

JUST WAR THEORY AND THE RECENT U.S. AIR STRIKES AGAINST IRAQ

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I. INTRODUCTION ⁽¹⁾

One of the perennial realities of human existence is war. From the earliest recorded events of human history all the way through to modern times, human communities have engaged in armed conflict as a method of dispute resolution. While war has been a constant part of the human experience, there has also been a tendency within virtually all human civilizations to limit the extent of war and the methods by which warfare may be conducted.⁽²⁾ In Western civilization, this limitation on warfare has taken shape as an effort to limit both the determination of when war is appropriate and the means used in battle.⁽³⁾

Within the Western moral, legal, and political arena, the connected questions of when war is appropriate and what means are acceptable in warfare has been the subject of a great deal of examination. The basic theory which has arisen within Western culture to evaluate the legitimacy of military action is called just war theory.⁽⁴⁾ The just war theory has received widespread acceptance both within Western culture and in the international community as a means by which a war may be determined to be justified or not.⁽⁵⁾ Just war theory, which has both religious and secular proponents, is perhaps the most universally recognized moral theory by which the use of force may be evaluated.

This article will attempt to determine whether the decision by the United States government to launch air strikes against Iraqi military forces in September, 1996 is justified under just war theory. This article will first present a general overview of just war theory, including its background, main sources, and generally recognized principles. This article will then present a brief factual overview of the U.S. action, and will analyze that action in light of the criteria of just war theory, demonstrating that the recent U.S. military strikes against Iraq do not meet the criteria of just war theory as commonly understood.

II. A GENERAL OVERVIEW OF JUST WAR THEORY

A. BACKGROUND ON JUST WAR THEORY

Just war theory has a varied and diverse background.⁽⁶⁾ The just war tradition includes the contributions of philosophers and theologians dating back to Roman times. As James Tuner Johnson has pointed out,

Just war is an historical tradition formed by experience and reflection, including much that is neither specifically theological (or even religious), nor philosophical. It has been strongly influenced by international law, the traditions of chivalry, and soldierly practices derived from the experience of many battles.⁽⁷⁾

Just war theory as a method of evaluating military actions has been recognized historically by thinkers as varied as Cicero, St. Augustine, St. Thomas Aquinas, Grotius, and Daniel Webster. It is a theory which has been used by Christians and non-Christians alike to determine whether or not the decision to go to war and the means used to prosecute that war are just. It is crucial to keep this varied and complex pedigree of the just war tradition in mind when dealing with just war theory, otherwise it becomes possible to restrict the "breadth and diversity of the tradition,"⁽⁸⁾ which could in turn lead to a serious misapplication of the theory in a particular circumstance. Understanding, then, that the theory of just war is one in which many sources mingle over the course of centuries, it is helpful to make a brief overview of those sources before delving into the main task of explaining and applying just war theory to the particular problem raised in this article, namely, whether the recent use of force by the United States against Iraq is justified under the theory.

B. MAIN SOURCES OF JUST WAR THEORY

1. The Religious Sources of Just War Theory

Many of the key thinkers who have expounded on just war theory through the centuries have identified themselves with the Christian faith, both in its Catholic and Protestant varieties. Just war theory has also gained a general acceptance among Christian theologians, philosophers, and jurists as a method of passing judgment on the morality or immorality of a particular conflict.⁽⁹⁾ The general Christian conception of just war theory

forms the core of secular just war theory and as such has had a tremendous influence on the secular conception of the just war.⁽¹⁰⁾

Early Christian approaches to war were largely pacifistic in nature, due to a focus in the early Church to the notion that Christians were distinct from the rest of society.⁽¹¹⁾ However, with the growing Christianization of the Roman Empire, and the increasing political and social influence of the Christian Church, Christian theologians during the fourth and fifth centuries began to develop justifications for the use of force which would eventually take shape over time as just war theory.⁽¹²⁾

The first major Christian theologian to address himself to the task of determining the circumstances under which war is legitimate was St. Augustine of Hippo.⁽¹³⁾ Augustine held that "[t]he natural order, which is suited to the peace of moral things, requires that the authority and deliberation for undertaking war be under the control of a leader."⁽¹⁴⁾ For Augustine, war is a permissible part of the life of a nation, and the power of prosecuting a war was part of the natural powers of a monarch, ordained to uphold peace.⁽¹⁵⁾ War, far from being something which Christians should shun, is part of the life of a nation, ordained by natural law, a law which according to the New Testament is ordained by God.⁽¹⁶⁾

Augustine's conception of the just war did not create a carte blanche for bloodshed.⁽¹⁷⁾ In formulating his ideas on war, St. Augustine was careful to state the purposes for which war may be fought, and the procedural means which must be satisfied in order for a war to be just. "[F]or it makes a great difference," he wrote, "by which causes and under which authorities men undertake the wars that must be waged."⁽¹⁸⁾ For Augustine, for a war to be just, it must be fought for the right reasons, and it must be waged under rightful authority.⁽¹⁹⁾

Augustine held that the only reason which justified war was the desire for peace. "Peace is not sought in order to provide war, but war is waged in order to attain peace."⁽²⁰⁾ Augustine criticizes other motives for war, such as "[t]he desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating, and similar things,"⁽²¹⁾ and refers to them as things which are "justly blamed in wars."⁽²²⁾ In fighting a war, the goal must be to do that which is necessary to obtain peace; "[I]et necessity slay the warring foe, not your will."⁽²³⁾ Augustine also includes under the subject of necessity the just treatment of prisoners and conquered peoples, making it clear that mercy should be shown to the vanquished, particularly if they are no longer a threat to peace.⁽²⁴⁾

Besides right intention, St. Augustine also held that it was necessary for a war to be waged under lawful authority.⁽²⁵⁾ The purpose of the war-making powers of the state is to ensure peace, which in turn helps to foster the common-good of those in society.⁽²⁶⁾ Augustine recognized that it was necessary for the authority and decision to undertake war to be made by a recognized leader.⁽²⁷⁾ In addition, the soldiers who serve under the leader must serve the peace and common-good of society.⁽²⁸⁾ Warfare which is declared

by unlawful authority therefore fails to meet this criteria, as does warfare which is not directed toward peace and the common good.

The second major Christian thinker to deal with the issue of war is St. Thomas Aquinas (1225-1274).⁽²⁹⁾ Aquinas based himself upon St. Augustine's view of war, elaborating on the teachings of the bishop of Hippo.⁽³⁰⁾ In explicating his theory regarding the justness of a war, Aquinas focused on defining the right to make war and the importance of the intent which stands behind the decision to go to war.⁽³¹⁾ In his attempt to formulate a simple rule which would give guidance on these issues, Aquinas argued that a war is justified when three basic, necessary conditions were met: 1. the war was prosecuted by a lawful authority with the power to wage war;⁽³²⁾ 2. the war was undertaken with just cause;⁽³³⁾ and 3. the war was undertaken with the right intention, that is, "to achieve some good or to avoid some evil."⁽³⁴⁾ Together with St. Augustine, Aquinas' views on the justification of war form the basic core of just war theory, and it is from their concepts that the theory of just war is adapted and expanded by later thinkers.

2. Secular Sources of Just War Theory

The secular sources for just war theory span a considerable length of time. They include such philosophers as the ancient Roman Cicero and the Dutch Protestant Hugo Grotius. In addition, modern decrees on justifiable warfare, such as the commission to the Nuremberg War Crimes Tribunal, and the United Nations Charter also act to flush out the modern conception of just war theory.

Cicero, the great Roman orator, jurist, and philosopher was one of the first to deal with the questions of justifiable war. Cicero held that the use of force was justifiable only when the war was declared by an appropriate governmental authority acting within specific limits.⁽³⁵⁾ For Cicero, the ability to wage war rested with the state, and the state alone, and could be lawfully waged only "after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made."⁽³⁶⁾ In addition, Cicero also proposed the existence of a universal norm for human behavior which transcended the laws of individual nations and governed their relations with each other.⁽³⁷⁾ Cicero's belief in this universal norm was grounded in his view that there was a *humani generis societas*, a "society of mankind [sic] rather than of states."⁽³⁸⁾ This view of a universal standard of behavior for nation-states which exists outside of promulgated law would have a profound impact on later just war theorists, particularly on Hugo Grotius.

Grotius was a 16th century Dutch Protestant who is sometimes referred to as the father of international law.⁽³⁹⁾ Grotius, who lived in the aftermath of the brutal Thirty-Years War in Europe, wrote extensively on the right of nations to use force in self-defense in his book *Jure Belli ac Pacis* ("On the Rights of War and Peace"), which was published in 1625.⁽⁴⁰⁾ It was largely Grotius who secularized just war theory,⁽⁴¹⁾ making the theory more acceptable for the age of the Enlightenment. For Grotius, a war is just if three basic criteria were met: 1) the danger faced by the nation is immediate; 2) the force used is

necessary to adequately defend the nation's interests; and 3) the use of force is proportionate to the threatened danger.⁽⁴²⁾

Grotius grounded his agreement with Cicero's notion of the need for a declaration of war in the natural law, and also argued that the purpose of just war theory is to provide "succor and protection for the sick and wounded in war, combatants and civilians alike."⁽⁴³⁾ A result of this view is the notion that just war theory exists externally of any recognized legal system, that it is a part of the "law of nations" which is followed by all civilized nations.⁽⁴⁴⁾ For Grotius, it is not necessary to prove just war theory by consulting with any of the established laws of the nations of Europe, or their customs.⁽⁴⁵⁾ Rather, those laws are known through the universal medium of the natural law, a law which transcends nations and their own particular legal codes, a law which is binding on all human societies in their interactions with each other.⁽⁴⁶⁾

After Grotius, just war theory underwent relatively few modifications until the nineteenth century. During the first century of its existence, the United States' government came to acknowledge the legitimacy of just war theory. In 1842, the U.S. Secretary of State, Daniel Webster, acknowledged the legitimacy of the customary norms employed by Grotius to define the just war.⁽⁴⁷⁾ This recognition occurred as a result of attempts to resolve the so-called "Caroline Incident."⁽⁴⁸⁾

The Caroline Incident occurred when the British attempted to prevent supplies from reaching Canadian rebels.⁽⁴⁹⁾ In their attempts to restrict the flow of material to the rebels, the British burned the U.S. ship *Caroline* and killed several U.S. citizens.⁽⁵⁰⁾ When the United States protested, the British government responded that its actions were justified as a matter of self-defense.⁽⁵¹⁾ Webster responded by stating that the only way for the British claim to self-defense to stand was if it met the traditional elements of just self-defense.⁽⁵²⁾ Webster outlined those elements as consisting of necessity of self-defense, and the reasonable and not excessive use of force.⁽⁵³⁾ In essence, this definition of just self-defense mirrors that proposed by Grotius.

During the remainder of the 19th and early 20th centuries, just war theory underwent modest development. There were treaties, such as the Hague Conventions, which codified just war theory, but there was little major development in just war theory. That changed with the end of the Second World War. As a result of World War II, two basic documents were issued which resulted in increased recognition of just war theory in the international arena. The first document is the charter for the Nuremberg war crimes trials, and the second is the United Nations Charter. The Nuremberg Charter encapsulated the reigning notion of just war theory as represented by both St. Thomas Aquinas and Grotius.⁽⁵⁴⁾ The Nuremberg Tribunal established that just war theory, as Grotius understood it, is universally binding customary law.⁽⁵⁵⁾

The United Nations Charter also has contributed to just war theory by recognizing the inherent right of each sovereign nation to self-defense.⁽⁵⁶⁾ Article 51 of the U.N. Charter affirms the right of each nation to self-defense, until the Security Council can take action in order to restore and stabilize international peace and security.⁽⁵⁷⁾ Article 51 states two

key points in regard to international relations and the rightful use of force in international disputes: 1) the regulation of the use of force; and 2) collective security.⁽⁵⁸⁾ The U.N. Charter effectively outlaws the use of military force as a method of resolving international conflicts between nation-states.⁽⁵⁹⁾ At the same time, the charter recognizes the inherent right of each nation to defend itself from an attack from an exterior foe which is by its very nature unlawful.⁽⁶⁰⁾ This right of a nation to engage in defensive military actions has also been upheld by the International Court of Justice in its ruling in the case of Nicaragua v. United States of America.⁽⁶¹⁾ In that case, Nicaragua brought action against the United States for its support of insurgency forces attempting to overthrow the Sandinista government in Nicaragua.⁽⁶²⁾ The International Court of Justice in its ruling held that the right of a nation to engage in self-defense, as customarily understood, was incorporated into Article 51 of the U.N. Charter.⁽⁶³⁾ As the Court stated, "[i]n the language of Article 51 of the United Nations Charter, the inherent right (or *droit naturel*) which a State possesses in the event of an armed attack, covers both collective and individual self-defense."

B. GENERALLY RECOGNIZED PRINCIPLES OF JUST WAR THEORY

As the proceeding section has demonstrated, just war theory, despite its diverse sources and historical development, has several commonly recognized elements. These elements are traditionally divided into two basic categories which deal with the two basic fundamental issues regarding the legitimacy of war.⁽⁶⁴⁾ The first issue, sometimes referred to in Latin as the *jus ad bellum* (literally, "that which is right or just to engage in resort to war"⁽⁶⁵⁾), concerns when it is appropriate to resort to war as a method of conflict resolution.⁽⁶⁶⁾ The second issue, *jus in bello* (literally, "that which is right or just within war"⁽⁶⁷⁾) deals with what methods of warfare are permissible within the context of a war which meets the criteria of the *jus ad bellum*.⁽⁶⁸⁾ Since this article is interested only in evaluating the validity of the decision made by the U.S. government to launch air strikes against Iraq, it will limit its discussion on just war theory to the *jus ad bellum*.

The core elements of the *jus ad bellum* consist of those principles which were originally recognized by the medieval commentators on just war theory as being most central to the whole doctrine of just war.⁽⁶⁹⁾ As elucidated by St. Thomas Aquinas, the core principles consist of the following three elements: 1) just cause; 2) competent authority; and 3) right intention.⁽⁷⁰⁾

Just cause is classically understood to refer to self-defense.⁽⁷¹⁾ The use of military force is justified when it is used to repel an unjust aggressor and to retake that which the unjust aggressor has taken.⁽⁷²⁾ It is generally acknowledged that a nation may use force to protect a neighboring state from attack from an outside hostile power.⁽⁷³⁾ Thus, defense of self, or defense of another, are legitimate reasons for a nation-state to resort to military force.

The second element of *jus ad bellum* is that the war must be declared by competent authority.⁽⁷⁴⁾ As recognized by theorists like Cicero and Aquinas, for a war to be just, the decision to go to war must be lawfully made.⁽⁷⁵⁾ If an illegal or non-legal authority within

an nation made the decision to go to war, such a decision would be unjust, for it would violate the basic principles of how a given society is governed.⁽⁷⁶⁾

Finally, the war must be fought with right intention, meaning that the motives for the war must not be to inflict undue suffering on the enemy state; the defending nation must use only that amount of force which is necessary for it to achieve its just cause.⁽⁷⁷⁾ The motives of those engaged in making the decision to go to war must not be tinged with vengeance or a desire for retribution.⁽⁷⁸⁾ Rather, the decision to go to war must be essentially protective; the goal of war is to obtain a just and durable peace.⁽⁷⁹⁾ Such a peace is unlikely if the war is waged out of hateful or vengeful motives, with a desire not solely for self-protection but the total destruction of the enemy.⁽⁸⁰⁾ If in its actions, the defending state's use of force exceeds what is necessary for the success of its just cause, the defending state's right intention is problematic.⁽⁸¹⁾ Seen this way, right intention serves to reinforce the requirement that the state which seeks to justly use force be acting in a truly defensive capacity, rather than engaging in military adventurism on the pretext of self-defense.

III. APPLICATION OF JUST WAR THEORY TO U.S. ACTIONS

A. FACTUAL BACKGROUND

On September 3, 1996 the United States military began air strikes against Iraqi military positions in both northern and southern Iraq.⁽⁸²⁾ The air strikes were in retaliation for official Iraqi government support for the Kurdistan Democratic Party (K.D.P.),⁽⁸³⁾ a Kurdish faction which had, with Iraqi assistance, taken control of the northern city of Irbil.⁽⁸⁴⁾ The K.D.P, one of two Kurdish factions which at that time were vying for control of the northern Kurdish safe haven, had swept its U.S.-backed Kurdish rival, the Patriotic Union of Kurdistan (P.U.K.) out of the city.⁽⁸⁵⁾

The U.S. military retaliation lasted for two days.⁽⁸⁶⁾ On September 11 and 12, Iraqi forces launched anti-aircraft missiles at U.S. warplanes patrolling the southern "no-fly zone" near the border with Kuwait.⁽⁸⁷⁾ This action prompted U.S. Secretary of Defense William Perry to state that "the responses we will make. . .will be disproportionate with the provocations which are made against us."⁽⁸⁸⁾ The U.S. justified its actions by citing to a 1991 U.N. resolution which demanded that Iraq cease oppressing the Kurds.⁽⁸⁹⁾

The threat of retaliation on the part of the United States led the Iraqi government to agree to cease targeting U.S. and other allied patrol aircraft in the southern no-fly zone.⁽⁹⁰⁾ This led to a de-escalation of the tensions in the region. On September 25, the United States announced that it no longer supported the Kurdish safe haven in northern Iraq, and that it had plans to relocate pro-U.S. Kurds to the United States.⁽⁹¹⁾ When questioned by the House of Representatives International Relations Committee about the policy shift, Robert Pelletreau, the senior Clinton Administration advisor on Iraq, stated that the Clinton Administration never had a policy of defending the Kurdish safe haven from Iraqi repression.⁽⁹²⁾

B. ANALYSIS OF U.S. ACTION

Under the generally recognized principles of just war theory, the actions taken by the United States cannot meet the requirements of the *jus ad bellum*. The requirements of the *jus ad bellum* under just war theory are essentially three-fold:⁽⁹³⁾ just cause,⁽⁹⁴⁾ competent authority,⁽⁹⁵⁾ and right intention.⁽⁹⁶⁾ The decision by the United States to launch air strikes against Iraq in September 1996 do not meet the requirements of the just cause prong, nor is it likely to meet the requirement for right intention.

The issue under the first requirement is whether the United States acted with just cause in using military force to punish the Iraqi government for its intervention in the conflict between Kurdish factions in northern Iraq. Just cause has generally been understood to mean self-defense.⁽⁹⁷⁾ If self-defense is narrowly construed in this case, the United States obviously does not meet the just cause requirement because the original provocation by the Iraqis (the intervention in the northern Kurdish safe haven) was not directed against any American territory or citizens. However, just war theory has usually recognized the principle of defense of another, where one state may come to the aid of another state which is being unjustly attacked by a third state.⁽⁹⁸⁾ If this understanding of self-defense as including defense of another is used, an argument can be made that the United States' actions are justified as an effort to defend the Kurds in the safe haven. Since the United States sought to retaliate against Iraqi actions against the Patriotic Union of Kurdistan, an argument could be made that the U.S. military strikes were carried out in an effort to defend the P.U.K.

A more serious problem with the United States' use of military force in this situation concerns the nature of the Iraqi military action which provoked the U.S. action. Unlike the Iraqi invasion of Kuwait, the Iraqi military's support of the K.D.P. occurred within the recognized borders of Iraq. There was no international act of aggression by the Iraqis because the Iraqi military operations did not cross international boundaries. The dispute between the Kurdish factions in the north was a dispute that took place within the recognized borders of Iraq, borders which are recognized under international law and the United Nations Charter.⁽⁹⁹⁾ The military actions undertaken by Iraqi forces were undertaken within the boundaries of Iraq. As such, there are only two states involved in this conflict: the United States and Iraq. There simply is no Kurdish state for the United States to be able to defend. It is widely accepted under international law that there is no right for a nation to intervene on behalf of a revolutionary group in another nation.⁽¹⁰⁰⁾ For this reason, the claim that the U.S. use of force was legitimate in order to defend the Kurds is problematic.⁽¹⁰¹⁾

A central problem with the U.S. action is that it seems unlikely that the U.S. use of force was intended to defend the Kurds. The original U.S. justification for the attack, namely Iraqi aggression in the north, becomes problematic when seen in the light of the policy statement made before Congress by the senior Clinton Administration advisor on Iraq. The fact that most U.S. military action took place in the southern Iraqi no-fly zone set up by the United Nations at the close of the Gulf War also makes the original justification for the attack hard to accept. Within a month of the military intervention, which was

undertaken ostensibly to increase the security of the northern Kurdish safe haven, the United States announced plans to completely abandon its policy supporting the integrity of the northern Kurdish zone.⁽¹⁰²⁾ Further, the U.S. attacks were disproportionately targeted at the south, away from the Kurdish zone, in an effort to "materially [reduce Iraq's] ability to mount a threat" to the Gulf states.⁽¹⁰³⁾ This only makes sense if the actual U.S. intent in this use of force was not to protect the Kurds, but Kuwait.

It is probable that the United States is unable to meet the requirements of the just cause criteria of the just war theory. It is unlikely that the United States acted in defense of the Kurds in the north. Even if the U.S.'s actions were based on a desire to defend the Kurds, the attacks were launched against a sovereign nation which was not engaged in acts of international aggression. For these reasons, the United States' action fails to meet the just cause criteria of the just war theory; thus failing to meet the overall requirements for its military action against Iraq to be justifiable under the theory. Despite the failure of the United States to meet the just cause criteria of just war theory, it is still useful to examine the U.S. actions in regard to the other criteria of just war theory in order to see how those criteria apply in this case.

The second requirement for just war under the criteria of *jus ad bellum* is that the war be prosecuted by competent authority. Were the U.S. military strikes undertaken under the color of legitimate, legal authority? It would appear that the U.S. did act within the constraints of this requirement. The President of the United States, under the American Constitution, has the lawful authority, as commander-in-chief, to use military force, so long as Congress is notified.⁽¹⁰⁴⁾ The constitutional and legal requirements of this action were met, so the U.S. action was carried out by competent authority.

Finally, the last requirement is that the military action be carried out with right intention.⁽¹⁰⁵⁾ Right intention requires that the action be carried out without the motivation of inflicting gratuitous suffering out of a desire to punish the aggressor nation-state.⁽¹⁰⁶⁾ The U.S. strikes were precise and carefully targeted against military targets.⁽¹⁰⁷⁾ In this regard, it can safely be said that the United States did not inflict gratuitous suffering on either the Iraqi people or the Iraqi military. However, there is an issue as to whether the U.S. action was designed to punish Iraq for its use of force in support of the K.D.P. If the attacks were designed as a punishment for Iraq, then right intention would not be met.⁽¹⁰⁸⁾ The U.S. strikes were targeted not only at Iraqi forces in the Kurdish safe haven; most of the attacks were launched against military positions south of Baghdad. This behavior would indicate that the purpose of the attacks was not to rectify a particular situation, but to punish Iraq. Such a punitive intent colors the whole of the U.S. action, and makes it difficult to see how the U.S.'s use of force could meet the criteria of right intention.

IV. CONCLUSION

Just war theory is an attempt to think morally about war. The theorists who have recognized and shaped just war theory throughout Western civilization have included both secular and religious writers, including some of the greatest names of Western

philosophy and legal theory. Just war theory has been recognized and used widely in the 20th century in an attempt to limit the horrors of war, and has been incorporated into international law through the United Nations Charter, the Nuremberg Charter, and the decision of the International Court of Justice in the Nicaragua case. Generally construed, just war theory consists of two basic categories: jus ad bellum and jus in bello. This article examined U.S. decision to use force under the jus ad bellum requirements of just war theory. Those requirements are: 1) just cause; 2) competent authority; and 3) right intention. The U.S.'s recent military action against Iraq fails to meet the necessary requirements of the jus ad bellum. For this reason, the American air strikes against Iraq in September, 1996 were unjust.

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2. James Turner Johnson, "Just War Tradition and Low-Intensity Conflict" in Legal and Moral Constraints on Low-Intensity Conflict, 147, 148 (Alberto R. Coll, et al. eds. 1995). For examples of the diverse background of theories to limit warfare, see the dissenting opinion of Judge Weeramantry of the International Court of Justice in the I.C.J.'s decision Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 95 (July 8), Internet address at http://www.dfat.gov.au/ild/icj_nuc/w_man_c.html.

3. Examples of the efforts of the international community to limit warfare are quite extensive, and stretch back well into the Middle Ages. As Judith Gail Gardam points out in her article Proportionality and Force in International Law, 87 Am. J. Int'l L. 391, 395 (1993), the Catholic Church was active in the Middle Ages in limiting warfare, as seen by the Second Lateran Council's prohibition in 1139 of the use of crossbows, bows and arrows, and siege weapons in conflicts between Christian nations. Id. In the 19th century, secular attempts were made to limit warfare, such as the 1868 St. Petersburg Declaration which prohibited the use of weapons which cause unnecessary suffering and also forbade the practice of denying quarter to a vanquished enemy. Id. at 397. Finally, during the 20th century, several conventions, such as the Hague Convention (No. IV) of 1907, the Hague Rules of Air Warfare (1923), the Geneva Convention (1947), and the United Nations Charter all sought to limit the extent of the means of warfare. Id. at 399-402.

4. Johnson at 148.

5. The widespread use of just war theory by both Western countries and the international community can be seen in the use of just war theory by the International Military Tribunal at Nuremberg. The Nuremberg tribunal used the basic just war categories to determine if the actions taken by the Axis powers were in accord with international law. See Article 6(a) and (b) of the Nuremberg Charter, reprinted in Telford Taylor, The Anatomy of the Nuremberg Trials 648 (1992). See also Nicholas Rostow, The World Health Organization, The International Court of Justice, and Nuclear Weapons, 20 Yale J. Int'l L. 151, 163-175 (1995) for a general overview of the law of armed conflict, and

especially pages 169-70 for the use of just war concepts such as proportionality and legality by the Nuremberg Tribunal.

6. Johnson at 147-149. According to Johnson, just war theory incorporates moral reflection, theology, philosophy, chivalric custom and military practice, ecclesiastical canon law, secular civil law, and diplomatic precedent among rulers. Id. at 148-149.

7. Id. at 148.

8. Id. at 149.

9. See generally Paul Ramsey, War and the Christian Conscience (1961) and The Just War: Force and Political Responsibility (1968). See also the National Conference of Catholic Bishops, The Challenge of Peace (1983); Richard J. Mouw, The Spiritual Thrust of Just War Doctrine, *New Oxford Review*, Mar. 1988, at 11; Mark Juergensmeyer, The Terrorists Who Long for Peace, 20-Spg. *Fletcher F. World Aff.* 1, 5 (1996).

10. Gardam at 817.

11. Id. at 223.

12. Id., citing R. Bainton, Christian Attitudes Toward War and Peace 14 (1960).

13. Id. at 223.

14. St. Augustine of Hippo, Against Faustus the Manichaeon XXII.73-79, in Augustine: Political Writings, 222 (Michael W. Tkacz and Douglas Kries, trans, Ernest L. Fortin and Douglas Kries, eds. 1994).

15. Id. at 220.

16. See Romans 2:14-15 (Douay-Rheims Version) where the Apostle Paul writes that there is a natural law written on the human heart by which the actions of men may be evaluated.

17. Augustine at 221-222.

18. Id. at 222.

19. Id. at 220, 222.

20. Id. at 220.

21. Id. at 221.

22. Id. at 222.

23. Augustine at 220.

24. Id.

25. Id. at 222.

26. Id. at 220-222.

27. Id. at 222.

28. Augustine at 222.

29. St. Thomas deals with the question of the legitimacy of war in his Summa Theologicae, Part II, II, Q. 40, Art. 1.

30. Id., especially Reply Obj. 1-3 where St. Thomas bases his arguments heavily on the writings of St. Augustine.

31. Aquinas, Summa Theologicae, II, II, Q. 40, Art. 1.

32. Id.

33. Id.

34. Id.

35. David J. Bederman, Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis, 10 Emory Int'l L. Rev. 1, 31-32 (1996).

36. Id. .

37. Id. at 6.

38. Id.

39. Bederman at 1.

40. Id.

41. Roberts at 225. See also Johnson at 151.

42. Hugo Grotius, The Law of War and Peace, Bk. II, Ch. 1 (1949) cited in Ziyad Motala and David T. ButleRitchie, Self-Defense in International Law, the United Nations, and the Bosnian Conflict, 57 U. Pitt. L. Rev. 1, 10 n.75 (1995).

43. Bederman at 32.

44. Roberts at 225.

45. Bederman at 32.

46. Id.

47. Motala at 10.

48. Id.

49. Id.

50. Id.

51. Id. at 11.

52. Motala at 11. See also H.R. Exec. Doc. Nos 302 & 73, 25th Cong., 2d Sess. (1837).

53. Id.

54. See the Nuremberg Charter, art. 6(a)-(c). The charter lists the waging of aggressive war, "violations of the laws or customs of war," and the extermination and enslavement of civilians among its examples of wartime criminal conduct. Id.

55. Rostow at 169-70.

56. United Nations Charter, articles 2(4) and 51. See also Gardam at 403-11; Motala at 3.

57. U.N. Charter art. 51.

58. Motala at 4.

59. Id.

60. Id.

61. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14. The International Court of Justice did not decide this case based on the U.N. Charter because of a reservation made by the United States. See Louis Henkin, "Law and U.S. Policy" in Might v. Right: International Law and the Use of Force 47 n.22 (2d ed.1991). The Court instead looked at customary international law for its authority. Id. However, it is crucial to note that the Court held that the U.N. Charter and traditional customary international law were, in the words of one commentator, "essentially congruent in relevant respects, in effect construing the Charter." Id.

62. U.S. v. Nicaragua at 18-19; see also Barry E. Carter and Phillip R. Trimble, International Law, 2d ed. 310, 311 (2d ed. 1995).

63. Nicaragua v. United States of America at 94, 102-103; see also Motala at 11.

64. H.A. Wilson, International Law and the Use of Force by National Liberation Movements, 17 (1988); Roberts at 222; Johnson at 149; Bederman at 29. The tradition of dividing just war theory into two distinct analytical categories has its roots in the work of Grotius, Aquinas, Augustine, and Cicero. Bederman at 29.

65. Johnson at 149; Wilson at 17.

66. Roberts at 222; Johnson at 149; Wilson at 17.

67. Johnson at 149.

68. Id.

69. Id.

70. Aquinas, Summa Theologicae, II, II, Q. 40, Art. 1.

71. Johnson at 158; see also William V. O'Brien, "Just War Doctrine's Complementary Role in the International Law of War," in Legal and Moral Constraints on Low-Intensity Conflict, 181, 189 (Alberto R. coll, et al. eds. 1995). O'Brien writes that "[t]he substance of the cause in modern just war doctrine is individual and collective self-defense." Id. at 189.

72. Johnson at 158.

73. U.N. Charter art. 51.

74. Johnson at 158. Johnson compares the concept of "right authority" with the modern concept of sovereignty and argues that the just war notion of authority basically mirrors the modern notion of sovereignty. Id.

75. Bederman at 31-32; Aquinas, Summa Theologicae, II, II, Q. 40, Art.1..

76. Aquinas, Summa Theologicae, II, II, Q. 40, Art. 1.

77. O'Brien at 181.

78. Id. at 191.

79. Id.

80. Id. O'Brien sees the requirement of right intention as having two basic sources: one theological and the other utilitarian. The theological concern behind this requirement, in O'Brien's view, is the requirement to refrain from hatred and vengeance. The utilitarian concern, which O'Brien labels as a "prudential requirement of international politics," involves the recognition that it is bad public policy to "incur unnecessarily the abiding hatred of others" while it is good public policy to reconcile with former enemies. Id.

81. Id. at 191.

82. Hussein Hails 'Liberation' of Kurd Zone, Chicago Sun Times, Sept. 23, 1996, available in Westlaw, Allnews Database.

83. Id.

84. Id.; Iraq is Again the Scene of Hostilities, Boston Globe, Sept. 16, 1996, available in Westlaw, NPMJ Database.

85. See supra notes 83, 86.

86. Id.

87. Saddam Hails Army for Firing on U.S. Warplanes, New Orleans Time-Picayune, Sept. 23, 1996, available in Westlaw, Allnews Database.

88. U.S. Pulls Back from the Brink, Middle East Economic Digest, Sept. 27, 1996, available in Westlaw, Allnews Database.

89. Agence France-Presse, Sept. 25, 1996, available in Westlaw, AGFP Database..

90. See supra note 83, 86.

91. U.S. Wipes Its Hands of Kurds' 'Safe Haven,' Considers Airlift, Chicago Tribune, Sept. 26, 1996, available in Westlaw, Allnews Database.

92. Id.

93. For the general requirements for the jus ad bellum under just war theory, see note 115 supra, and accompanying text. See also Aquinas, Summa Theologicae, II, II, Q. 40, Art. 1; Johnson at 150.

94. Id.

95. Id.

96. Id.

97. Johnson at 158; O'Brien at 189.

98. See, e.g., U.N. Charter art. 51.

99. Id.

100. Wilson, at 23, 29-30. Wilson quotes James W. Garner, Questions of International Law in the Spanish Civil War, AJIL, 31, 68 (1937) saying "[i]f assistance is rendered to the legitimate government [involved in a civil war] it is not a case of unlawful intervention, as is the giving of assistance to rebels who are arrayed against its authority." Id. at 30.

101. U.N. Charter art. 51. Article 51 mentions the right of self-defense of a state, and also recognizes the operation of collective security agreements, and U.N. intervention in an international conflict. Id. It says nothing about the right of an outside state to intervene in an internal matter within another sovereign state. Id.

102. See supra note 92.

103. Rolling Up Iraq: Hussein Backs Down for the Moment, but a CIA Operation is Destroyed, U.S. News & World Report, Sept. 23, 1996, available on Westlaw, Allnews Database.

104. See U.S. Const. art. II, § 2; War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

105. O'Brien at 181.

106. Id.

107. The U.S. attacks were so precise that one critic described them as "'pinprick' bombing attacks." Paul Wolfowitz, Clinton's Bay of Pigs, Wall Street Journal, Sept. 27, 1996, available in Westlaw, Allnews Database.

108. O'Brien at 181, 191.