 2001, situation.

Yet at this stage it is unreasonable to expect the US government to rely on the UN to fulfill its defensive needs. The UN lacks the capability, authority and will to respond to the kind of threat to global security posed by this new form of terrorist world war. The UN was established to deal with wars among states, while a transnational actor that cannot be definitively linked to a state is behind the attacks on the United States. Al Qaeda’s relationship to the Taliban regime in Afghanistan is contingent, with Al Qaeda being more the sponsor of the state rather than the other way around.

Richard Falk, *Ends and Means: Defining a Just War*, NATION, Oct. 29, 2001, at 11, 12.

93. It is, of course, wise from a political standpoint for a nation to build coalitions of support before undertaking a military action. In some cases, particularly for smaller nations, it may even be essential. Cf. Roger Cohn, Editor’s Note, MOTHER JONES, July-Aug., 2003, at 4, 4 (arguing that “[t]he United States needs international consensus”). But cf. Rieff, *supra* note 86, at 39 (“the Clinton administration . . . embraced the [foreign-policy] principle ‘with partners if we can, alone if we must’”).

94. Even though there have been between 100 to 180 wars since the chartering of the UN in 1945, only two military actions have been authorized by the UN: the Korean War and the 1991 Gulf War. Richard John Neuhaus, *The Sounds of Religion in a Time of War*, FIRST THINGS, May 2003, at 76, 77. See also Comm. on Int’l Security Affairs of the Ass’n of the Bar of the City of N.Y., *The Legality and Constitutionality of the President’s Authority to Initiate an Invasion of Iraq*, 57 RECORD 379, 387 (Fall 2002) [hereinafter Comm. on Int’l Sec. Affairs] (similarly observing that U.S. forces have been deployed only twice pursuant to UN Security Council authorization: the Korean War and the Gulf War). While the Gulf War was sanctioned by the UN Security Council, Pope John Paul II opposed the war at the time it was launched. Neuhaus, *supra* note 94, at 78. See also Uhlmann, *supra* note 5, at 11 (“[The Gulf War] was opposed by the Vatican on the ground that it appeared to entail excessive use of force.”); COULTER, *supra* note 7, at 211 (noting that the UN Security Council did not approve the Clinton administration’s attack on the Serbs in the Balkans). On the other hand, some scholars have argued that UN or NATO approval of military action would nullify the constitutional requirement of Congressional

moral body.<sup>95</sup> It is appropriate, of course, to encourage it to act in a moral manner, but the UN is a confederation of nations, each of which has its own political agenda.<sup>96</sup> It is therefore not reasonable to expect the UN to serve as a moral guidepost when making decisions as to whether a given military action is just.<sup>97</sup> In other words, not only is UN approval unnecessary to the determination of whether a war is just, but to turn such approval into a requirement would be to put the

---

authorization of a declaration of war. See Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 74 (1991).

95. It is only logical that national political concerns will influence votes in the international arena, but this prevents the UN from serving as a legitimate moral compass.

At present, three of the veto-holding powers on the Security Council—France, Russia, and China—conduct their foreign policy according to the bluntest Realpolitik calculus (a calculus which led France and Russia to help undermine the containment of Iraq in the late 1990s for commercial reasons). How their judgment, based on those calculations of raw national interest, constitutes a moral legitimacy that trumps all others is not an easy case to make.

Weigel, *supra* note 74, at 5. Even more bluntly: "A UN in which Iraq is scheduled to chair a May-June disarmament conference, a UN which elects Libya the chair of its Human Rights Commission, is a UN in desperate need of radical reform, not of protestations about its allegedly superior moral authority." *Id.*

96. Many commentators have speculated that France and Russia opposed military action against Iraq because it would reveal and interfere with financial dealings between those nations. See Bill O'Reilly, Editorial, *O'Reilly: Faith May be Misplaced: Pope Supports Course of Action That Will Likely Fail*, VENTURA COUNTY STAR, Mar. 15, 2003 at B10 ("It is fairly easy to understand why France, Germany, China and Russia oppose removing Saddam Hussein by force; all of those countries are doing profitable business with Saddam, and all of them would like to see American power diminished."). Similarly, at least one British politician who opposed military intervention was alleged to have accepted payments from Saddam Hussein's regime. See Editorial, *Saddam's Hired Hands*, WASH. TIMES, May 2, 2003, at A22 (discussing British MP George Galloway's paid agreement to propagandize on behalf of Iraq).

97. "[T]he manifest inability of the UN to handle large-scale international security questions suggests that assigning a moral veto over U.S. military action on these fronts to the Security Council would be a mistake." Weigel, *supra* note 25, at 26. Weigel went on to note:

Then there is the question of what we might call "the neighborhood" on the Security Council: What kind of moral logic is it to claim that the U.S. government must assuage the interests of the French foreign ministry and the strategic aims of the repressive Chinese government—both of which are in full play in the Security Council—in order to gain international moral authority for the war against terrorism and the defense of world order against outlaw states with weapons of mass destruction? A very peculiar moral logic, indeed, I should think.

*Id.* But cf. Lockett, *supra* note 87 (quoting papal spokesman Joaquín Navarro-Valls to the effect that a preventive war would not fall within the just war doctrine, even if the war were approved by a UN vote).

political machinery above the moral calculation.<sup>98</sup> This would completely thwart the very concept of just war.<sup>99</sup>

---

98. See Weigel, *supra* note 25, at 26 (“I very much doubt that [UN approval] is morally imperative from a classic just war point of view.”); John Norton, Catholic News Service, *U.S. Theologian Tells Vatican Officials War Would be Self-Defense* (Feb. 12, 2003) (quoting Michael Novak, speaking at a February 10 Rome symposium organized by the U.S. Embassy to the Vatican: “The absolutely best thing is complete agreement. But the moral principle stands whether there is complete international agreement or not.”), available at <http://www.nccatholic.org/news.php?ArtID=811> (on file with the Ave Maria Law Review).

99. On June 5, 2003, Cardinal Angelo Sodano, Vatican Secretary of State, sent a letter to the UN Secretary-General Kofi Annan to express the Vatican’s encouragement for the United Nations to “develop more efficient and concerted forms of cooperation.” Zenit News Agency, *Vatican’s Letter on Role of United Nations: Cardinal Sodano Writes to Secretary-General on Pope’s Behalf* (June 20, 2003), available at <http://www.zenit.org/English/visualizza.phtml?sid=37557> (Code: ZE03062004) (on file with the Ave Maria Law Review). The Holy See still views the United Nations as an important international body which can play a role in securing respect for international law. Archbishop Renato Martino, President of the Pontifical Council for Justice and Peace, explained that the numerous pre-war references to the United Nations did not imply approval of its present structure or of relations of power that take place in it, “[r]ather, it is a strong appeal to the ideals that guide the U.N. and that are the foundation of any other international organization.” Zenit News Agency, *Crisis of U.N. Should Lead to Reinforcement of Its Role, Says Archbishop Martino: Guidelines Offered by President of Pontifical Council for Justice and Peace* (June 20, 2003), available at <http://www.zenit.org/english/visualizza.phtml?sid=37552> (Code: ZE03062022) (on file with the Ave Maria Law Review). At the same time, it was “an invitation to reinforce the consolidation of international relations that the war [in] Iraq compromised, regardless of the ethical and political judgment held on that conflict.” *Id.* Among the options to strengthen international organizations such as the UN, Archbishop Martino proposed the application “with greater conviction, of the principle of subsidiarity.” *Id.* Other suggestions made by Archbishop Martino were to undertake “in a gradual way, reforms that give value to multilateralism,” and “to adapt the structure of the U.N. to real relations among states.” *Id.*

It is only fair to note, however, that the Holy See would not necessarily endorse a military action just because the UN approved it. “Today the Vatican argues that no war against Iraq can be just without the imprimatur of the Security Council and an overt act of aggression on Baghdad’s part. But back in 1991 we had both—and the Vatican’s opposition was equally impassioned.” William McGurn, *The Pope’s Legions*, WALL ST. J., Mar. 14, 2003, at W13. McGurn stated, “In his otherwise positive biography of the pope, George Weigel notes that the pontiff struck an ‘almost apocalyptic’ note in the run-up to the [UN-approved] war provoked by Iraq’s 1990 invasion of Kuwait.” *Id.* (citing GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 619 (1999)). See also Lockett, *supra* note 87. Similarly, in 1999 the Holy See supported the North Atlantic Treaty Organization’s bombing campaign in Serbia as a “humanitarian intervention,” even though the UN had not formally endorsed it. Charles Collins, *Pope’s Croatian Trip Reopens Just War Questions*, OUR SUNDAY VISITOR, June 22, 2003, at 5, 5. This campaign developed in the latter half of the 1990s when conflict and ethnic cleansing came to the predominantly Albanian Kosovo province of Serbia. Even though the UN did not approve the bombing campaign in advance, NATO began such a campaign in 1999 to “force the acquiescence of the Serbian government.” *Id.* Franciscan Father David Jaeger, a canon law professor in Rome, noted that a UN mandate was lacking in Kosovo but argued that UN approval was implicit. *Id.*

## IV. THE VATICAN'S RESPONSE AND THE VATICAN'S ROLE

Although the Security Council did not provide a new authorization for war against Iraq in 2003, the Bush administration did try to obtain another stamp of approval. Officials argued that military action against Iraq met the traditional definition of a just war.<sup>100</sup> According to the administration, the purpose for going to war with Iraq was to protect the American nation and way of life from the dangers posed by Saddam Hussein and his weapons of mass destruction.<sup>101</sup> In addition, the Iraqi people and other people of that region needed to be protected from a dictator who had demonstrated that he was willing to use whatever means necessary to maintain power.<sup>102</sup> President Bush made this clear when he said, "And tonight I have a message for the brave and oppressed people of Iraq: Your enemy is not surrounding your country; your enemy is ruling your country. And the day he and his regime are removed from power will be the day of your liberation."<sup>103</sup>

---

100. See Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 5, at 109 (Feb. 3, 2003). President Bush gave several reasons for going to war with Iraq. In 1999 the United Nations concluded that Saddam Hussein had biological and chemical material to produce weapons that could kill several million people. *Id.* at 114. That material was not accounted for, and there was no evidence that it had been destroyed. *Id.* Furthermore, intelligence reports indicated that Saddam Hussein was pursuing the development of nuclear weapons. *Id.* at 115. President Bush made clear that "[e]vidence from intelligence sources, secret communications, and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of Al Qaida. Secretly, and without fingerprints, he could provide one of his hidden weapons to terrorists or help them develop their own." *Id.*

101. *Id.* at 114-16.

102. *Id.* at 115-16.

103. *Id.* at 116. As for fighting on behalf of others, Francisco Suárez believed it permissible for a state that was not directly affected by an action to engage in war to uphold "the common rights of nations." SUÁREZ, *supra* note 23, at 817. Suárez agreed that aid to a friendly country justified resort to war but "only on condition that the friend himself would be justified in waging the war, and consents thereto, either expressly or by implication." *Id.* If the injured or offended nation "does not entertain such a wish, no one else may intervene, since he who committed the wrong has made himself subject not to every one indiscriminately, but only to the person who has been wronged." *Id.* Suárez continued, "the assertion made by some writers, that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinctions of jurisdiction." *Id.* Suárez did, however, accept the right of the prince to wage war in a cause not his own, without an invitation from the state concerned, and that was when "a state worshipping the one God inclines toward idolatry through the wickedness of its prince." Meron, *supra* note 23, at 113 (quoting SUÁREZ, *supra* note 23, at 824). Waging war in this case would be valid "if the prince forcibly compelled his [presumably Christian] subjects to practice idolatry; but under any other

National Security Advisor Condoleeza Rice went even further, making a moral case for the invasion of Iraq:

This is an evil man [Saddam Hussein] who, left to his own devices, will wreak havoc again on his own population, his neighbors and, *if he gets weapons of mass destruction and the means to deliver them*, on all of us.

It is a very powerful *moral case* for regime change. . . .

We certainly do not have the luxury of doing nothing . . . if Saddam Hussein is left in power, doing the things that he's doing now, *this is a threat that will emerge*, and emerge in a very big way.<sup>104</sup>

Despite these appeals, religious leaders from around the world (including the Vatican) were opposed to military action against Iraq.<sup>105</sup> In fact, former President Jimmy Carter wrote that religious

---

circumstances, [such a ground] would not be a sufficient cause for war, unless the whole state should demand assistance against its sovereign." *Id.* (quoting SUÁREZ, *supra* note 23, at 824).

104. Comm. on Int'l Sec. Affairs, *supra* note 94, at 382 (emphasis added) (quoting Interview with Condoleezza Rice, U.S. National Security Advisor, BBC News (Aug. 15, 2002), available at <http://news.bbc.co.uk/1/hi/world/americas/2193426> (on file with the Ave Maria Law Review)). Condoleezza Rice also said, "The problem here is that there will always be some uncertainty about how quickly [Saddam Hussein] can acquire nuclear weapons. But we don't want the smoking gun to be a mushroom cloud." Haynes, *supra* note 77. Thus, from the beginning, the administration considered regime change to be a legitimate, moral basis for renewing hostilities with Iraq. See Comm. on Int'l Sec. Affairs, *supra* note 94, at 381 (noting that the United States and a number of its allies agreed with Secretary of State Colin Powell's statement that "[r]egime change is something the United States might have to do alone").

105. Archbishop Renato Martino, president of the Pontifical Council for Justice and Peace, suggested that an American attack on Iraq would be a "preventive war" and as such "a war of aggression and there is no doubt whatsoever that it does not belong to the definition of a just war." Zenit News Agency, *Without Disarmament, Peace Is Disarmed, Says Archbishop Martino: Favors Development Instead* (Dec. 17, 2002), available at <http://www.zenit.org/english/visualizza.phtml?sid=29125> (Code: ZE02121703) (on file with the Ave Maria Law Review). See also *War on Iraq is a Crime Against Peace: Vatican Prelate*, AGENCE FRANCE PRESSE, Mar. 17, 2003 ("War is a crime against peace which cries for vengeance before God.") (quoting Archbishop Martino). Vatican foreign minister, "Archbishop Jean-Louis Tauran, cautioned that a strike against Iraq would aggravate ill will toward Christians in the Muslim world" and might lead to a "type of anti-Christian crusade." Frank Bruni, *Pope Calls for War Fires to be Extinguished*, N.Y. TIMES, Dec. 26, 2002, at A19 (quoting Archbishop Jean-Louis Tauran). See also Editorial, *God or Country?*, AMERICA, Mar. 31, 2003, at 3, 3 ("In short, war against Iraq would be arrogant, unnecessary and foolish. . . . [It] will be a defeat for U.S. security. It will promote, rather than curb, proliferation of weapons of mass destruction. . . . It will intensify anti-Americanism abroad and with it the terrorist threat. It will undermine U.S. leadership in the world for generations to come.").

leaders had “an almost universal conviction” that an invasion would be unjust.<sup>106</sup>

The objections were of sufficient concern to the Bush administration that in February 2003, the U.S. State Department sent American theologian Michael Novak to the Vatican in an effort to convince Pope John Paul II and the Roman Curia that the planned attack met the just war criteria.<sup>107</sup> The Holy See was already on record

---

In a September 13, 2002 letter to President George W. Bush, the president of the United States Conference of Catholic Bishops, Bishop Wilton Gregory, noted that the previous year his predecessor had told Bush that “the use of force against Afghanistan could be justified, if it were carried out in accord with just war norms and as one part of a much broader, mostly non-military effort to deal with terrorism.” 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 261, 261-63 (2002). Bishop Gregory continued: “We believe Iraq is a different case. Given the precedents and risks involved, we find it difficult to justify extending the war on terrorism to Iraq, absent clear and adequate evidence of Iraqi involvement in the attacks of September 11th or of an imminent attack of a grave nature.” *Id.* at 261. He further observed in the letter that the “United States and the international community have two grave moral obligations: to protect the common good against any Iraqi threats to peace and to do so in a way that conforms with fundamental moral norms.” *Id.* Bishop Gregory then argued that military action would not satisfy the moral norms governing the use of such force. *Id.* However, not all American bishops were opposed to war with Iraq. For example, Philip Hannan, the retired archbishop of New Orleans and a former Army chaplain and paratrooper, stated:

I have seen the results of the atomic bomb and I have also had the opportunity to empty two concentration camps near the end of World War II. . . .

I would like to assure all of you that if we allow some despotic power to rule the earth, or to rule a portion of it, we are in terrible shape, both for our religion as well as the protection of all our rights, particularly in the use of nuclear or atomic weapons.

Richard Dujardin, *U.S. Bishops Voice Reservations over Possible Iraq Strike*, PROVIDENCE J., Nov. 13, 2002, at A-01.

106. Mark O’Keefe, *Antiwar Movement Stalled in Pews*, CHRISTIAN CENTURY, May 3, 2003, at 14, 14. Leaders of the Episcopal, the Evangelical Lutheran, and the United Methodist churches opposed the war, but a Gallup poll indicated two out of three Americans who attended church regularly tended to support the war. More specifically, a separate poll conducted by the Pew Research Center indicated that 62 percent of Catholics and mainline Protestants support the war. *Id.* See also Gerard Henderson, *How Churches Played into Iraq’s Hands*, SYDNEY MORNING HERALD, Apr. 15, 2003, at 17 (detailing the positions of various religious leaders around the world regarding the war in Iraq); *God or Country?*, *supra* note 105, at 3 (“With the exception of some Southern Baptist leaders and mega-church pastors, nearly all U.S. churches are opposing war with Iraq.”).

107. Catholic News Service, *US Enlists Michael Novak to Help Defend Concept of ‘Preventive War’* (Jan. 14, 2003), available at <http://www.cathnews.com/news/301/82.php> (on file with the Ave Maria Law Review). Before the war, Novak had written:

But in what ways is the regime of Milosevic in Kosovo less horrific than the barbaric practices of Saddam Hussein in Iraq? . . . As a matter of prudential judgment, on this narrow issue of whether there are more reasons to intervene in Iraq on humanitarian

as being opposed to war,<sup>108</sup> but Novak met privately with Archbishop Jean-Louis Tauran, Vatican Undersecretary for Relations with States, and officials of the Pontifical Council for Justice and Peace. Later Novak detailed his Vatican presentation at a symposium organized by the U.S. Embassy to the Vatican.<sup>109</sup>

Novak made the case that Iraqi President Saddam Hussein had disrupted international order by refusing to disarm and that Iraqi weapons could fall into the hands of a new breed of international terrorists eager to strike countries around the world with no advance warning. "A limited and carefully conducted war to bring about a regime change in Iraq is, as a last resort, morally obligatory," Novak argued.<sup>110</sup>

For public authorities to fail to conduct such a war would be to put their trust imprudently in the sanity and good will of Saddam Hussein. . . . Given Saddam's proven record in the use of such weapons, and given his recognized contempt for international law, only an imprudent or even foolhardy statesman could trust that these two forces will stay apart forever. At any time they could

---

grounds than in Kosovo, the evidence points hands down to weightier reasons to intervene in Iraq.

Michael Novak, *Civilian Casualties & Turmoil*, NAT'L REV. ONLINE (Feb. 18, 2003), at <http://www.nationalreview.com/novak/novak021803.asp> (on file with the Ave Maria Law Review).

108. On January 13, 2003, Pope John Paul II said the following in his address to the diplomats accredited to the Holy See:

War is never just another means that one can choose to employ for settling differences between nations. As the charter of the United Nations Organization and international law itself remind us, war cannot be decided upon, even when it is a matter of ensuring the common good, except as the very last option and in accordance with very strict conditions, without ignoring the consequences for the civilian population both during and after military operations.

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).

109. Catholic News Service, *Catholic Theologian Argues for War: U.S. Theologian Michael Novak Went to the Vatican in Early February to Make the Case for War* (2003), available at <http://www.americancatholic.org/news/justwar/Iraq/argumentfor.asp> (on file with the Ave Maria Law Review) [hereinafter *Catholic Theologian Argues for War*].

110. *Id.* See also Norton, *supra* note 98 (quoting Novak on the same point); see also McCormick, *supra* note 9, at 804 (stating that war "may be 'in certain circumstances obligatory'") (citation omitted).

combine, in secret, to murder tens of thousands of innocent and unsuspecting citizens.<sup>111</sup>

According to most accounts, Michael Novak's arguments failed to persuade leaders at the Vatican that the invasion of Iraq was a just war.<sup>112</sup> On February 19, 2003, Archbishop Celestino Migliore, Permanent Observer of the Holy See to the United Nations, reported in a statement to the Security Council,

The Holy See is convinced that even though the process of inspections appears somewhat slow, it still remains an effective path that could lead to the building of a consensus which, if widely shared by Nations, would make it almost impossible for any Government to act otherwise, without risking international isolation. The Holy See is therefore of the view that it is also the proper path that would lead to an agreed and honorable resolution to the problem, which, in turn, could provide the basis for a real and lasting peace.<sup>113</sup>

These and other statements emanating from the Vatican were taken as a rejection of the Bush administration's overtures.<sup>114</sup>

---

111. *Catholic Theologian Argues for War*, *supra* note 109. Novak said the September 11, 2001, terrorist attacks "threw the behavior of Saddam Hussein into an entirely new light and enhanced the danger Saddam Hussein poses to the civilized world a hundredfold." *Id.*

112. See, e.g., John Thavis, Catholic News Service, *Vatican Backs Efforts to Prevent Iraq War, Disarm Saddam* (Feb. 18, 2003), available at <http://www.nccatholic.org/news.php?ArtID=816> (on file with the Ave Maria Law Review). But see Norton, *supra* note 98 ("U.S. Ambassador to the Vatican Jim Nicholson, who sat in on Novak's meeting with Archbishop Tauran, told Catholic New Service he was 'very pleased' with how the private Vatican meetings went . . .").

113. His Eminence Monsignor Celestino Migliore, Intervention of H.E. Msgr. Celestino Migliore at the Meeting in the Chamber of the Security Council of the United Nations on the Iraqi Issue (Feb. 19, 2003), at [http://www.vatican.va/roman\\_curia/secretariat\\_state/2003/documents/rc\\_seg-st\\_20030219\\_migliore-security-council\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2003/documents/rc_seg-st_20030219_migliore-security-council_en.html) (on file with the Ave Maria Law Review).

114. The Pope's instruction on this issue, unlike issues relating to faith and morals, is not binding on ordinary Catholics.

On this issue, Catholics have the freedom to differ with the pope. Father Andrew Nelson, former rector of the Milwaukee archdiocese's St. Francis Seminary, said the pope's statements on Iraq are part of his ordinary teaching authority. The pope has not spoken infallibly. Catholics can disagree, but they have a serious obligation to listen respectfully and to give the pope's statements the presumption of truth, Nelson said.

The American leaders wanted a Vatican endorsement of the invasion of Iraq. Disappointed when that did not happen, many took the papal response as a declaration that the war was unjust.<sup>115</sup> In fact, Americans were wrong to look to the Pope for a declaration that the war was just. War is the ultimate extension of politics. It certainly has a moral component,<sup>116</sup> but questions as to how, when, and even whether to go to war are essentially political questions that are not within the Church's area of expertise.<sup>117</sup> As the world moves towards war, the Church turns towards its pastoral missions of providing peace and comfort.<sup>118</sup>

In 1917, during the First World War, Pope Benedict XV set forth a peace plan calling for "universal disarmament" and the "settling of international disputes by arbitration."<sup>119</sup> He sent the plan to Germany with his representative, Eugenio Pacelli, who was elected pope in

---

/mar03/124029.asp (on file with the Ave Maria Law Review). See also Second Vatican Council, *Lumen Gentium [Dogmatic Constitution on the Church]* ¶ 25 (1964), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 109, 135 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1998) (Second Vatican Council's explanation of infallibility); Eric Gorski, *Church View Questioned: Dissent OK, Anti-War Chaput Says*, DENVER POST, Apr. 3, 2003, at A-17 (Denver Archbishop Charles Chaput expressed his opposition to the war, but said that Catholics were free to disagree on this point, unlike with the Church's opposition to abortion, euthanasia, and genocide, which are "three crimes" that are "always grievously wrong.") (quoting Charles J. Chaput, O.F.M. Cap., *Some Personal Thoughts on the War and Its Dilemmas*, DENVER CATHOLIC REG., Apr. 2, 2003, at 2). For examples of the confusion among American Catholics with respect to the Vatican's opposition to the war in Iraq, see *Letters to the Editor: The War in Iraq*, INSIDE THE VATICAN, Aug. 2003, at 8, 8-9.

115. See, e.g., *Letters to the Editor: The War in Iraq*, *supra* note 114.

116. "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." 1 SECRETARIAT OF THE INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 186 (William S. Hein & Co. 1995) (1947).

117. "[I]t strikes us that the U.S. Ambassador to the Holy See, James Nicholson, had it right when he said that the Catholic catechism distinguishes between lay and clerical roles, placing the responsibility for weighing the morality of a war with public authorities." McGurn, *supra* note 99. That is not to say that a Pope could never endorse military action. See Collins, *supra* note 99, at 5 (The Holy See supported a bombing campaign in Serbia as a "humanitarian intervention.").

118. See Wilton D. Gregory, *On the Brink of War: A Statement*, 32 ORIGINS 687, 687 (2003) (Gregory, President of the United States Conference of Catholic Bishops, wrote: "In time of war, our first obligation is prayer and solidarity."); Shelby Oppel, *Divisions on War Challenge Catholics, Faith Communities*, SUNDAY OREGONIAN, Apr. 13, 2003, at B3 (referencing Bishop William Skylstad of Spokane who suggested that the role of the bishops shifted once the war began).

119. See CHARLES HUGO DOYLE, WE HAVE A POPE: THE LIFE OF POPE PIUS XII 18 (1942).

1939.<sup>120</sup> The plan, unfortunately, did not bring the war to an early end, so Benedict XV then shifted his focus to easing the suffering of the impoverished, prisoners of war, and others who were in distress.<sup>121</sup>

When Pacelli was made pope, he chose the name Pius XII in honor of his predecessor Pius XI.<sup>122</sup> In Latin, "Pius" signifies "pious, kindhearted, and gentle," and in Hebrew it means "conciliation."<sup>123</sup> He chose as his coat-of-arms a dove holding an olive branch in his beak, and as his device the phrase "*Opus Justitiae Pax*" ("the work of justice is peace").<sup>124</sup> Concerned about the outbreak of war, Pius XII developed a plan for peace before his coronation. In his first message on Vatican radio, Pius XII pleaded for peace throughout the world while pledging to work for unity.<sup>125</sup> Addressing the cardinals shortly after his coronation, Pius XII promised that his papacy would be devoted to the struggle for peace.<sup>126</sup> Pius XII came to be known as the "Herald of Peace" because he often publicly prayed for eternal rest for the war dead, and for all who suffered because of the war, including refugees, prisoners, and exiles.<sup>127</sup>

While Pius continually counseled peace, he did not suggest that it would be immoral for the Allies to respond to German aggression.<sup>128</sup> At the same time, he did not proclaim that the Allied effort

120. RONALD J. RYCHLAK, *HITLER, THE WAR, AND THE POPE* 6, 108 (2000).

121. *Id.* at 6.

122. *Id.* at 112-13.

123. *Id.* The supreme title of the pope, "*Pontifex maximus*," means "the great builder of bridges." *Id.* at 112.

124. *Id.* at 113.

125. *Id.* (citation omitted).

126. *Id.* at 112 (citation omitted).

127. *Id.* at 113 (citation omitted). Reflecting on this period in a radio broadcast after the war, Pius said,

The world was then still at peace: but what a peace and how precarious! With a heart full of anguish, perplexed, praying, we bent over that peace like one that assists a dying man and fights obstinately to save him from death even when all hope is gone.

Pope Pius XII, Address by Pope Pius XII to the College of Cardinals (June 2, 1945), at <http://www.ibiblio.org/pha/policy/1945/450602a.html> (on file with the Ave Maria Law Review).

128. Despite all of his efforts to avoid war, end hostilities, and comfort the afflicted, due to his refusal to openly take sides, Pius is today sometimes subjected to ridicule, and he has unjustly been called "Hitler's Pope." See Ronald J. Rychlak, *Goldhagen v. Pius XII*, *FIRST THINGS*, June-July 2002, at 37; Ronald J. Rychlak, *Historical Dishonesty: The Big Lie of John Cornwell's Book Hitler's Pope*, *THIS ROCK*, Jan. 2001, at 8.

constituted a just war.<sup>129</sup> While religious leaders certainly have the right to offer their opinions as to the “justness” of any military option, it is possible to thereby embolden an evil regime and make war all the more likely.<sup>130</sup> (In World War II, it was not the pope, but the acquiescence of other European nations that emboldened Hitler.)

Moving ahead to 2003, and looking at the actions and statements of Pope John Paul II preceding the invasion of Iraq, an interesting parallel emerges. Although the pope, members of the Roman Curia, and assorted bishops’ conferences wanted peace, most of the statements (and all of the papal statements) were fully in line with the tradition established by earlier popes.<sup>131</sup> They did not endorse war, but they also did not urge capitulation to a tyrant.

---

129. He did, however, refuse to bless the German “crusade” into the Soviet Union. RYCHLAK, *supra* note 120, at 158.

130. This may have happened with the Iraq war: “An unintended consequence of [Iraq’s deputy prime minister Tareq] Aziz’s audience with the Pope was to send a false message to Saddam in Baghdad. He came to believe that the West was too soft to stand up to Iraq.” Henderson, *supra* note 106, at 17.

131. The *Wall Street Journal* originally reported: “If there were any doubts left about where Pope John Paul II stands on war with Iraq, they ought to have been answered by his characterization of any military effort against Saddam as a ‘crime against humanity.’” McGurn, *supra* note 99. A similar assertion was made by columnist Robert L. Bartley. Robert L. Bartley, *Thinking Things Over: Religious Crossfire Hits the President*, WALL ST. J., Apr. 21, 2003, at A13. The latter column led to a correction that was printed in the *Wall Street Journal* four days later. The correction stated that John Paul II opposed war in Iraq, but he did not call the war a “crime against humanity.” The correction also referenced the misquote in McGurn, *supra* note 99, which it indicated had already been corrected. *Corrections*, WALL ST. J., Apr. 25, 2003, at A9. See also *The O’Reilly Factor* (Fox News Network television broadcast, June 3, 2003) (Show guest Dr. Larry Chapp stated, “I don’t think Pope John Paul II has declared it, sort of officially, to be an unjust, immoral war.”); McGurn, *supra* note 99 (“[T]he Holy Father’s own statements have been more nuanced than the oft-intemperate language used by other Vatican officials, not to mention the Vatican’s official and semi-official publications.”).

Giorgio Ruini, editorialist of the Vatican newspaper *L’Osservatore Romano*, “‘categorically excludes’ attempts to portray the Pope’s position as anti-American.” He explained that attempts to link papal statements to the anti-war, anti-American sentiment of some groups were a betrayal of the Holy Father’s intentions. Zenit News Agency, *Vatican Isn’t the Only One Wary of War: Charges of Interference and Pacifism Don’t Hold Up* (Feb. 15, 2003), available at <http://www.zenit.org/english/visualizza.phtml?sid=31409> (Code: ZE03021501) (on file with the Ave Maria Law Review) [hereinafter *Vatican Isn’t the Only One Wary of War*]. Ruini explained that it was vital to maintain the concepts of peace and justice. In this sense the Vatican’s position was not at all “‘pacifist’ . . . but rather in favor of a ‘pacification’ of the situation.” *Id.* “Such a pacification would involve removing the causes of conflict.” *Id.*

Cardinal Roger Etchegaray, sent as a special papal emissary to Baghdad in the weeks prior to the invasion of Iraq, explained that one of the conditions for peace (e.g., requirements for avoiding war) was that Iraq collaborate fully with the UN inspectors. *Id.* This was made clear by Cardinal Pio Laghi, Special Envoy of John Paul II to President George W. Bush, in a statement delivered on March 5, 2003. Zenit News Agency, *Cardinal Laghi’s Statement Following Meeting With Bush: “Holy See Maintains That There Are Still Peaceful Avenues”*

Pope John Paul II, as would be expected, was extremely concerned about the human toll all wars take. He wanted that message to reach all those concerned before war began.<sup>132</sup> That, of course, is a traditional and completely appropriate role for the Church to play.<sup>133</sup> Because this is the expected answer in virtually every case, it makes little sense for the public to look to any pope for a declaration that a war is just. Counsel from the papacy will (and should) be to avoid war.

There is another reason why it is unwise to look to popes or other religious leaders for a declaration that a given war is just: religious

---

(Mar. 6, 2003), available at <http://www.zenit.org/english/visualizza.phtml?sid=32326> (Code: ZE03030622) (on file with the Ave Maria Law Review). See also *Signs of the Times: Papal Envoy Meets Bush*, *supra* note 88, at 4 (“At the press conference, one journalist asked Cardinal Laghi what would happen if [President] Bush did not listen to the pope’s ‘instructions’ . . . ‘The Holy Father doesn’t give instructions. . . It is up to the United States government to consider the consequences,’ he said.”). Ultimately, these statements seem to recognize that the final responsibility for peace rested with Iraqi compliance. *Vatican Isn’t the Only One Wary of War*, *supra*.

132. See Pope John Paul II, *supra* note 108, at 144.

“NO TO WAR!” War is not always inevitable. It is always a defeat for humanity. International law, honest dialogue, solidarity between states, the noble exercise of diplomacy: these are methods worthy of individuals and nations in resolving their differences. . . . And what are we to say of the threat of a war that could strike the people of Iraq, the land of the prophets, a people already sorely tried by more than 12 years of embargo? War is never just another means that one can choose to employ for settling differences between nations. As the charter of the United Nations and international law itself remind us, war cannot be decided upon, even when it is a matter of ensuring the common good, except as the very last option and in accordance with very strict conditions, without ignoring the consequences for the civilian population both during and after the military operations.

*Id.* The Pope’s comments were not the blunt condemnations of American military action that some accounts incorrectly reported. See also Neuhaus, *supra* note 94, at 76. Neuhaus, who supported the war, was in full agreement with the papal pronouncements and found them to be “entirely consistent with the teaching of St. Thomas Aquinas and others in the just war tradition.” *Id.*

133. Cardinal Sergio Sebastiani explained that the Holy Father’s interventions were aimed at exhorting the parties involved to reflect on the consequences of their actions. *Vatican Isn’t the Only One Wary of War*, *supra* note 131. Consider the following statement by George Weigel:

When the Pope prays for peace, when the Pope pleads for peace, he is not taking a pacifist position, as some have claimed. Those committed to the just war tradition are committed to it precisely because they are for peace. The difference between pacifism and the just war tradition is that the latter recognizes that there are circumstances in which the use of proportionate and discriminate armed force is a moral obligation in pursuit of peace. That is a difference the new Catholic “default position” [against war ever being just] blurs, and that is yet another reason why it is dubiously Catholic.

Griffiths & Weigel, *supra* note 66, at 36.

leaders are not usually well-informed about the political and military factors that must go into the just war determination. Certainly they are not as well-informed as are political and military leaders.

The American bishops premised their 1983 pastoral letter<sup>134</sup> on the assumption that weapons would continually become more dangerous and pose a continuously greater threat to civilian populations.<sup>135</sup> It now seems that assumption was wrong. The new “smart bombs” have changed the weapons landscape.<sup>136</sup> Precision-guided munitions have greatly enhanced the military’s ability to limit civilian casualties and thereby changed the just war equation,<sup>137</sup> but religious leaders have not been fully aware of these technological advances.<sup>138</sup>

Another new factor that relates to weaponry is the issue of delivery systems. In the twentieth century, weapons of mass destruction threatened (and devastated) civilian populations. Just war theorists adapted the theory to account for such weapons, based upon the assumption that delivery required facilities that were available only to nations, and only to some of them. Recent terrorist groups, however, have sought to obtain the ability to deliver devastating weapons in civilian areas.

---

134. CHALLENGE OF PEACE, *supra* note 2.

135. *Id.* at 34.

136. See Fred Kaplan, *How Smart Are Our Smart Bombs?: They’re Better Than Ever, But They Still Won’t Topple Saddam*, SLATE MAGAZINE (Oct. 17, 2002), at <http://slate.msn.com/toolbar.aspx?action=print&id=2072709> (on file with the Ave Maria Law Review).

The new smart bombs are guided to their targets by Global Positioning Satellites, in much the same way that the GPS system in your new car guides you to your destination. The pilot punches the target’s coordinates into the bomb’s GPS receiver. The GPS tells the bomb where it is, where it’s going, and where it’s supposed to go, until it arrives on target—plus or minus three feet, on average (an astonishing level of precision)—and explodes.

*Id.*

137. *Just War Tradition*, *supra* note 25.

138. Non-governmental sources are likely to be lacking much important information. Catholic scholar Paul Griffiths stated that “Catholic citizens of the U.S. do not have and cannot get the evidence and argument they would need to rebut the assumption that lethal military force ought not be used. From which it follows that we ought to continue in that assumption.” Griffiths & Weigel, *supra* note 66, at 32. Under this standard, it is hard to see how anyone could ever have enough reliable information to reach a decision that war is just. Indeed, Griffiths virtually admits as much: “changes in the organization of states and in information technology may (and in my view should) lead to an effective ban on judgment by Catholic citizens that a particular war ought to be undertaken.” *Id.* at 32-33. It would, of course, be absolutely irresponsible for a national leader to take such a position.

With the dramatic and sometimes frightening developments in modern weapons and delivery systems,<sup>139</sup> it is perhaps unreasonable to expect any religious leader to be fully informed about modern military capabilities. It is also unlikely that religious leaders are privy to the government's war-related intelligence.<sup>140</sup> Lack of information and failure to understand the capabilities of new weapons, of course, could easily result in an incorrect estimate of unintended damage from military action.<sup>141</sup> (It seems that the Vatican leadership was

---

139. See Kaplan, *supra* note 136 ("In Desert Storm, just 3 percent of the bombs dropped were smart bombs. In Kosovo . . . the figure rose to 30 percent. In Afghanistan, it approached 70 percent.").

140. Cf. Novak, *supra* note 53 (The primary responsibility for the decision to go to war rests with public authorities, not with "distant commentators." Public authorities "are by the principle of subsidiarity the authorities closest to the facts of the case and—given the nature of war by clandestine terror networks today—privy to highly restricted intelligence."). Political and military leaders often limit the amount of information that they make available to the press and to religious leaders, and they may even present misleading assessments. Compare Spencer Ackerman & John B. Judis, *The First Casualty*, NEW REPUBLIC, June 30, 2003, at 14 (arguing that the Bush administration over-stated some of the reasons for invading Iraq), and Jonathan Schell, *Letter from Ground Zero: Cognitive Torture*, NATION, July 14, 2003, at 8 (making a similar argument), with Hayes, *supra* note 77, at 29 (arguing that the Bush administration "has consistently *underplayed* the connections between Saddam Hussein and al-Qaeda"). Consider the following statement by Paul Griffiths:

Do we American Catholics have sources [of information] on which we can rely? We do not. Our principal sources are three: the U.S. government itself, in the person of those appointed to speak for it; the U.S. media; and foreign governments and media. But we have no good reason to think that any of these sources is sufficiently reliable to provide what we need, and we therefore also have no good reason to think that we have access to the evidence and argument we would need if we were to judge the burden of proof to be met. From which it follows rapidly, and by necessity, that we may not endorse our country's decision to use lethal military force against the government and people of Afghanistan.

Weigel & Griffiths, *supra* note 66, at 32.

141. It is also fair to note that certain "political" concerns could have influenced the Holy See's judgment on just war issues. For example, it has been suggested that the Vatican was concerned about a backlash against Catholics in Iraq and other places in the Middle East. See John L. Allen Jr., *Vatican: War Threatens U.N.'s Status*, NAT'L CATHOLIC REP., Mar. 21, 2003, at 3 ("The Vatican has long been concerned that if war is seen by Muslims as a Western assault on Islam, Christian minorities in the Islamic world might become targets."). In a December 23, 2002, interview, Vatican diplomat Archbishop Jean-Louis Tauran warned that "a type of anti-Christian, anti-Western crusade could be incited because some ignorant masses mix everything together." John L. Allen Jr., *So Far, No Islamic-Christian Clashes*, NAT'L CATHOLIC REP. (Apr. 4, 2003), at <http://www.nationalcatholicreporter.org/word/pfw0404.htm> (on file with the Ave Maria Law Review). See also John Thavis, Catholic News Service, *Modern-Day Exodus: Flight of Catholics from Iraq Troubles Vatican* (Feb. 18, 2003) (quoting one Vatican official on the number of Catholics leaving Iraq: "It's like a biblical exodus, . . . [a]nd with the threat of a new war, the remaining Catholics must be thinking very hard about packing their bags."), available at <http://www.nccatholic.org/news.php?ArtID=815> (on file with the Ave Maria Law Review).

surprised by the Iraq War's quick resolution and the relatively small number of civilian casualties.)<sup>142</sup> This is but another reason why one should not look to the Vatican for a before-the-fact ruling as to the justness of any given military action.

In the end, as the *Catechism of the Catholic Church* explains, the decision to undertake military action is a matter for national leaders, not international organizations like the UN and not even the universal Church.<sup>143</sup> The pope can be expected to counsel prudence, toleration, and understanding. He may plead for cooperation from both sides, but in the absence of a clear "rescue" type of operation, he should not be expected to declare a war to be just in this day and age of weapons of mass destruction.<sup>144</sup> That does not mean, however, that any military action is justified, or that warring nations are free to ignore just war doctrine and the counsel of religious leaders, but neither does it mean that a given war is unjust simply because it was not approved by the pope or another religious leader.<sup>145</sup>

---

142. Joseph Cardinal Ratzinger said that the "result is happier than could have been thought." John Norton, *Vatican Says Saddam's Regime Collapse Marks "Opportunity" for Iraqis*, DENVER CATHOLIC REG., available at <http://www.archden.org/dcr/news/php?e=20&s=1&a=404> (on file with the Ave Maria Law Review); see Catholic News Service, *Vatican Says Collapse of Saddam's Regime Marks "Opportunity" for Iraqis* (Apr. 10, 2003), available at <http://www.americancatholic.org/News/JustWar/Iraq/default.asp> (on file with the Ave Maria Law Review).

143. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6, ¶ 2308 (referring to the possibility of an "international authority with the necessary competence and power" to defend nations, but it contemplates that such an organization does not yet exist).

144. Cf. *U.S. Bishop Wants to Send Troops to Liberia*, OUR SUNDAY VISITOR, July 27, 2003, at 6 (Bishop John H. Ricard, chairman of the U.S. Bishops' Committee on International Policy asked the Bush administration to "support the deployment of an international stabilization force" to Liberia); *Vatican Isn't the Only One Wary of War*, *supra* note 131 (noting that American bishops supported a limited military presence in Afghanistan). Regarding the morality of employing the military for humanitarian intervention, see Richard Falk et al., *Humanitarian Intervention: A Forum*, NATION, July 14, 2003, at 11.

145. The Bush administration's efforts to obtain such a blessing were futile, despite being commendable. See Uhlmann, *supra* note 5, at 10 ("In the run-up to Operation Iraqi Freedom, to have listened to President Bush, or to his principal civilian and military advisors, was to learn how profoundly just war thinking has influenced the leadership of the world's most powerful nation."). Even after most hostilities had ended, the Bush administration tried to convince the Pope that the invasion met the just war requirements. Zenit News Agency, *Pope and Powell Discuss Iraq, Africa, Holy Land*, WANDERER, June 12, 2003, at 1 (Powell said "that he intended to convince the Holy Father that the U.S./U.K. war on Iraq was a 'just war'").

## V. A ROLE FOR (AND A LESSON FROM) THE INTERNATIONAL CRIMINAL COURT?

If neither the UN nor the Holy See can be expected to sanction military action, and the decision must be left to national leaders, is the just war doctrine simply an advisory standard that each nation must apply to its own case? To a degree, the answer to that question has traditionally been “yes.” At the end of the Second World War, however, the Allies conducted war crimes trials in Nuremberg and Tokyo.<sup>146</sup> More recently, *ad hoc* tribunals were established to deal with abuses in the former Yugoslavia<sup>147</sup> and Rwanda.<sup>148</sup> These tribunals led to the doctrines that shape international criminal law today.

In the summer of 1998, the United Nations convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy.<sup>149</sup> The charge to the conference was to negotiate an agreement relating to an International Criminal Court (“ICC”).<sup>150</sup> Despite numerous unresolved issues, the delegates at that conference adopted a draft statute (the “Rome Statute”).<sup>151</sup> More than a treaty, the Rome Statute changed customary international law and claimed jurisdiction for the ICC over citizens of non-signatories in certain cases.<sup>152</sup> It has now been ratified, and the ICC has come into being.

---

146. See Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38 (1947). Even before World War II had ended, people started talking about putting war criminals, like Adolf Hitler and his close associates, on trial for war crimes. See, e.g., MICHAEL YOUNG, *THE TRIAL OF ADOLF HITLER* (1944).

147. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

148. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

149. See generally *Memorandum of the Secretary-General on the Methods of Work and Procedures for the Conference*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, U.N. Doc. A/CONF.183/3 (1998).

150. *Id.* at ¶ 23.

151. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*].

152. *Id.* at art. 4-5, 12-14. See generally Am. Bar Ass’n Section of Int’l Law and Practice, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 1998 A.B.A. SEC. INT’L. L. & PRAC. 118B (tracing procedural history of the International Criminal Court); Am. Bar Ass’n Task Force on an Int’l Criminal Court and the N.Y. State Bar Ass’n, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 27 INT’L LAW. 257 (1993) (making jurisdictional and other recommendations for an international criminal court); Working Group on Improving the Effectiveness of the United Nations, *Report on Improving the Effectiveness of the United*

The ICC has jurisdiction over three core crimes: genocide,<sup>153</sup> crimes against humanity,<sup>154</sup> and war crimes.<sup>155</sup> It is also charged with prosecuting the crime of aggression.<sup>156</sup> Negotiators, however, have been unable to agree on the definition of that crime.<sup>157</sup> As such, defendants may not yet be prosecuted in the ICC for the crime of aggression.

The crime of aggression relates to aggressive (usually military) action against another nation. As such, the definition of the crime of aggression would probably be fairly close to the traditional definition of an unjust war. Negotiators at the ICC are having particular difficulty with this definition because they are essentially trying to define just war in such a way that it will meet the standards required of a criminal statute. In other words, it will have to be sufficiently clear and unambiguous, giving all people notice, and it will have to

---

*Nations in Advancing the Rule of Law in the World*, 29 INT'L LAW. 293, 300-04 (1995) (making recommendations for the establishment of an international criminal court); *Report of the International Law Commission on the Work of Its Forty-Sixth Session: Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Agenda Item 140, at 3, U.N. Doc. A/49/355 (1994) (suggesting a statutory framework for an international criminal court).

153. *Rome Statute*, *supra* note 151, at art. 5, para. 1(a).

154. *Id.* at art. 5, para. 1(b). The list includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance, and persecution. *Id.* at art. 7, para. 1. With regard to "forced pregnancy," *see generally* Benjamin B. Ferencz, Book Review, 94 AM. J. INT'L L. 218, 219 (2000) (reviewing THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS (1999)) ("The emotionally charged issue of 'forced pregnancy' required delicate compromises with Catholic and Arab countries, which feared interference with national laws prohibiting abortion.").

155. *Rome Statute*, *supra* note 151, at art. 5, para. 1(c).

156. *Id.* at art. 5, para. 1(d).

157. One model proposed that liability for the crime of aggression be based on the individual responsibility model contained within the Charter of the International Military Tribunal fashioned for use by the International Military Tribunal following World War II. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. A second model simulated General Assembly Resolution 3314 of 1974, which placed responsibility for the crime of aggression with the states themselves. G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th mtg., U.N. Doc. A/Res./3314 (1974). The Preparatory Committee on the Establishment of an International Criminal Court has also set forth three possible definitions of aggression. *See* Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 417-18 n.24 (2000). U.S. Ambassador David Scheffer argued that the inclusion of this crime was an ill-conceived concession to advocates, and its future definition "could be without limit and call into question any use of military force or even economic sanctions." Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 204 (2001) (quoting David J. Scheffer, Address Before the Committee of Conscience Holocaust Museum, Washington, DC (Apr. 22, 1998) (responding to Genocide and Crimes Against Humanity)).

apply across the board in a wide variety of circumstances. This is an attempt to take a moral idea and force it into a legalistic form.

The idea of turning a moral doctrine as complicated as the just war theory into a piece of criminal legislation would be daunting enough if the factors that go into the doctrine (most notably weaponry and delivery systems) were stagnant. As it is, however, the task seems not only overwhelmingly difficult, but even misconceived.<sup>158</sup>

There is certainly a realm and an important role for legislation and legalistic precision. Not all moral considerations, however, can be reduced to a series of factors to be weighed in a mathematical formula.<sup>159</sup> There comes a point at which the legalistic approach to an issue must give way to a different dimension, to prudential considerations. Sometimes it is necessary to move beyond the realm of justice and into the realm of charity.<sup>160</sup> Both St. Augustine and St. Thomas Aquinas, for instance, argued that the just war doctrine fell under the principles of justice *and* charity.<sup>161</sup>

The just war doctrine is based upon a weighing of different factors that vary from one situation to the next. Because of that, it must always be applied in a particular context. As such, the doctrine does not lend itself well to the legislative form into which theorists have tried to force it over the past century.

Just war theorists and the architects of the International Criminal Court have been trying to remove context from the just war doctrine and the “crime of aggression” analysis. That is the biggest problem that negotiators are having with the ICC and it is the stumbling block for clear thinking on the just war doctrine. Just war decisions have to

---

158. See McCormick, *supra* note 9, at 803 (“Rather than being a set of static rules, this synthesis [i.e., the just war doctrine] represents a dynamic and flexible attempt to limit both the purposes and conduct of warfare.”).

159. The difficulties of constructing prohibitive legislation was reflected in the hearings at Nuremberg, where the adjudicated war crimes “were of such an extreme nature that no one had ever thought of formulating rules of positive international law against them.” O’Brien, *supra* note 14, at 798.

160. A puzzle illustrating this point was developed by Carneades (cir. 213-125 B.C.) around the year 155 B.C. Known as “the plank of Carneades,” the puzzle postulated a shipwreck. Two survivors each grasp a plank at the same moment. It can support one of them but not both. Who has the legal right to the plank? Both and neither was Carneades’ answer. A better answer was given seventeen centuries later by just-war theorist Francisco Suárez who said that this case is where the order of justice terminates and the order of charity begins. HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 18 (Thomas R. Hanley, O.S.B. trans., Liberty Fund, Inc. 1998) (1936).

161. Novak, *supra* note 53 (“For both St. Augustine and St. Thomas Aquinas, thinking about war falls under the principles of charity and justice.”).

be made based upon factors that are not possible to identify in advance. As such, the effort to draft a law defining just and unjust wars is likely to result in legislation that will not be applicable in many cases. Moreover, with new developments in weapons and warfare, and based upon the lessons of the last century, the definition will need to be continually reviewed and updated. That is likely to render the existing definition incomplete at any given time.

Rather than trying to turn the just war doctrine into a legislative template for identifying those situations when war can be waged, it may be better to view the just war doctrine as an aspect of natural law.<sup>162</sup> Within weeks of the outbreak of World War II, Pope Pius XII noted the need to have natural law serve as the basis of international standards:

[T]he new order of the world, of national and international life, must rest no longer on the quicksands of changeable and ephemeral standards that depend only on the selfish interests of groups and individuals. No, they must rest on the unshakeable foundation, on the solid rock of natural law and Divine Revelation.<sup>163</sup>

The natural law exists without being written down. It can be identified, but it is impossible in advance to identify with precision all of the factors that must go into the just war calculations in every conceivable situation.<sup>164</sup>

This conclusion does not mean that tyrants are free to act with impunity. As at Nuremberg, violators can be punished.<sup>165</sup> Moreover, if the ICC negotiators are ever able to agree on a definition for the crime of aggression, they might create an international standard by which the “justness” of a war would be measured. In essence, this

---

162. More than being a guide to individual conduct, natural law “serves as a standard for the laws enacted by the state.” CHARLES E. RICE, FIFTY QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 33 (rev. ed. 1999). See generally ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS (2002); COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW (Edward B. McLean ed., 2000).

163. Pope Pius XII, *Summi Pontificatus* [Encyclical Letter on the Unity of Human Society] ¶ 82 (1939), reprinted in CLAUDIA CARLEN, I.H.M., THE PAPAL ENCYCLICALS 1939-1958, at 5, 16 (1981). In fact, Pius even wrote of “principles of international natural law.” *Id.* ¶ 74.

164. See Robert John Araujo, S.J., *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 AVE MARIA L. REV. 159, 160-61 (2003) (“In the Catholic tradition, natural law is not a body of substantive law in itself but a means by which the human mind formulates legal principles that can then be applied to govern a specific jurisdiction.”).

165. See *id.* at 163. “[I]nternational law has a strong foundation in the natural law tradition that is very much at the core of international human rights law.” *Id.*

would be a matter of judging the prudential decisions of national leaders against a norm that is informed by traditional just war factors. Leaders would not be free to disregard the good of the citizenry or to engage in wars of aggression. In other words, there would be an accounting for horrendous crimes. The court's judgment, of course, runs a very significant risk of being politically charged and could only come after-the-fact, when the important information would be available to the judges.<sup>166</sup> Whether such a trial could ever lead to an accurate assessment of the justness of any war remains to be seen, but the benefit of a determination coming after the military action rather than before it gives an ICC trial an advantage over any entity asked to reach such a decision before-the-fact.

### CONCLUSION

Thomas Merton was correct when he wrote that Christians have a duty to "work for the total abolition of war"<sup>167</sup> because "unless war is abolished the world will remain constantly in a state of madness and desperation."<sup>168</sup> At the same time, we need to recognize that despite such work, wars sometimes need to be fought. In those cases, the main concern is that the wars that we fight are just and that we fight them in an appropriate manner.

National sovereigns possess the authority to make the final decision about going to war. They are best able to assess all of the factors that go into the just war equation. Of course, in order to make this assessment, national leaders must have a degree of flexibility to exercise their prudential judgment regarding the numerous factors that go into the just war analysis.<sup>169</sup> This would include consideration

---

166. This discussion is not to suggest that the ICC is without very serious flaws. See John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55 (2003); John M. Czarnetzky & Ronald J. Rychlak, *The International Criminal Court and the Question of Subsidiarity*, 2000-2003 THIRD WORLD LEGAL STUD. 115 (2003); John M. Czarnetzky & Ronald J. Rychlak, *A Court Out of Order*, FIRST THINGS, Apr. 2003, at 24.

167. Thomas Merton, *The Root of War is Fear*, in THE POWER OF NONVIOLENCE: WRITINGS BY ADVOCATES OF PEACE 96, 97 (2002).

168. *Id.* (emphasis in original).

169. The decision to take a nation to war is probably the most difficult issue that the leader of a nation will ever face. As commentator Paul J. Griffiths noted,

[T]he decision in question, recall, is whether to endorse an action that will kill large numbers of human beings, people made in God's image, people for whom Christ died. No Catholic should endorse such an action lightly or easily. The very thought

of the realities of modern weaponry and warfare and the character of the involved regime.<sup>170</sup>

The problem with the approach taken by many just war theorists is that they want to draft a criminal statute, with numerous factors, each of which must be satisfied before a nation can go to war. In a world where it is possible for an aggressor to strike at a distance, with little or no warning, and to cause mass casualties, that is not the proper construct.

To begin here—to imagine that the role of moral reason is to set a series of hurdles (primarily having to do with *in bello* questions of proportionality and discrimination) that statesmen must overcome before the resort to armed force is given moral sanction—is to begin at the wrong place. And beginning at the wrong place almost always means arriving at the wrong destination.<sup>171</sup>

Instead of this structure, just war theorists should come to see the doctrine as numerous factors, each of which must be weighed and considered, but not as a template outlining each and every condition that is necessary before war can be considered just. Those who would abuse their legitimate authority to wage war might ultimately (after-the-fact) be evaluated against a standard developed by the International Criminal Court.

Theorists who try to force the just war doctrine into a number of pre-defined categories are applying a legalistic analysis that simply

---

of doing so should produce horror, a wail of anticipatory lament and repentance, and this means that the burden of proof is heavy.

Griffiths & Weigel, *supra* note 66, at 32.

170. It is, of course, possible—even likely—that national leaders will at times reach the wrong decision about whether war is justified. If, however, they have honestly sought to do the right thing, mistakes regarding going to war will probably be no more common than mistakes of not going to war when war was called for (and would have saved more lives). In such cases, those leaders should find solace and inspiration in the words of Norman Vincent Peale, written about his endorsement of the American entry into World War II:

If in giving my support to war, which is the means for making this great freedom possible, I am guilty of sin, then I believe that the same understanding Heavenly Father (who can unravel all dilemmas), who has often forgiven me of other sins, will absolve me of this one, also. As a Christian I must fight against wickedness. I can do so without hate. On the contrary, I can do so with a great sense of love, because I am struggling for something that is of the best in men, the death of which would mean tragedy indescribable. I believe that God sees me in this dilemma and understands.

Peale, *supra* note 35, at 8-9.

171. Weigel, *supra* note 25, at 23.

does not fit the reality. “Just war doctrine, rightly understood, is not some sort of moral multiple-choice test keyed to only one set of correct answers. The Catechism of the Catholic Church recognizes as much.”<sup>172</sup> In order to properly assess difficult situations, leaders must have discretion to put the various factors (including weapons, wars, treaties, regimes, and collateral damage to people, buildings, and the environment) into context.<sup>173</sup> To deny this discretion to the sovereign would be to strip the leader of the ability to minimize danger to its citizens—and that would be a most unjust result.

---

172. Uhlmann, *supra* note 5, at 11. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 6, ¶ 2309 (“The evaluation of these conditions for moral legitimacy [of war] belongs to the prudential judgment of those who have responsibility for the common good.”).

173. One would think, for instance, that the impact on children in a given region might be an important consideration. See, e.g., PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE UN & THE OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SEC’Y-GEN. FOR CHILDREN AND ARMED CONFLICT, CHILDREN IN ARMED CONFLICT: EVERYONE’S RESPONSIBILITY (2001).