

## ARTICLES

### REFLECTIONS ON JUST WARS AND JUST WARRIORS

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#### INTRODUCTION

This Article will address the perceived conflict between faith in the Prince of Peace and military service and any limits on such service imposed by the just war doctrine. It will then address the continuing controversy regarding the application of the just war doctrine to the Iraq war and the justness of our cause there. Finally, it will discuss questions of illegal or immoral orders and conscientious objection and pacifism.

These reflections on just wars and just warriors are informed by my own Catholic faith and military experience. I have now served in the U.S. Marine Corps for over twenty-seven years, including service as a tank platoon commander, tank battalion adjutant, Marine Expeditionary Unit Senior Judge Advocate, defense counsel, prosecutor, trial judge, appellate judge, and in support of Operation Enduring Freedom (“OEF”) as Assistant Staff Judge Advocate for Operational Law at U.S. Central Command in the immediate aftermath of September 11, 2001. In this capacity, I was responsible for providing legal advice on issues related to operational, international, and criminal law arising out of the war on terrorism. I have served side by side with Marines from the ranks of private to general, at both home

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and abroad, in both war and peace. Thus, I feel somewhat qualified to comment on both war and warriors.

## I. MILITARY SERVICE AND CATHOLICISM

### A. *The Paradox—The Prince of Peace and Just War Doctrine*

*Jesus Christ said, “Blessed are the peacemakers, for they shall be called sons of God.”*<sup>1</sup>

At Gethsemane, on the eve of His unjust trial and crucifixion, when the Apostle Peter resisted the soldiers and servants who had come to arrest Jesus, He commanded, “Put your sword back into its place; for all who take the sword will perish by the sword.”<sup>2</sup> Given these promises of Our Lord, it can seem at least somewhat counterintuitive that Christians would participate in military service.

The Church, the Kingdom of God on Earth, has faced the dilemma of temporal forces and armed conflict for two millennia since Her Savior was raised from the dead. If His redemption had extinguished human volition and, thus, removed the possibility of sin from the world, the world would entirely be governed by Christian principles and war would be no more. But until we have, by His aid, driven all trace of sin from our hearts and from our globe, we cannot hope for a universal polity founded on the Sermon on the Mount. Instead, in our secular, fallen world, defense of the common good still requires, at times, recourse to force of arms. Use of such force in military service can prove not only morally defensible, but even praiseworthy.<sup>3</sup>

In the Old Testament, we read of many chosen men of God who went to war under divine mandate: Joshua and the judges, whom God commanded to exterminate pagan peoples that practiced child sacrifice and other abominations against earth and heaven;<sup>4</sup> and King David, among the greatest of Israel’s kings, who unified his people and expanded his territory through war and conquest.<sup>5</sup>

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<sup>1</sup> *Matthew* 5:9 (Rev. Standard Version, Catholic Ed.).

<sup>2</sup> *Matthew* 26:52.

<sup>3</sup> JOHN A. HARDON, *THE CATHOLIC CATECHISM* 346 (1975).

<sup>4</sup> *See, e.g., Joshua* 10:40–42.

<sup>5</sup> *Cf. 1 Samuel* 17:13–53, 18:27–30, 19:8, 30:1–31; *2 Samuel* 2:17–3:6, 5:6–10, 17–25, 8:1–14, 10:1–19, 12:26–31, 21:15–22.

Though God no longer directs war as he did in the Old Testament or brings political leaders to power by miracles of changing staffs to snakes, He still guides us with the wisdom expressed in the Old Testament. For example, in *Leviticus*, He commanded Moses that “‘You shall not . . . stand by idly when your neighbor’s life is at stake.’”<sup>6</sup> This command reflects an apparent obligation that we come to the defense of others.

Although the Gospels recommend and require faith, love, and other virtues not often perceived as consistent with martial spirit and activity, they do not prohibit military service.

Consider the instructions of John the Baptist to a soldier. When John was preaching of the coming Christ and the necessity of penance and conversion, a soldier came to him to be baptized. Instead of counseling the soldier to resign, John directed him to remain content with his wages and to refrain from extortion and intimidation, abuses then common in the Roman army.<sup>7</sup>

Similarly, Jesus neglected an opportunity to condemn warfare when a Roman centurion requested that Jesus heal a sick slave. The centurion had recognized Jesus’ power to command miracles by comparing it to the centurion’s own ability to command the soldiers under his authority. Rather than condemn war and the soldiers who made it possible, Jesus healed the slave and said of the centurion that “‘not even in Israel [had He] found such faith.’”<sup>8</sup>

While it is true that Jesus counseled his followers to forgive, make peace, and avoid repaying evil for evil,<sup>9</sup> in no Gospel passage did He tell a parable or otherwise address those situations where one must kill to defend innocent life or the common good.<sup>10</sup>

In fact, Jesus’ parable of the Good Samaritan requires a Christian to provide for the physical needs of a neighbor and

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<sup>6</sup> *Leviticus* 19:16 (New American).

<sup>7</sup> See *Luke* 3:14.

<sup>8</sup> *Luke* 7:2–9; *Matthew* 8:5–13 (Rev. Standard Version, Catholic Ed.).

<sup>9</sup> See *Matthew* 5:38–48.

<sup>10</sup> Nor does Jesus’ direction that his followers turn the other cheek, *Matthew* 5:39; *Luke* 6:29, prohibit the defense of innocent life or the common good. In Jesus’ day, slapping someone across the face with the back of the right hand constituted an especially denigrating insult, but not a serious offer of harm. While Jesus counseled against defending one’s pride with force, He said nothing about defending one’s very life and limb. ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION 61 (1960).

fellow human being who has been attacked.<sup>11</sup> Similarly, a Christian should aid a neighbor if he comes upon him while he is being attacked.

*B. The Revelation of the Just War Doctrine*

Early Church teachings concerning war and military service reflect an attempt to practically apply Christian love, not to provide a legalistic interpretation of the Gospel. The Christian ideal of peace transcended the mere absence of war and included the absence of all manner of conflict, a triumph over evil. Moreover, such peace referred primarily to relations with God, not with others.<sup>12</sup>

Though Jesus himself declined to prohibit military service, some early Church history seems to evidence Christians who adopted such a prohibition. During the time of Marcus Aurelius, Athenagoras, a Christian apologist, refuted Roman claims of Christian cannibalism by citing a Christian aversion to all manner of killing.<sup>13</sup> Moreover, Tertullian argued that, while praying for the Emperor and the Empire and engaging in spiritual warfare, believers should not participate in the military.<sup>14</sup> The applicability of Tertullian's prohibition to present conflicts is somewhat muted though, because his writings reflect not so much an aversion to bloodshed as to the proximate occasions of sin that inevitably accompanied a Roman military career, such as idolatry,<sup>15</sup> divination, and other conflicts between God, Cæsar, and family.<sup>16</sup> Like Tertullian, Origen emphasized the superiority of prayer to combat.<sup>17</sup> To the extent that an

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<sup>11</sup> See Luke 10:30–35.

<sup>12</sup> BAINTON, *supra* note 10, at 53–55.

<sup>13</sup> See Athenagoras, *A Plea for the Christians*, in 2 THE ANTE-NICENE CHRISTIAN LIBRARY: TRANSLATIONS OF THE WRITINGS OF THE FATHERS DOWN TO A.D. 325, at 375, 419 (Alexander Roberts & James Donaldson eds., Marcus Dods et al. trans., Edinburgh, T. & T. Clark 1867), available at <http://www.earlychristianwritings.com/text/athenagoras-plea.html>. He went on to say that a Christian cannot bear to see a man put to death, even justly. See BAINTON, *supra* note 10, at 78.

<sup>14</sup> See Tertullian, *Apology*, in 3 THE ANTE-NICENE FATHERS: TRANSLATIONS OF THE WRITINGS OF THE FATHERS DOWN TO A.D. 325, at 17, 42–46 (Alexander Roberts & James Donaldson eds., S. Thelwall trans., Charles Scribner's Sons 1903), available at <http://www.earlychristianwritings.com/text/tertullian01.html>.

<sup>15</sup> See TERTULLIAN, DE IDOLOLATRIA 63, 65 (J.H. Waszink & J.C.M. Van Winden eds., E.J. Brill 1987).

<sup>16</sup> See Tertullian, *The Chaplet*, in 40 THE FATHERS OF THE CHURCH 231, 242–43, 255–60 (Rudolph Arbesmann et al. trans., Fathers of the Church, Inc. 1959).

<sup>17</sup> See Origen, *Against Celsus*, in WAR AND THE CHRISTIAN CONSCIENCE 31, 31–

American warrior can avoid the accessory temptations of military service, the limited prohibitions of Tertullian and Origen would not apply.

Similarly, although at least two Christians attained martyrdom by refusing to serve in the Roman army, their dying witness did not indicate a prohibition understood to apply to all Christians. One of them, Marcellus the Centurion, mentioned idolatry when announcing his refusal to continue his service in the military.<sup>18</sup> The other, Maximilian, did not give a specific reason why his faith prevented him from fighting during his trial,<sup>19</sup> nor did he refute his accusers who asked how he could refuse to fight when so many other Christians readily fought in the Roman army.<sup>20</sup>

During the third and early fourth centuries A.D., Christians served in increasing numbers in the Roman military and some, such as the Theban Legion, continued to suffer for their faith.<sup>21</sup> Indeed, Tertullian, Origen, and a third writer, Lactantius, remained in the minority with regard to their apparently pacifistic views.<sup>22</sup> Their opponents argued that, should Christianity seek to become Empire-wide, converting all people, as loyal citizens of the Empire, the faithful should serve its essential interests, including defense by force of arms. As such, pacifism remained a special form of asceticism to which God called only a select few.<sup>23</sup>

Among these early Christians, preference regarding pacifism may have arisen from very practical sources. The pacifist ideal seemed to flourish at the heart of the Roman Empire, during the Pax Romana. There, life remained secure and peaceful and few would have seen the immediate need for military service. However, in the Roman hinterland, where life was still “nasty, brutish, and short” because of continual barbarian incursion,

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35 (Albert Marrin ed., 1971), available at <http://www.newadvent.org/fathers/0416.htm>.

<sup>18</sup> See *Acts of Saint Marcellus, Centurion and Martyr*, in WAR AND THE CHRISTIAN CONSCIENCE, *supra* note 17, at 43, 43.

<sup>19</sup> See *Acts of Saint Maximilian the Martyr*, in WAR AND THE CHRISTIAN CONSCIENCE, *supra* note 17, at 40, 40–42.

<sup>20</sup> See *id.* at 42.

<sup>21</sup> BAINTON, *supra* note 10, at 68–69.

<sup>22</sup> See Lactantius, *The Divine Institutes*, in WAR AND THE CHRISTIAN CONSCIENCE, *supra* note 17, at 36, 38–40.

<sup>23</sup> See HARDON, *supra* note 3, at 346–47.

people would implicitly understand the practical necessity of armed defense.<sup>24</sup>

St. Augustine's still recognizable articulation of the Christian teaching regarding the morality of military service paralleled development of wide acceptance of such service among Christians. When a soldier wrote to Augustine, uneasy concerning a perceived dissonance between his faith and his service in the military, the Saint reassured the soldier of the objective morality of the military profession by discussing the examples of David and the just centurion mentioned earlier.<sup>25</sup>

Discussing problematic Gospel passages, for example Jesus' exhortations to turn the other cheek and not to repay evil for evil, St. Augustine reconciled such apparent contradictions by stating that such exhortations apply only to one's inner disposition, not to one's visible works.<sup>26</sup>

In his discussion of the morality of military service, St. Augustine was the first theologian to articulate a coherent just war theory, discussing the circumstances in which soldiers may fight. Although St. Augustine wrote about the objective superiority of peace to the alternative, and of the subjective desirability of even an unjust peace,<sup>27</sup> he did not espouse pacifism.

While the just war doctrine established a presumption in favor of peace and against war, it also recognized that force may be used for the sake of preserving or restoring peace and protecting human dignity and human rights. Interwoven with this doctrine is the classical Catholic understanding that politics

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<sup>24</sup> BANTON, *supra* note 10, at 69 (quoting THOMAS HOBBES, *LEVIATHAN* ch. XIII, ¶ 9 (J.C.A. Gaskin, ed., Oxford Univ. Press 1989) (1651)).

<sup>25</sup> Letter 189 from St. Augustine of Hippo to Boniface (418), <http://www.newadvent.org/fathers/1102189.htm> ("Do not think that it is impossible for any one to please God while engaged in military service. Among such persons was the holy David, to whom God gave so great a testimony . . . among them was also that centurion who said to the Lord: 'I am not worthy that Thou shouldst come under my roof, but speak the word only, and my servant shall be healed' . . . concerning whom the Lord said: 'Verily, I say unto you, I have not found so great faith, no, not in Israel.'").

<sup>26</sup> Letter 138 from St. Augustine of Hippo to Marcellinus (412), <http://www.newadvent.org/fathers/1102138.htm>.

<sup>27</sup> ST. AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* 147–48, 634–93, 928–29 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998) (426).

must serve moral ends, and that war, as an extension of politics, must thus serve some moral end as well.<sup>28</sup>

Once war has begun, warned Augustine, soldiers should cultivate an interior disposition of virtue, refraining from indulgence in hatred, bloodlust, vengeance, and ambition.<sup>29</sup> Thus, rather than serving as a disqualification from military service, virtue was viewed as a co-requisite to military service. Augustine only prohibited the bearing of arms by monks and clergy, whose lives and vows are more completely at odds with martial duties and other worldly obligations.<sup>30</sup>

The Crusades brought about a major rearticulation of the concept of military service. Previously, military service had been seen as only a necessary expedient in a fallen world. The Saracen invasions of the Holy Land caused military service to be increasingly seen as a positive means to defend the Faith and those who practiced it.

Parallel with that development, some medieval theologians promoted individual discernment with regard to military service in particular wars. Peter the Chanter asserted that knights and vassals bore no obligation to serve in their lords' unjust conflicts.<sup>31</sup> Likewise, Roland of Cremona argued that the duty of a soldier in a war of doubtful justice was to fear God rather than man, and thus refuse to fight.<sup>32</sup>

St. Thomas Aquinas continued to perfect the articulation of a Christian's duty with regard to military service. Like St. Augustine before him, St. Thomas's discussion of military service focused on the objective morality of the war. Like St. Augustine, he recognized that clergy were absolutely prohibited from military service though no such prohibition applied to laymen.<sup>33</sup>

Renaissance scholars contributed significantly to the articulation of the Church's teaching regarding military service

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<sup>28</sup> Thus, private wars carried out for private gain rather than by the political leaders entrusted with the defense of the common good can never be just. Only the state, having a monopoly on coercive power and use of force, may use it to defend the common good.

<sup>29</sup> ST. AUGUSTINE, *CONTRA FAUSTUM MANICHAEUM* 22:74–78 (Boniface Ramsey ed., Ronald Teske trans., New City Press 2007) (400).

<sup>30</sup> BAINTON, *supra* note 10, at 98.

<sup>31</sup> See Charles J. Reid, Jr., *John T. Noonan Jr., on the Catholic Conscience and War: Negre v. Larsen*, 76 NOTRE DAME L. REV. 881, 906 (2001).

<sup>32</sup> See *id.*

<sup>33</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. II–II, Q. 40, art. 2 (Christian Classics 2d ed. 1981) (1266–1273) [hereinafter *SUMMA THEOLOGIAE*].

and conscientious objection. Francisco de Vitoria taught that when one's ruler coerced service in an unjust war, the individual should fear God rather than man and refuse to fight.<sup>34</sup> St. Alphonsus de Ligouri, the renaissance lawyer, missionary, and bishop, reiterated Vitoria's teachings, asserting that a subject was obligated to participate in his ruler's war if he believed it just or was ignorant of its justice. Though he required one in doubt to fight, St. Alphonsus held that one who knew without doubt that a war was unjust must not fight.<sup>35</sup>

Today, the *Catechism* specifically requires noncompliance, grounded in an upright conscience, with state actions that contravene the Gospel or the moral order.<sup>36</sup> It is clear that an "unjust war" is contrary to the Gospel and the moral order and, as such, requires noncompliance by the individual Christian. However, whether a particular war is unjust is less clear and requires further consideration of the just war doctrine.

### C. *The Elements*

The just war doctrine can be distilled down to one underlying divine command: "You shall love your neighbor as yourself."<sup>37</sup> Further elements all hang on this central foundation of neighborly love and have been articulated by the Church in the centuries since the resurrection. Let us now consider the elements which indicate whether a war is just.

A Christian who loves his neighbor must go to war only for just reason and may use only just tactics and methods in fighting. These two requirements are inseparable: It would be nonsense to suggest that a Christian may either pursue an unclear or unjust end in a morally acceptable manner, or may use any and all means, no matter how violent, to pursue an end that is just. A just war must be rightly initiated and rightly seen through. To fail either requirement is to fail both.

However, twentieth-century secular philosophers, observing unending hostilities between nations and despairing as to

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<sup>34</sup> See Reid, *supra* note 31, at 906–10.

<sup>35</sup> See *id.* at 910. One who knowingly participated in an unjust war should be denied absolution unless he sought immediate discharge from the army and ceased all bellicose activity in the meantime. See *id.*

<sup>36</sup> CATECHISM OF THE CATHOLIC CHURCH ¶2242 (2d ed. 1997) [hereinafter CATECHISM].

<sup>37</sup> *Matthew* 22:39 (New American).

whether either combatant was justified, separated these requirements with the hope that they might reduce the violence of war even if they were unable to prevent nations from going to war.<sup>38</sup> To these disembodied considerations they gave the traditional-sounding Latin names *jus ad bellum*, which pertained to the justice of going to war, and *jus in bello*, which pertained to the justice of activities within the context of war.<sup>39</sup>

The international law of war maintains these distinctions of *jus ad bellum* and *jus in bello*, and the “legality” of actions you may be asked to take as a member of the United States’ armed forces may be determined under that methodology. Arguably, separating these considerations has motivated the United States and other materially prosperous nations to develop precision munitions, “smart bombs,” and tactics designed to minimize civilian casualties and collateral damage. However, no amount of training or perfecting of weapons can justify an otherwise unjust conflict. Legal recognition of a “just war” by the International Court of Justice, the United Nations, or the United States Supreme Court will serve as no defense before the tribunal of Almighty God. As one who loves God and your neighbor, you may participate in organized violence only where both *jus ad bellum* and *jus in bello* are met.

The United States Conference of Catholic Bishops and commentators such as George Weigel and James Turner Johnson have adopted these traditional-sounding Latin terms for discussing just war.<sup>40</sup> Indeed, they may be useful terms, so long as you always recall that you cannot have one without the other.

St. Augustine and St. Thomas focused particularly on the situations in which it would be just to go to war. With regards to the *jus ad bellum* considerations, the Augustinian and Thomistic just war tradition requires three things for the prosecution of a just war. Under this doctrine, a war would be just only if: (1) it

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<sup>38</sup> Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 1 (2004) (“In the conventional view, the laws of war, both *jus ad bellum* and *jus in bello*, primarily seek to oppose or restrain the practice of organized violence.”).

<sup>39</sup> See generally Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT’L REV. RED CROSS 553 (1997).

<sup>40</sup> See JAMES TURNER JOHNSON, MORALITY AND CONTEMPORARY WARFARE 36–37 (1999); George Weigel, *The Just War Case for the War*, AM. NAT’L CATH. WKLY., Mar. 31, 2003, available at [http://www.americamagazine.org/content/article.cfm?article\\_id=2879](http://www.americamagazine.org/content/article.cfm?article_id=2879).

were waged by a competent authority charged with the protection of the common good; (2) it were waged pursuant to a just cause; and (3) it were waged with right intent.<sup>41</sup>

In *Gaudium et Spes*, the Second Vatican Council, mindful of the genocides of the twentieth century and the then-present threat of nuclear annihilation, urged all nations to pursue all non-violent alternatives to war and to minimize the horrors of any necessary war.<sup>42</sup> While the Council recognized that nations have the right and duty to wage war to protect the common good, the Council stressed that nations should resort to war only after having exhausted all other peaceful means.<sup>43</sup> Thus, in addition to the three classic requirements of just war, the Council explicitly recognized ideals regarding pre-war efforts and a requirement that one not pursue a war of annihilation. Additionally, the Council documents seem to provide only for just wars of defense, implicitly indicating that there can now be no just offensive war or war of aggression.<sup>44</sup>

The *Catechism of the Catholic Church* echoes the documents of Vatican II and states that a competent authority should wage war in self-defense and only after all peaceful means have failed.<sup>45</sup> The *Catechism* then lists four prudential considerations as requirements which must be met for defensive use of military force to be justified:

- [1] the damage inflicted by the aggressor on the nation or community must be lasting, grave, and certain;
- [2] all other means of putting an end to it must have been shown to be impractical or ineffective;
- [3] there must be serious prospects of success;
- [4] warfare must not produce evils and disorders graver than the evil to be eliminated.<sup>46</sup>

Determination of whether these factors have been satisfied remains the responsibility of the one charged with the care of the common good.<sup>47</sup> Additionally, public authorities caring for the

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<sup>41</sup> See *SUMMA THEOLOGIAE*, *supra* note 33, pt. II-II, Q. 40, art. 1 (citing St. Augustine's views and various works).

<sup>42</sup> See PAUL VI, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 79 (1965) [hereinafter *GAUDIUM ET SPES*].

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

<sup>45</sup> *CATECHISM*, *supra* note 36, ¶ 2309.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

common good “have the right and duty to impose on citizens *the obligations necessary for national defense*.”<sup>48</sup>

From the third just war element—that a just war only be prosecuted with a right intent—we can also recognize the invocation of the *jus in bello* principles which fairness in war has traditionally required—discrimination and proportionality of means.<sup>49</sup> Discrimination requires the warrior to avoid direct, intended harm to noncombatants.<sup>50</sup> Proportionality of means requires that one use means no more destructive than necessary to achieve a justified end.<sup>51</sup>

Of the two, discrimination can more easily be determined: It is always wrong to intentionally attack noncombatants for the purpose of martial gain. This is not to say that one may never unleash an attack which one knows will impact non-combatants. Under the principle of double-effect,<sup>52</sup> one may pursue a military operation against enemy forces with the knowledge that noncombatants will be killed so long one does not intend or will the deaths of the noncombatants. For example, the bombing of

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<sup>48</sup> *Id.* ¶ 2310. The *Catechism* also discusses *jus in bello* considerations, noting that the justice of a war does not render all means of prosecuting the conflict licit. In particular, the *Catechism* condemns mistreatment of noncombatants, prisoners, and wounded soldiers, as well as genocide and the indiscriminate targeting of areas that include civilians. *See id.* ¶¶ 2313–14.

<sup>49</sup> JOHNSON, *supra* note 40, at 18–19. Johnson argues that the *jus in bello* considerations are only to be considered after the decision to go to war is made. *Id.* at 36. He holds that an opposite, “modern,” position examines these questions contemporaneously—bringing about a “just war pacifism” by applying an exacting discrimination and proportionality analysis of the actions that would need to be taken to secure certain military objections. *Id.* *But see* 2 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE* 898–99 & n.116 (1993).

The choice to engage in war includes both the choice to conduct it (which not only is made at the outset but repeatedly reaffirmed) and the choice of means (which not only is made after the war starts but is presupposed by preparations for war). Sometimes the conditions required for justly going to war (*ius ad bellum*) are distinguished from the conditions required for justly engaging in military action (*ius in bello*) . . . However, neither that distinction nor the precise list of conditions has deep roots in Catholic tradition; “Challenge of Peace” draws on works by Ralph Potter and James Childress, two contemporary Protestant theologians . . . who sum up the results of the nonsystematic reflections of various modern theologians. *Id.* (citing NATIONAL CONFERENCE OF CATHOLIC BISHOPS, PASTORAL LETTER *THE CHALLENGE OF PEACE: GOD’S PROMISE AND OUR RESPONSE* ¶¶ 80–110 (1983) [hereinafter *THE CHALLENGE OF PEACE*]).

<sup>50</sup> JOHNSON, *supra* note 40, at 18.

<sup>51</sup> *Id.* at 18–19.

<sup>52</sup> *See, e.g.*, 1 GRISEZ, *supra* note 49, at 239–41.

an al Qaeda camp known to include women and children together with Osama bin Laden might be justified.

Unlike discrimination, which informs us that the intended killing of noncombatants for military ends is always wrong, proportionality is a somewhat more fluid concept in that circumstances inform us as to the amount of force permissible for a desired end. For example, it may be appropriate to bomb a whole al Qaeda camp including Osama because he might escape in the time it takes conventional forces to arrive. On the other hand, to use an extreme example, the principle of proportionality would never permit the use of nuclear weapons to annihilate Osama, if he were known to be in Riyadh or London.

The *Catechism of the Catholic Church*, quoting *Gaudium et Spes* and applying discrimination and proportionality, unequivocally states: “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.”<sup>53</sup>

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<sup>53</sup> CATECHISM, *supra* note 36, ¶ 2314 (quoting *GAUDIUM ET SPES*, *supra* note 42, ¶ 80). During a discussion on the morality of nuclear weapons, Joseph Cardinal Ratzinger, former prefect of the Congregation for Doctrine of the Faith, stated at a meeting of the American, French, and German Episcopal conferences in Rome in 1983 that a national bishops’ conference did not have the “mandatum docendi,” or commission, to teach the faithful of a nation. This meeting and Ratzinger’s remark has been widely reported by critics of the statement. See, e.g., EPISCOPAL CONFERENCES: HISTORICAL, CANONICAL, AND THEOLOGICAL STUDIES, at vii (Thomas J. Reese ed., 1989). The apostolic letter *Apostolos Suos* of Pope John Paul II makes a similar point:

[T]he power of the College of Bishops over the whole Church is not the result of the sum of the powers of the individual Bishops over their particular Churches; it is a pre-existing reality in which individual Bishops participate. They have no competence to act over the whole Church except collegially.

JOHN PAUL II, APOSTOLIC LETTER *APOSTOLOS SUOS* ¶ 12 (1998) [hereinafter *APOSTOLOS SUOS*]. Nonetheless, it can be useful to consider the applications of *jus in bello* proposed by the forerunner of the United States Conference of Catholic Bishops in their 1983 pastoral letter *The Challenge of Peace: God’s Promise and Our Response*. In addition to the use of nuclear weapons on civilian populations, the American bishops criticized the indiscriminate use of conventional arms, such as the carpet and incendiary bombings of World War II. *THE CHALLENGE OF PEACE*, *supra* note 49, ¶ 101–02.

## II. CHALLENGING APPLICATIONS

A. *Operation Iraqi Freedom*

People of goodwill often differ with regard to the justice of any particular war. The present conflict in Iraq, for example, provides considerable evidence that people of goodwill can, and do, differ with regard to the justice of a particular war.

Five days after American bombings began Operation Iraqi Freedom in March 2003, Edwin O'Brien, Archbishop for the Military Services in the United States, wrote America's Catholic servicemen and women, indicating that many of the facts which might justify the war could not be known, but instructing service members to "presume the integrity of our [nation's] leadership and . . . to carry out their military duties in good conscience."<sup>54</sup>

Conversely, two weeks before the war, the annual Lenten message of Bishop John Botean, the spiritual leader of the Byzantine-rite Romanian Catholics living in the United States, included an examination of the *Catechism's* instructions concerning just war and then declared that "the nation-state is never the final arbiter or authority for the Catholic of what is moral."<sup>55</sup> While Bishop Botean did not analyze any of the specific considerations of the just war doctrine, he concluded:

[A]ny direct participation and support of this war against the people of Iraq is objectively grave evil, a matter of mortal sin. Beyond a reasonable doubt this war is morally incompatible with the Person and Way of Jesus Christ. With moral certainty I say to you it does not meet even the minimal standards of the Catholic just war theory.<sup>56</sup>

According to Notre Dame professor Charles E. Rice, "[w]hen a bishop exercises his teaching authority for his diocese, his statements are binding in conscience."<sup>57</sup> Thus, Byzantine-rite Romanian-American Catholics would appear to not be able to participate in Operation Iraqi Freedom.<sup>58</sup>

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<sup>54</sup> ARCHBISHOP EDWIN O'BRIEN, PASTORAL LETTER *ASSUMPTION OF MARY* (2003).

<sup>55</sup> BISHOP JOHN MICHAEL BOTEAN, *2003 LENT MESSAGE* (Mar. 7, 2003).

<sup>56</sup> *Id.*

<sup>57</sup> *Is Pacifism a Legitimate Option for Catholics*, WANDERER F., Sept. 29, 1983, at 1, col. 3.

<sup>58</sup> *Apostolos Suos* makes a similar point: "[T]he faithful entrusted to the pastoral

On the other hand, Bishop Wilton Gregory, then President of the United States Conference of Catholic Bishops, took a more ambivalent course in the weeks leading up to the war. Bishop Gregory first noted that preemptive war in Iraq would create deeply troubling moral and legal precedents and that the bishops knew of no facts which would seem to justify such a war.<sup>59</sup> After acknowledging that people of goodwill might disagree as to how just war norms might be applied to the situation, he recognized the responsibility of national and world leaders to make the decisions regarding war.<sup>60</sup>

These statements from three bishops expose the practical difficulties in applying the just war theory. All three hold similar status in the Catholic Church, having been consecrated as bishops. Presumably, all three know whereof they speak with regard to the just war theory (at the very least, they have access to knowledgeable advisors). All three are Americans, which rules out the possibility that diverse national bias would influence their differing opinions. Yet, each presents a different opinion with regard to the present war: Archbishop O'Brien counsels presumption of the good will of our leaders; Bishop Botean voices active opposition; and Bishop Gregory, while holding that the war remains difficult to justify, states that people of good will may disagree on this matter. The fact that three Catholic bishops, from the same nation even, may hold such different views, exposes the practical problems that arise in any application of the just war theory, and the morality of military service in a given conflict.

Commentators such as George Weigel, Doug Kmiec, Michael Novak, and Fr. Richard John Neuhaus explicitly claim what the United States Conference of Catholic Bishops implicitly suggests: The President, acting as Commander-in-Chief, is the competent authority responsible for the security of the United States.<sup>61</sup>

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care of a particular Bishop are required to accept his judgment given in the name of Christ in matters of faith and morals, and to adhere to it with a religious assent of soul." *APOSTOLOS SUOS*, *supra* note 53, ¶ 11.

<sup>59</sup> See Bishop Wilton D. Gregory, President, U.S. Conference of Catholic Bishops, Statement on Iraq (Feb. 26, 2003), <http://www.usccb.org/sdwp/international/iraqstatement0203.shtml>.

<sup>60</sup> See *id.*

<sup>61</sup> See Douglas Kmiec, *The War Is Just: The President's Decision*, NAT'L REV., Mar. 7, 2003, available at <http://www.nationalreview.com/comment/comment-kmiec030703.asp>; Michael Novak, *Wrong: War to Topple Saddam Is a Moral*

Thus, though there may be disagreements from some quarters, the war is just, in part, because it is being prosecuted by the one charged with protecting the common good. Weigel puts it well: “Religious leaders and religious intellectuals must teach the relevant moral principles, insist that they inform public and governmental debate and bring their best prudential judgments to bear in those debates. But the call is made by others.”<sup>62</sup>

Although there is some debate as to the President’s authority, most of the debate regarding the moral justification for Operation Iraqi Freedom has focused on the just cause requirement and the requirement that the war be waged as a last resort only after all other peaceful means of resolving the conflict have been exhausted.

### 1. Just Cause

Regarding the just cause requirement, the United States has argued that it was acting to protect the lives of innocents from weapons of mass destruction (“WMD”) as well as in a humanitarian intervention—to liberate the Iraqi people from the brutal tyranny of Saddam Hussein and rebuild the devastated nation. To accomplish these ends, the United States sought the forcible disarmament of Iraq and a change of régime.<sup>63</sup>

In 1990 and 1991, the U.N. Security Council adopted resolutions authorizing states to take all necessary action to bring an end to Iraq’s aggression against Kuwait.<sup>64</sup> The 1991 cease-fire resolution continued these authorizations, required Iraq to dismantle its offensive military capabilities, including its WMD capabilities, and mandated inspections necessary to ensure compliance.<sup>65</sup> These and subsequent resolutions squarely placed the burden on Iraq to demonstrate compliance. Moreover, these resolutions authorized states to use all necessary means to enforce them if Iraq were found in material breach.<sup>66</sup>

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*Obligation*, TIMES (London), Feb. 12, 2003, Times2, at 5; Weigel, *supra* note 40; *Father Richard Neuhaus on the Iraqi Crisis*, ZENIT, Mar. 10, 2003, <http://www.zenit.org/article-6750?l=english>.

<sup>62</sup> Weigel, *supra* note 40.

<sup>63</sup> George Weigel, *Just War and Pre-emption: Three Questions*, CATH. DIFFERENCE (Oct. 2, 2002), [http://www.eppc.org/news/newsID.1407/news\\_detail.asp](http://www.eppc.org/news/newsID.1407/news_detail.asp).

<sup>64</sup> See S.C. Res. 686, ¶ 6, U.N. Doc. S/RES/686 (Mar. 2, 1991); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

<sup>65</sup> See S.C. Res. 687, ¶¶ 1, 8–9, U.N. Doc. S/RES/687 (Apr. 3, 1991).

<sup>66</sup> See S.C. Res. 688, ¶ 2, U.N. Doc. S/RES/686 (Apr. 5, 1991); S.C. Res. 687,

From 1991 to 2003, Saddam Hussein brazenly flouted all the obligations imposed by the U.N., including his 1998 expulsion of U.N. weapons inspectors. In late 2002, the U.N. Security Council unanimously demanded that he prove that he had carried out the obligations imposed by over a dozen U.N. Security Council Resolutions. Although the resolutions assigned to Iraq the burden of showing its weapons and demonstrating disarmament, Saddam Hussein provided no such proof.<sup>67</sup> To the contrary, the U.N. weapons inspectors dispatched to Iraq to ensure compliance with the resolutions and verify Saddam's professed disarmament found ample evidence of violations.<sup>68</sup>

As such, going to war with Iraq arguably had nothing to do with "preemptive" self-defense. Instead, such a war could be justified under international law and traditional just war doctrine as the lawful conclusion to the just war begun in 1991. This was not, however, the justification advanced by the United States. Instead, the United States relied on the doctrines of preemptive self-defense and humanitarian intervention.

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*supra* note 65, ¶¶ 1,10–13, 24, 27; S.C. Res. 686, *supra* note 64, ¶¶ 1–3; *see also* S.C. Res. 1284, ¶ 13, U.N. Doc. S/RES/1284 (Dec. 17, 1999); S.C. Res. 986, ¶ 13, 16, U.N. Doc. S/RES/986 (Apr. 14, 1995); S.C. Res. 715, ¶ 5, U.N. Doc. S/RES/715 (Oct. 11, 1991); S.C. Res. 707, ¶¶ 1–3, U.N. Doc. S/RES/707 (Aug. 15, 1991).

<sup>67</sup> *See* President's Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2003), 39 WEEKLY COMP. PRES. DOC. 109, 114–15 (Feb. 3, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

<sup>68</sup> *See id.* In 1999, the U.N. found that Saddam possessed 25,000 liters of anthrax, a quantity sufficient to kill millions of people. In addition, Saddam possessed enough material to manufacture in excess of 38,000 liters of botulinum toxin—also sufficient to kill millions of people. Moreover, American intelligence indicated Saddam retained the capabilities of manufacturing in excess of 500 tons of sarin, mustard, and VX nerve agent. Furthermore, despite intelligence findings that Saddam possessed 30,000 munitions capable of deploying chemical weapons, inspectors discovered only sixteen. Additionally, Iraqi defectors revealed that Saddam had mobile biological weapons labs, capable of rapid motion that would facilitate concealment. Moreover, the International Atomic Energy Agency ("IAEA") established that Saddam had an advanced nuclear weapons program, researching various means to enrich uranium for weapons. In addition, American intelligence has found that Saddam has sought other materials necessary for the production of such weapons. At no time has Saddam accounted for his weapons; neither has the Iraqi dictator proven their destruction. Intelligence indicated that Saddam had consistently engaged in a course of mendacity, concealing documents, tampering with evidence, and intimidating witnesses. Saddam has blocked aerial surveillance of weapons sites and substituted intelligence operatives for some of the scientists the U.N. inspectors needed to interview. *Id.*

Under the U.N. Charter, members have agreed to refrain from the threat or use of force.<sup>69</sup> However, the U.N. Charter further provides that this does not impair the inherent right of self-defense.<sup>70</sup> Traditionally, the use of force in self-defense is only permissible if the use of force is preceded by actual necessity. In the past, such necessity required imminent danger and that peaceful means, if available, be exhausted prior to exercising the right of self-defense. However, doctrinal evolution has recognized the concept of “anticipatory self-defense”<sup>71</sup> and its Bush administration adaptation, “preemptive self-defense.”

The doctrine of anticipatory self-defense becomes increasingly important in this age of WMDs. The devastation potential of such weapons, the swiftness of their delivery, and their covert delivery capability (suitcase bombs, vials of toxic chemical/biological agents, infected persons) makes waiting for a first strike suicide, not self-defense. Allowing such weapons to be in the hands of a leader with a history of reckless aggression and use of WMDs, and an apparent intent to do so again, would have been a breach of President Bush’s obligation to the American people.<sup>72</sup>

Before the war that drove him from power, Saddam Hussein had a history of developing and employing weapons of mass destruction both during the Iraq-Iran War and against Kurdish-Iraqi civilians, killing untold thousands. After its experiences of the 1980s, Iraq did not abandon its quest to attain weapons of mass destruction but merely shifted tactics, perfecting its expertise so to one day rebuild its arsenal with more sophisticated weapons with greater lethality. Thus, the real threat did not consist of actual weapons of mass destruction, but the technical expertise necessary to manufacture such weapons quickly, coupled with the willingness to use such weapons and the fear that terrorist groups, such as al-Qaida, would benefit from the Iraqi program.<sup>73</sup> This threat and fear was not a creation of the Bush administration, but it was a threat and fear well-recognized by the Clinton administration.

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<sup>69</sup> U.N. Charter art. 2, para. 4.

<sup>70</sup> *See id.* art. 51.

<sup>71</sup> *See generally* George Weigel, *Moral Clarity in a Time of War*, *FIRST THINGS*, Jan. 2003, at 20, 20–27.

<sup>72</sup> *See id.* at 24.

<sup>73</sup> *See* Rolf Ekeus, *Iraq’s Real Weapons Threat*, *WASH. POST*, June 29, 2003, at B7.

When President George W. Bush was still governor of Texas, a unanimous Senate and a ninety percent majority in the House passed the “Iraq Liberation Act of 1998,” declaring it should be U.S. policy “to support efforts to remove the regime headed by Saddam Hussein from power in Iraq.”<sup>74</sup> “Every senior Clinton administration national security official called for removing Saddam and echoed numerous, unanimous U.N. Security Council resolutions declaring Saddam’s regime a ‘threat to the peace.’”<sup>75</sup> In 2003, America went to war pursuant to a statute approved by more than seventy percent of Congress and supported by seventy-three percent of the American people.<sup>76</sup>

Although no “smoking gun” with regard to the Iraqi weapons of mass destruction has emerged since the initiation of hostilities,<sup>77</sup> Pentagon weapons inspector David Kay reported the

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<sup>74</sup> Iraq Liberation Act of 1998, Pub. L. No. 105–338, § 3, 112 Stat. 3178, 3179 (1998) (codified as amended at 22 U.S.C. § 2151 (2000)).

<sup>75</sup> Robert F. Turner, *Lessons for Iraq*, WASH. TIMES, Apr. 30, 2006, at B4.

<sup>76</sup> *See id.*

<sup>77</sup> On March 31, 2003, U.S. Central Command confirmed that, in a raid near Tallil airfield, southwest of An Nasiriyah, the 1st Marine Expeditionary Force uncovered a large weapons cache, including ammunition, chemical decontamination equipment, chemical suits, and unidentified artillery munitions. Brigadier Gen. Vincent Brooks, Deputy Dir. of Operations, CENTCOM, Operation Iraqi Freedom Briefing (Mar. 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030331-9.html>. On April 11, 2003, Coalition forces uncovered evidence of radioactive material, possibly plutonium, beneath the al-Tuwaita nuclear reactor in Baghdad. This discovery took place shortly after the 101st Airborne Division uncovered eleven shipping containers of lab equipment at a chemical plant in Karbala, including chemical protective gear, grenades, and ammunition. Iraqi scientist Gazi George maintained that one could definitely refine such material for a radiation bomb. David Albright, with the IAEA, suggested the possibility of a booby trap, given the dangerously high, even lethal, levels of radioactivity. Although unexpected, the discovery did not provide conclusive evidence of Saddam’s WMD program. *Weapons-Grade Plutonium Possibly Found at Iraqi Nuke Complex*, FOX NEWS, Apr. 11, 2003, <http://www.foxnews.com/story/0,2933,83821,00.html>. The most damaging information comes from Dr. Khidir Hamza—of late the nuclear weapons chief to Saddam Hussein, and presently assisting the coalition rebuilding effort in his native country—who confirms Bush’s allegations concerning the purchase of uranium from Niger. Last autumn, Hamza stated that Iraq had recently received shipments from Africa of spent fuel rods from a Russian nuclear reactor. Moreover, Iraq had been processing 1.3 tons of low-grade uranium, possibly from Brazil. Hamza maintains that Saddam had extracted literally tons of uranium from phosphate stores in northern Iraq. According to German intelligence, Iraq had sufficient uranium supplies for three nuclear weapons. The late Iraqi régime had been assiduously refining uranium over an extended period of time, all for the purpose of developing nuclear weapons. Moreover, two months prior to Bush’s state of the Union address, Amir al-Saadi, of late an advisor to Saddam Hussein, told the *Detroit Free Press* of shipments of uranium from Niger in the 1980s. In his recent

discovery of “dozens of WMD-related program activities and significant amounts of equipment that Iraq concealed from the United Nations.”<sup>78</sup> Such activities and equipment included clandestine laboratories containing equipment subject to U.N. monitoring and capable of chemical and biological weapons research; a prison laboratory possibly used in human testing of biological weapons; concealed reference strains of, and research on, biological organisms; and undeclared unmanned aerial vehicles and missiles capable of delivering WMDs.<sup>79</sup> Recently, the United States revealed that it had located hundreds of chemical artillery shells.<sup>80</sup>

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

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book, Hamza discusses how Iraq’s nuclear weapons program remained massive and well funded, on the verge of developing a short-range nuclear missile. The Iraqi nuclear weapons program employed over 12,000 people, including 2,000 engineers at peak years of 1993 and 1994. In the late 1980s, expenditures on the bomb exceeded ten billion dollars. *Saddam’s Bombmaker Backs Bush on Iraqi Nuclear Threat*, NEWSMAX.COM, Aug. 6, 2003, <http://www.newsmax.com/scripts/showinside.pl?a=2003/8/6/00310>. The evidence already unearthed also includes progress reports, records of rewards Saddam gave to scientists for major breakthroughs, and audiotapes of interviews. Pentagon officials and Arabic translators continue to comb through 7.5 miles of documents, either seized from Iraqi government buildings, or turned over by cooperative Iraqi civilians. *Pentagon Bombshell: U.S. Uncovers WMD Document ‘Mother Lode,’* NEWSMAX.COM, July 16, 2003, <http://archive.newsmax.com/scripts/showinside.pl?a=2003/7/16/164802>.

<sup>78</sup> *Interim Progress Report on the Activities of the Iraq Survey Group (ISG): Hearing Before the H. Permanent Select Comm. on Intelligence, the H. Comm. on Appropriations, Subcomm. on Defense, and the S. Select Comm. on Intelligence* (2003) (statement of David Kay, Pentagon Weapons Inspector), available at <http://www.whitehouse.gov/infocus/iraq/kay-20031008.html>.

<sup>79</sup> *See id.*

<sup>80</sup> *Report: Hundreds of WMDs Found in Iraq*, FOX NEWS, June 22, 2006, <http://www.foxnews.com/story/0,2933,200499,00.html>.

<sup>81</sup> *See* George Weigel, *The Just War Tradition and the World After September*

Time does not permit a complete recounting of Saddam Hussein's well-documented brutality towards his own people. Having liberated Iraq from the brutality of Saddam and his family, the U.S.-led coalition has done much to alleviate the situation in the war-torn country including providing food, water, clothes, and medicine; rebuilding roads and other infrastructure; establishing hospital facilities; and rebuilding the judicial, financial, educational, health care, sanitation, and municipal systems.<sup>82</sup> Although currently plagued by sectarian violence, the United States has done much to bring democracy to Iraq and provide humanitarian relief to its suffering people.

## 2. Last Resort

The just war doctrine also requires that war be an act of last resort. Just prior to the initiation of hostilities, Pope John Paul II, while implicitly recognizing the legitimacy of our cause,<sup>83</sup> expressed strong reservations about the use of force to resolve the ongoing dispute. He reminded the world that war constitutes an extreme measure, to be resorted to only after exhausting peaceful means. The Pope expressed grave doubts as to the fulfillment of that condition.<sup>84</sup>

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11, 5 LOGOS 13, 28–29 (2002).

<sup>82</sup> See, e.g., Press Release, U.S. Cent. Command, Civil Affairs Winning the Hearts and Minds in Central Iraq (May 6, 2003); Press Release, U.S. Cent. Command, Coalition and Iraqis Team Up for Humanitarian Efforts (July 22, 2003); Press Release, U.S. Cent. Command, Coalition Forces Improve Quality of Life in Mosul (July 22, 2003); Press Release, U.S. Cent. Command, Medics Leave Legacy of Caring for Iraqi Civilians (June 9, 2003); Press Release, U.S. Cent. Command, Task Force Ironhorse Engineers Help Iraqi Town (Aug. 7, 2003); *Late Edition with Wolf Blitzer: Lieutenant General Ricardo Sanchez Interview* (CNN television broadcast July 27, 2003), available at <http://www.globalsecurity.org/military/library/news/2003/07/mil-030727-dod01a.htm>; Major Gen. Ray Odierno, Videoteleconference from Baghdad (June 18, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030618-0281.html>; Lieutenant Gen. Ricardo Sanchez, Press Briefing on the Confirmation of the Deaths of Uday and Qusay Hussein (July 23, 2003), available at <http://www.globalsecurity.org/wmd/library/news/iraq/2003/07/iraq-030723-dod01.htm>; Dr. William Winkenwerder, Assistant Sec'y of Def. for Health Affairs, News Conference on DoD Efforts To Help Rebuild the Iraqi Health System (July 25, 2003), available at <http://www.globalsecurity.org/wmd/library/news/iraq/2003/07/iraq-030725-dod02.htm>.

<sup>83</sup> See POPE JOHN PAUL II, PAPAL LETTER *ANGELUS* ¶ 2 (2003) (“The political leaders of Baghdad certainly have the urgent duty to collaborate fully with the international community to eliminate every reason for armed intervention.”).

<sup>84</sup> See *id.* Similarly, Cardinal Pio Laghi, then Papal Envoy to the United States, stated that, although Iraq must disarm, any action taken against the Hussein régime must involve the United Nations and must be the last resort. See CARDINAL

As noted previously, the question of whether the United States had exhausted all peaceful means of removing the threat posed by the Hussein régime and was using force only as a last resort requires the application of the prudential judgment of those in authority—in this case, the President acting with the concurrence of the U.S. Congress.

In my view, this criterion appears to have been satisfied with respect to Iraq. The United States resorted to twelve years of diplomacy, numerous U.N. Security Council resolutions, hundreds of weapons inspections, and an unprecedented forty-eight hour notice prior to launching Operation Iraqi Freedom.<sup>85</sup> Clearly, further diplomatic efforts would have proven futile, leaving the use of force as the only remaining reasonable alternative.

The decision to go to war is a difficult decision. It remains, however, an exercise of prudential judgment and such decisions ultimately rest with the political leaders of nations.<sup>86</sup>

It is notable that despite his opposition to the war and contrary to many secular and religious media reports, Pope John Paul II did not explicitly condemn the war as immoral or contrary to the just war tradition.<sup>87</sup> This reluctance seems appropriate:

[T]he proper role of religious leaders and public intellectuals is to do everything to clarify the moral issues at stake in a time of war, while recognizing that what we might call the “charism of responsibility” lies elsewhere—with duly constituted public authorities, who are more fully informed about the relevant facts and who must bear the weight of responsible decision-making and governance.<sup>88</sup>

Operation Iraqi Freedom was made legal under international law according to traditional notions of “anticipatory” or “preemptive” self-defense, as well as under the authority of existing United Nations resolutions in place that were

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PIO LAGHI, *STATEMENT OF CARDINAL PIO LAGHI, SPECIAL ENVOY OF JOHN PAUL II TO PRESIDENT GEORGE BUSH* (Mar. 5, 2003).

<sup>85</sup> See President’s Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338, 338–39 (Mar. 24, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.

<sup>86</sup> See Kmiec, *supra* note 61.

<sup>87</sup> Michael P. Orsi, *Yes: Probable Cause Existed of Saddam’s Threat to U.S.; Is War Against Iraq Moral?*, DETROIT NEWS, Mar. 30, 2003, at 15A.

<sup>88</sup> Weigel, *supra* note 71, at 27.

consistently violated by Iraq since the conclusion of the 1991 Persian Gulf War.<sup>89</sup>

At the moment of our intervention, the threat posed by the Hussein régime appeared real and further diplomatic action appeared futile. Had the United States dismissed the threat Saddam's régime posed, we feared that many innocents could have suffered if the Iraqi dictator fully realized his perceived ambition of developing weapons of mass destruction. Even if the United States erred in assessing the gravity of the threat from the Iraqi régime, the war liberated the Iraqi people from a brutal despotic tyrant, serving a humanitarian purpose. Such a result militates against any error Presidents Clinton and Bush may have made in assessing the necessity of waging war.<sup>90</sup>

*B. Immoral Orders: Duty To Disobey Illegal Orders*

An issue concerning military service that has garnered special attention in the past sixty years concerns the duty of a soldier, even one serving lawfully in a just war, to follow unjust orders to commit atrocities. The Holocaust made this question a subject of widespread international discussion. Following the Allied victory and trials of the Holocaust's perpetrators—where many Nazi defendants asserted that they had merely acted under orders—the world awoke to the danger that soldiers might mindlessly follow orders to shocking lengths.<sup>91</sup> The advent of totalitarian fascism and equally totalitarian communism led the Church to place a particular emphasis on conscience.

A popular old saying holds that “all's fair in love and war.” The bishops of the world rejected this view at the Second Vatican Council, contending that, “Nor, by the same token, does the mere fact that war has unhappily begun mean that all is fair between the warring parties.”<sup>92</sup> Specifically, the Council stated that blind obedience does not excuse one who violates “universal natural

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<sup>89</sup> Mark S. Latkovic, *Just War Theory, Catholic Morality, and the Response to International Terrorism: Addendum on War with Iraq* (Mar. 26, 2003) (on file with author).

<sup>90</sup> See Tony Blair, U.K. Prime Minister, Address to Joint Session of Congress (July 17, 2003), available at <http://www.cnn.com/2003/US07/17blair.transcript>.

<sup>91</sup> See Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 14–18, 23–24 (1996) (detailing the criticism and abrogation of the “superior orders defense” after World War II).

<sup>92</sup> *GAUDIUM ET SPES*, *supra* note 43, ¶ 79.

law” and that methodical extermination is a mortal sin whose resistance “merits supreme commendation.”<sup>93</sup>

The Council also approved the formulation of international treaties aimed at alleviating the horrors of war, requiring that such agreements be honored. The Council particularly recognized the responsibility of government officials to keep the horrors of war in check and make provisions for those who, for reasons of conscience, refuse to bear arms.<sup>94</sup>

In *Pacem in Terris*, Pope John XXIII discussed unjust laws, indicating that one who attempted to command genocide or any other directive contrary to the will of God had forfeited the right to command, which flows only from the moral order and its source in God.<sup>95</sup> His arguments could apply equally to illegal or unjust orders.

In a similar context, Germain Grisez writes:

Authentic obedience and loyalty require subordinates to call attention to such [immorality] and, if necessary, resist it, rather than accommodate it by moral compromises allowing it to persist and even, perhaps, causing it to proliferate. In a situation of this sort, a Christian also ought to bear in mind that Jesus promised the kingdom to those who suffer for righteousness' sake.<sup>96</sup>

Dr. James Toner, a professor of military ethics at the Air Force War College, claims that it is morally praiseworthy for a warrior to serve his country, if he does so honorably.<sup>97</sup> As such, warriors retain the moral responsibility to disobey illegal orders. As it is not the responsibility of the military to provide religious education, prospective Catholic warriors should seek a religious education sufficient to form their consciences and prepare for any dilemmas military service might pose. Similarly, Catholic colleges and universities should willingly provide religious and moral education to future military leaders so as to best prepare them for any future dilemmas of military service. It is for this reason that calls for removing Reserve Officers' Training Corps (“ROTC”) from Catholic campuses should be resisted and why

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See JOHN XXIII, ENCYCLICAL LETTER *PACEM IN TERRIS* ¶¶ 46–47 (1963).

<sup>96</sup> 3 GRISEZ, *supra* note 49, at 194.

<sup>97</sup> See James H. Toner, *What Military Ethics Is All About: The Christian Soldier*, CATH. MIL., Sept. 17, 2003, [http://www.catholicmil.org/html/article\\_toner.php?id=39](http://www.catholicmil.org/html/article_toner.php?id=39).

Notre Dame, under Fr. Theodore Hesburgh's leadership, resisted such calls during the Vietnam War.

As Christians, we are called to show *due* obedience to competent authority. Obeying an order contrary to the laws of God, however, does not require obedience. The duty to follow God and conscience remains absolute and unlimited; the duty to follow superior orders remains relative and limited. Thus, superior orders do not excuse immoral conduct.<sup>98</sup> As with an irrational directive, the subordinate would have to advise his superiors of the immorality of the directive, if necessary seek vindication through the chain of command, or, ultimately, accept the potential consequences of his choice to either obey or disobey the order.

### C. *Pacifism and Conscientious Objection*

Thus far I have discussed whether Catholics may serve in the military. The Church and the just war doctrine teaches that military service is moral, given the proper circumstances. While many may dispute whether a certain set of circumstances justifies war and participation in it, the determination remains entirely objective: Either it is contrary to the law of God to fight a particular war, or it is not. Thus, an American Catholic must conscientiously object to any unjust war. Whether a drafted civilian or the highest general, no one may pursue unjust national gain by military force.

Additionally, a Catholic may conscientiously object even to a just war. That our nation is objectively justified in prosecuting any particular war does not obligate an American Catholic to be part of the war effort. In addition to conscientious objection from unjust wars, the Catholic faith also permits subjective abstention from all wars.

The Church recognizes the state's duty to protect the common good,<sup>99</sup> as well as the duty of citizens to support the state in such an endeavor.<sup>100</sup> While embracing just war theory, the Church also recognizes, and validates, the individual consciences of pacifistic conscientious objectors, who believe in the intrinsic evil of all war, and therefore refuse to participate in combat. The

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<sup>98</sup> *See id.*

<sup>99</sup> *See* CATECHISM, *supra* note 36, ¶ 2308.

<sup>100</sup> *See id.* ¶ 2310.

*Catechism* directs public authorities to make alternative provisions for such persons.<sup>101</sup>

As discussed before, conscientious objection has persisted since the beginning of the Church. On some occasions, Christians have faced even martyrdom for their refusal to serve in the military. On other occasions, Christians have managed to leave the military with their lives, eventually pursuing religious vocations. Until quite recently, the Church's instruction to the faithful concerning conscientious objection focused almost exclusively on the objective factors previously discussed which determine the underlying justice of the war effort. Since the Second Vatican Council, the Church has emphasized the respect to be accorded to those who subjectively oppose all wars.<sup>102</sup>

In the aftermath of the two world wars and the Cold War, the Council fathers stressed the importance of subjective conscience and the importance of pacifistic conscientious objectors to the larger community. With *Gaudium et Spes* and other documents, the Council recognized that states owe a duty to exempt pacifists from combat.<sup>103</sup> At the same time, the Council recognized that the state might require non-combat service from conscientious objectors.<sup>104</sup>

As noted previously, the right of conscientious objection applies not only to pacifists, but also to those individuals who do not believe that the war in question satisfies the elements of just war theory. It is important to note, however, that under U.S. law, there exists no right to selectively object to a particular war. To qualify for conscientious objector status, the claimant must object to all wars—in essence, the claimant must be a pacifist. If a member of the military objects to a particular war, they may not refuse to participate and any such refusal may result in disciplinary or judicial action.

#### CONCLUSION

Military service remains entirely consistent with the teachings of the Catholic Church. However, this does not absolve the warrior of all challenges with regard to such service. Traditionally, these challenges have arisen from unlawful orders

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<sup>101</sup> See *id.* ¶ 2311.

<sup>102</sup> *THE CHALLENGE OF PEACE*, *supra* note 49, ¶ 73.

<sup>103</sup> See *GAUDIUM ET SPES*, *supra* note 42, ¶ 79.

<sup>104</sup> See *id.*

to commit atrocities. However, at times, warriors may face orders unrelated to combat which nonetheless remain morally illicit. In both cases, the warrior must refuse to follow such orders. Finally, although the Church adheres firmly to just war theory, pacifism remains an option for whoever may object to all forms of war and the Church supports whoever may object to a given war on just war grounds.

While faithful Catholics must accept the Church's moral teaching as binding on his or her conscience, the Church leaves room for debate and disagreement as to how that teaching applies under particular circumstances—specifically whether a particular war satisfies the just war criteria.<sup>105</sup>

Although people of goodwill can differ on the morality of any given war,<sup>106</sup> a strong case for war with Iraq seems to have existed at the relevant time—when the war was launched. Now that we are at war, our focus must shift to the *jus in bello* considerations related to the just waging of war and ensuring that it is fought in a manner that minimizes noncombatant casualties. Our focus must also shift to seeing it through to completion—to victory. Finally, once we have secured victory, the international community must work to ensure a just and lasting peace.

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<sup>105</sup> See Deal Hudson, *War Drums*, CRISIS MAG., Oct. 10, 2002, available at <http://www.catholic.org/featured/headline.php?ID=78>.

<sup>106</sup> See Bishop Wilton D. Gregory, President, U.S. Conference of Catholic Bishops, Letter to President Bush on Iraq (Sept. 13, 2002), available at <http://www.usccb.org/sdwp/international/bush902.shtml>; see also Larry Witham, *What Makes a War 'Just'?*; *Christian Ethicists Send Bush 'Yellow Light'*, WASH. TIMES, Sept. 26, 2002, at A2.