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I. INTRODUCTION

The US-led invasion of Iraq in 2003 was and continues to be controversial throughout the domestic and international community. With the matter of the subsequent US occupancy of Iraq aside, a deep divide exists among scholars in different fields as to the question of whether or not the US was justified in its initial decision to invade. Within the legal field, controversy surrounds the question as to whether the US could rightfully invade without explicit UN authorization. While, at the time of the invasion, a majority of Americans and their elected officials supported the action, moral scholars remained, and continue to remain, split on the justness of the action. Even those who used the same ethical framework of analysis, namely the just war theory, are split on the morality of the decision. Considering this disparity, it is helpful to analyze the situation according to John Finnis' perception of the good, as established in *Natural Law and Natural Rights*. Following an application of the basic tenants of Finnis' theory, it seems as though the US decision to invade Iraq in 2003 was a use of force necessary to ensure the continuation of justice in the international community.

II. THE INVASION

On August 2, 1990 Iraq invaded and successfully conquered Kuwait.¹ Although this was not the first instance of contemporary Iraqi violence (the Iran-Iraq War in the 1980s), it was the starting point of Iraq's resistance to the United Nations ("UN").² The aggressive Iraqi behavior "alarmed" the UN Security Council, leading to its approval of Resolution 660, aimed to address

¹William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 THE AM. JOURNAL OF INT'L LAW 558 (2003).

² *Id.*

Iraq's "breach of international peace and security."³ This resolution condemned the Iraqi invasion, "demand[ing] that Iraq withdraw immediately and unconditionally all its forces... [and] call[ed] upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences."⁴

Despite the efforts of the Security Council, Iraq failed to comply with 660, leading to the adoption of Resolution 678 in November 1990.⁵ This statement declared that Iraq had until January 15, 1991 to implement Resolution 660 fully and authorized member states "to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."⁶ Despite these threats, Iraq continued to defy the UN, leading to the onset of Operation Desert Storm. A day after the Iraqi deadline was up, UN forces, led by the United States ("US"), launched a series of substantial air strikes and neutralized Iraqi air defenses. Ground forces subsequently moved in and quickly expelled Iraqi troops from Kuwait.⁷ The conflict ended February 27, 1991.⁸

In an attempt to end hostility and create peace in the region, the Security Council issued Resolution 687 on April 3, 1991.⁹ Resolution 687 called for a cease-fire and required Iraq to "unconditionally accept the destruction, removal, or rendering harmless," its weapons of mass destruction (biological, chemical, ballistic, and nuclear).¹⁰ The United Nations Special Commission ("UNSCOM") was also setup under this resolution and was intended to be a

³ S.C Res. 660 (U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990).

⁴ *Id.*

⁵ S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

⁶ *Id.*

⁷ John Yoo, *International Law and the War in Iraq*, 97 THE AMER. JOURNAL OF INT'L LAW 564 (2003)

⁸ *Id.*

⁹ Taft, Buchwald, *supra* note 1, at 560.

¹⁰ S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

weapons inspection agency in the country. Iraq accepted the terms of this resolution on the 6th of April and a formal cease-fire went into effect between all countries involved in the conflict.¹¹

The UN continued to adopt additional resolutions throughout the 1990s (e.g. Resolutions 707 and 715), which repeatedly condemned Iraqi action, claiming that Iraq was “in serious violation of a number of its obligations under... Resolution 687 and [failing] to cooperate with [inspection agency requirements].”¹² In 1997 the Security Council passed Resolution 1137, which, again, condemned Iraq’s repeated refusal to allow UNSCOM to effectively operate.¹³ It warned that if Iraq failed to “cooperate fully and immediately... [there would be] serious consequences.”¹⁴ Iraq agreed and resolved to fully comply by the end of October 1998.¹⁵ Nonetheless, by December 1998, UNSCOM reported that it was not able to fulfill its mandate, due to Iraqi obstruction.¹⁶ Immediately, US and British forces launched a 70-hour bombing mission, known as Desert Fox.¹⁷ After the conflict had ended, Iraq prohibited any UNSCOM access into the country and, consequently, the UN disbanded UNSCOM in December 1999.¹⁸

Tensions climaxed on the morning of September 11, 2001. Al Qaeda terrorists, with connections to Afghanistan, hijacked four US commercial passenger jets and successfully flew three of the aircraft into US buildings. The US responded with attacks directed towards Afghanistan and al Qaeda, and, while Iraq was not directly involved, the threat of future terrorist

¹¹ Yoo, *supra* note 6, at 564.

¹² See S.C. Res. 707, ¶ 1, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/707(1991).

¹³ S.C. Res. 1137, 814, U.N. SCOR, 48th Sess., 3188th mtg. at 4, U.N. Doc. S/RES/814 (1997)

¹⁴ *Id.*

¹⁵ Yoo, *supra* note 6, at 565.

¹⁶ Taft, Buchwald, *supra* note 1, at 560.

¹⁷ See Steven Lee Myers, *U.S. and Britain End Raids on Iraq, Calling Mission a Success*, N.Y. TIMES, Dec. 20, 1998, at 1; see also Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115 (1999).

¹⁸ Taft, Buchwald, *supra* note 1, at 560.

attacks led to a “sharper focus” on Iraq.¹⁹ The menacing possibility that terrorist groups could seek a safe haven in rogue nations with potential access to weapons of mass destruction (“WMDs”), such as Iraq, raised considerable security concerns in the US. In January 2002, President George W. Bush made this risk the focal point of his State of the Union Address, labeling North Korea, Iraq and Iran an “Axis of Evil.”²⁰ The US warned that it would act to enforce existing resolutions and attempted to pressure the UN to adopt further resolutions that explicitly allowed military intervention.²¹ The UN responded on November 8, 2002 with the release of Resolution 1441. It found Iraq to be in “material breach of its obligations under relevant resolutions... [and] warned Iraq that it [would] face serious consequences as a result of its continued violations.”²²

Although Resolution 1441 condemned Iraqi action, it did not explicitly call for military enforcement, and left the US demands somewhat unsatisfied.²³ Rather than pushing for further resolutions, the US elected to use Resolution 1441 as legal justification for invasion.²⁴ On March 19, 2003 the US, leading an “ad hoc ‘coalition of the willing,’” invaded Iraq.²⁵ Iraq was quickly defeated and on May 1, 2003, from the flight deck of the USS Lincoln, President Bush

¹⁹ Yoo, *supra* note 6, at 565.

²⁰ *Id.*

²¹ Christian Enemark & Christopher Michaelsen, *Just War Doctrine and the Invasion of Iraq*, 51 AUST. JOURNAL OF POL. AND HIST. 554 (2004).

²² S.C. Res. 1441, ¶¶ 2, 13, U.N. SCOR. 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002). For background leading up to the resolution, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 956 (2002).

²³ *Id.*

²⁴ Enemark, Michaelsen, *supra* note 20, at 554.

²⁵ Yoo, *supra* note 6, at 565.

announced that major combat operations in Iraq had ended, signaling a transition to operations aimed at stabilizing and reconstructing the country.²⁶

A total of 139 US troops were killed during the invasion and another 551 wounded.²⁷ These numbers are significantly smaller than other US conflicts. For example, in the Vietnam Conflict, another insurgency campaign, 58,220 US troops were killed and 304,000 wounded.²⁸ Similarly, in the Persian Gulf War, 383 US troops were killed and 776 were wounded.²⁹ Moreover, during the major combat operations it is estimated that roughly 3,230-4,327 Iraqi civilians were killed.³⁰ This, too, is a much smaller number than in other US wars. For example, a single night of US firebombing over Tokyo in 1945 yielded, on average, at least 85,000 civilian casualties.³¹ Civilian casualties were also much smaller in the invasion of Iraq, when compared to previous *insurgency* campaigns. The Vietnam War, for instance, led to the death of 522,000 civilians, a number 17–30 times larger than that in Iraq.³² In the Philippines, civilian deaths numbered around 200,000, which was roughly 11–17 times greater than the total in Iraq.³³

Although traditional combat capabilities were utilized, casualties were kept low in the 2003 Iraq campaign mainly due to the use of sophisticated military technology. Using GPS-guided all-weather bombs and infrared technology, US forces could see and strike Iraqi forces,

²⁶ *Bush Makes Historic Speech Aboard Warship*, CNN (May 1, 2003), http://articles.cnn.com/2003-05-01/us/bush.transcript_1_general-franks-major-combat-allies?_s=PM:US

²⁷ *Iraq Coalition Casualties: Fatalities by Year and Month*, <http://icasualties.org/iraq/ByMonth.aspx>

²⁸ Anne Leland and Mari-Jana Oborocea, *American War and Military Operations Casualties: Lists and Statistics*, Cong. Res. Service, 2–3 (2010).

²⁹ *Id.*

³⁰ Colin H. Kahl, *In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq*, 32 *INTERNATIONAL SECURITY* 7–46 (2007).

³¹ *Id.* at 14.

³² *Id.* at 14.

³³ *Id.*

despite their attempts to move at night or during sandstorms.³⁴ Further, during the Iraq campaign, a heavy emphasis was placed on the use of surveillance, precision and communication. Satellites, airborne radar and unmanned reconnaissance aircraft were utilized to provide extremely detailed oversight of Iraq for every day of the campaign.³⁵ Precision-guided missiles were employed to a greater extent than ever before, which enabled the US to strike specific targets without inadvertently hitting civilian centers.³⁶ Communication in combat was “vast and elaborate,” which allowed the US to act quickly and effectively.³⁷ As President Bush indicated, US forces focused on “striking selected targets of military importance to undermine Saddam Hussein’s ability to wage war,” one of which, he noted, was “leadership targets.”³⁸ The US also made the reduction of disproportionate damage to civilians and civilian infrastructure the focal point of their operations.³⁹ “No-strike” lists were created that included schools, mosques, sensitive cultural sites, hospitals, water treatment facilities, power plants, and other elements of civilian infrastructure.⁴⁰ As the campaign continued, additional items were added and the list eventually grew to include thousands of off-limit targets.⁴¹

³⁴ Michael E. O’Hanlon, *Operation Iraqi Freedom and the Future of the U.S. Military*, SABAN CENTER FOR MIDDLE EAST POLICY AT THE BROOKINGS INSTITUTION (2003).

³⁵ Paul Cornish, *Iraq, the Just War Tradition and the Mor*, 20 ST. MARY’S CHURCH, CAMBRIDGE (2004).

<http://www.ely.anglican.org/parishes/camgsm/sermons/S2004e/power_pc.html>.

³⁶ Kahl, *supra* note 29, at 21.

³⁷ Cornish, *supra* note 34.

³⁸ *Text of President Bush’s Address to the Nation*, LOS ANGELES TIMES (May 20, 2003) <http://articles.latimes.com/2003/mar/20/news/war-text20>

³⁹ Kahl, *supra* note 29, at 16.

⁴⁰ *Id.*

⁴¹ *Id.*

III. THE LEGAL DEBATE

Initially, the US intended to invade Iraq once it persuaded the Security Council to adopt an additional resolution that “[condemned] Iraq’s failure to comply with its disarmament obligations... [and] provide[d] implicit authorization for the use of force.”⁴² However, after Resolution 1441 was adopted, no further resolution was passed that permitted the use of force and, despite the lack of explicit authorization, the US invaded Iraq, claiming that it was operating under Resolution 678.⁴³ The US maintained that, although Resolution 687 called for a cease-fire, it had been negated by Resolution 1441, which declared Iraq to be “in material breach of these earlier resolutions... [through] its continuing development of WMD programs, its support for terrorism, and its repression of the civilian population.”⁴⁴ This material breach, according to the US, constituted a violation of the cease-fire, reestablished the relevancy of Resolution 678, and, in turn, legitimated the use of force.

The US specifically grounded its legal justification for unilateral action in paragraph 12 of Resolution 1441. Paragraph 12 stated that if a breach were reported to the Security Council, the Security Council would assemble to assess to the inspector’s report, “in order to *consider* the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”⁴⁵ The Security Council, according to the US, was required to “consider” the material breach but did not have to arrive at any conclusions regarding the maintenance of international peace and security. Accordingly, the US argued that its unilateral action was warranted because the Security Council had met and agreed that Iraq was

⁴² Joel H. Westra, *INTERNATIONAL LAW AND THE USE OF ARMED FORCE: THE UN CHARTER AND THE MAJOR POWERS* (2007), 126.

⁴³ Yoo, *supra* note 6, at 567.

⁴⁴ *Id.*

⁴⁵ S.C. Res. 1441, *supra* note 21, emphasis added.

acting in defiance, even though the Council never formally voted to decide on a proper response. As John Negroponte, former US ambassador to the UN, suggested, “this resolution contains no ‘hidden triggers’ and no ‘automaticity’ with respect to the use of force,” but insinuates that, after the Security Council had considered the violation, “the resolution did not constrain any Member State from acting . . . to enforce relevant United Nations resolutions.”⁴⁶

Although it was never formally offered as legal justification for unilateral action against Iraq, reference was made by several US officials, including Secretary of State Colin Powell, to invasion as being a form of preemptory strike.⁴⁷ Under the Article 51 of the UN Charter, every state is allowed to exercise their inherent right to self-defense.⁴⁸ This right can be utilized if an attack occurs against a member state and if it is subsequently reported to the Security Council.⁴⁹ Though an attack had not yet occurred, the US could have appealed to customary international law to justify the use of preemptive force and argued that the requirement that there be an actual attack was met due to the imminence of the threat. As a matter of established customary international law, preemptive self-defense is permissible when it passes the Caroline test.⁵⁰ According to this doctrine, preemption is legitimate if “the use of force [is] necessary because the threat is imminent and, thus, pursuing peaceful alternatives is not an option . . . [and] the

⁴⁶ *Press Release SC/7564*, THE UN. (Aug. 11, 2002)

<http://www.un.org/News/Press/docs/2002/SC7564.doc.htm>.

⁴⁷ *Powell Presents US Case To Security Council Of Iraq's Failure To Disarm*, THE UN NEWS CENTRE (Feb. 5, 2003)

<http://www.un.org/apps/news/story.asp?NewsID=6079&Cr=iraq&Cr1=inspect&Kw1=1441&Kw2=Iraq&Kw3=>.

⁴⁸ U.N. Charter art. 51. The other exception to Article 2, paragraph 4 is Article 53, which permits the use of force if directly authorized by the **United Nations** Security Council. See U.N. Charter art. 53.

⁴⁹ *Id.*

⁵⁰ Yoo, *supra* note 6, at 571–2.

response must be proportionate to the threat.”⁵¹ In the case of Iraq, the Caroline test may have been met, and in turn the Article 51 requirements fulfilled, because Iraq had used chemical weapons against Iran and its own population, and was also preventing UN weapon inspectors from examining its weapon supply since 1990.⁵² Such a threat was intensified after the 9/11 terrorist attacks. These relatively successful assaults furthered the fear that “rogue nations,” such as Iraq, would harbor terrorist activities, possibly supplying them with more powerful means of force, i.e. WMDs.⁵³ Given the availability of new weapons technology—weapons capable of being launched faster and farther than ever before—it may have been argued that it was no longer prudent for states to wait to be attacked before acting in self-defense and, thus, preemptory actions were justifiable.

In spite of the legal justification offered by the US for the invasion of Iraq, serious legal challenges were raised as to the legitimacy of the unilateral actions. Legal scholars, such as Thomas Franck, argued that the US was not a relevant party and had no ability to “determine that Iraq was in material breach.”⁵⁴ The cease-fire was enacted by the UN as a whole and individual states had no right to determine whether Iraq was acting in compliance or not. Furthermore, Franck argues, the US was acting unlawfully because the Security Council had not explicitly permitted states to use unilateral discretion for the enforcement of relevant resolutions.⁵⁵

⁵¹ Yoo, *supra* note 6, at 572.

⁵² John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 765 (2004)

⁵³ Yoo, *supra* note 6, at 574.

⁵⁴ Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 THE AM JOURNAL OF INT’L LAW (2007). (Jan. 27, 2008) <http://links.jstor.org/sici?sici=0002-9300%28200307%2997%3A3%3C607%3AWHNTUN%3E2.0.CO%3B2-Q>.

⁵⁵ Frank, *supra* note 51, at 612.

Additionally, states such as France, Germany, and Russia contended that Resolution 678 was no longer pertinent and that its “authorization had expired.”⁵⁶ Despite the lack of explicit terms of resolution cessation, it was argued that 678 was exclusively pertinent to the “liberation of Kuwait and to restoring peace and security in the region.”⁵⁷ Therefore, these states argued, because of the irrelevance of 678 in any matter other than the emancipation of Kuwait, Resolution 1441 was unable to resurrect any suggestion that 678 was applicable. Moreover, the People’s Republic of China, the Russian Federation, and France also adopted a joint statement following the adoption of Resolution 1441, which declared that further resolutions were required for the use of force to be justified under the UN Charter.⁵⁸

Similarly, such parties have further rejected any notion that the invasion of Iraq could be considered valid preemptive military action. Franck laments that, before 2003, uses of force, however lawful, were at least “accompanied by a fig leaf of justification... taken in response to an alleged prior attack or provocation.”⁵⁹ However the invasion of Iraq, justified as preemptive self-defense, would be an indication that major powers have abandoned their commitment to this “fig leaf”.⁶⁰ Any attempt to “stretch” the limitations of the use of force to include preemptive action, Franck argues, would be to disregard the Charter as a whole and provides a dangerous precedent of autonomous military action in the absence of an actual attack.⁶¹

While it has been argued that ex-post developments are not relevant to the justification of force ex-ante, Richard Falk believes that the danger of preemptive action was clearly

⁵⁶ Yoo, *supra* note 6, at 567.

⁵⁷ Frank, *supra* note 51, at 613.

⁵⁸ Joint statement from the Popular Republic of China, the Federation of Russia, and France, UN.INT. (Dec. 8, 2008), http://www.un.int/france/documents_anglais/021108_cs_france_irak_2.htm

⁵⁹ Frank, *supra* note 51, at 608.

⁶⁰ *Id.*

⁶¹ *Id.*

demonstrated by the “failure... to find any evidence of weapons of mass destruction,” and the fact that no such weapons were used in defense against US invasion.⁶² He points out that it “seems reasonable to conclude that... such weaponry does not exist... [and because WMDs] were not used by Iraq to defend the survival of the regime it is highly unlikely that they would ever have been used in circumstances where an annihilating retaliation could be anticipated.”⁶³ Thus, according to Falk, the US invaded Iraq on false assumptions, further solidifying the illegitimacy and danger of preemptive self-defense.⁶⁴

IV. POLITICAL AND DOMESTIC PERCEPTION

Despite the legal controversy surrounding the 2003 invasion of Iraq, the political and domestic spheres generally supported the decision. The majority of the head officials within the executive branch, including Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz favored action against Iraq, arguing that Iraq was a rogue nation that threatened US interests.⁶⁵ Secretary of State Colin Powell and the Joint Chiefs of Staff, among others, however, initially favored a strategy of containment and expressed concerns about the need to invade Iraq.⁶⁶ Ultimately it was agreed upon by members of the executive branch that a resort to war was necessary and should be based on Iraq’s possession of

⁶² Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 THE AMER. JOURNAL OF INT’L LAW (2003).

⁶³ Frank, *supra* note 51, at 610.

⁶⁴ *Id.*

⁶⁵ *See, e.g.*, U.S. Dep’t of Defense News Transcript, Deputy Secretary Wolfowitz Interview with Sam Tannenhaus, VANITY FAIR, at <http://www.dod.mil/transcripts/2003/tr20030509-depsecdef0223.html> (May 9, 2003). In the interview, Wolfowitz asserts that within the U.S. government there were four “fundamental concerns” with respect to Iraq: (1) Iraq's possession of WMD; (2) Iraq's support for terrorism; (3) the possibility of WMD being supplied by Iraq to terrorists; and (4) Iraq's treatment of its own people.

⁶⁶ Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 240 (2004)

WMDs.⁶⁷ However, since WMDs were also possessed by other states at this time, this justification was bolstered by reference to Iraq's failure to fulfill its disarmament obligations required by prior Security Council resolutions.

Congressional support for the invasion was mixed. On October 2, 2002 the Iraq War Resolution was introduced in Congress.⁶⁸ This joint resolution authorized military action because Iraq had "accumulated and used WMDs in the past against other nations and its own people, continued to violate UN Resolutions, demonstrated its continuing hostility toward the US, and provided aid to terrorist groups."⁶⁹ 61% of Democratic members of the House voted against the resolution, while less than 3% of Republicans voted against it.⁷⁰ Meanwhile, 42% of Democratic Senators voted against the resolution and 2% of Republican Senators voted against it.⁷¹ Most of those opposed based their concerns not on the fact that the Iraqi regime was not dangerous, but that the resolution placed too much power into the President's hands.⁷² Despite the higher number of Democrats in opposition to the bill, many prominent members of the party supported the invasion, including House Minority Leader Richard A. Gephardt, current Vice President Joe Biden and current Secretary of State Hillary Clinton.⁷³ Several Senators and Representatives attempted to amend the resolution to take additional measures, such as providing a termination

⁶⁷ U.S. Dep't of Defense News Transcript, Deputy Secretary Wolfowitz Interview with Sam Tannenhaus, VANITY FAIR, at <http://www.dod.mil/transcripts/2003/tr20030509-depsecdef0223.html> (May 9, 2003).

⁶⁸ Authorization For Use Of Military Force Against Iraq Resolution Of 2002, PL 107-243, October 16, 2002, 116 Stat 1498.

⁶⁹ *Id.*

⁷⁰ Alison Mitchell & Carl Hulse, *Threats And Responses: The Vote; Congress Authorizes Bush To Use Force Against Iraq, Creating A Broad Mandate* (Oct. 11, 2002), <http://www.nytimes.com/2002/10/11/us/threats-responses-vote-congress-authorizes-bush-use-force-against-iraq-creating.html>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

date for the authorization of the use of armed forces (i.e. the Byrd Amendment) or to obtain additional resolutions by the United Nations Security Council, however such attempts were not successful.⁷⁴ The bill passed the House of Representatives by a vote of 296 to 133, passed the Senate by a vote of 77 to 23, and was signed into law on October 16, 2002.⁷⁵

American public opinion showed general support for invasion but also indicated a belief that the US should wait for further Security Council regulations before resorting to war. Seven months before the September 11 terrorist attacks, a Gallup poll confirmed that 52% of Americans would favor an invasion, while 42% would oppose it.⁷⁶ Further, 64% believed that the US should have dismantled the Hussein regime at the end of the 1991 Gulf War.⁷⁷ In February 2003, another public opinion poll showed that 59% of Americans believed that the UN should have more time to conduct weapons inspections in Iraq and 56% indicated that the US should wait for Security Council authorization.⁷⁸ Weeks before the March 2003 invasion, 71% of Americans were found to believe that the decision to use force was the right one, yet that number dropped to 56% in support for a military invasion if the Security Council were to reject a resolution calling for military action.⁷⁹ Even after the beginning of military operations in Iraq, an ABC News/Washington Post poll showed a 62% support for the war.⁸⁰

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Iraq*, The Gallup Poll, GALLUP/CNN/USA TODAY, (Feb. 2001)
<http://www.gallup.com/poll/1633/Iraq.aspx#4>.

⁷⁷ *Id.*

⁷⁸ See Patrick E. Tyler & Janet Elder, *Poll Finds Most in U.S. Support Delaying a War*, N.Y. TIMES, Feb. 14, 2003, at A1 (reporting on a *New York Times*/CBS news poll based on random interviews with adults throughout the United States).

⁷⁹ See Scott Keeter, *Trends in Public Opinion About the War in Iraq, 2003-2007*, (Mar. 15, 2007) <http://pewresearch.org/pubs/431/trends-in-public-opinion-about-the-war-in-iraq-2003-2007>. See also Richard Benedetto, *Poll: Most Back War, But Want U.N. Support*, http://www.usatoday.com/news/world/iraq/2003-03-16-poll-iraq_x.htm.

⁸⁰ *Iraq*, CNN/ORC POLL (Dec. 16–18, 2003), <http://www.pollingreport.com/iraq.htm>.

V. THE MORAL DEBATE

Outside of the legal and political communities, the decision to invade Iraq was hotly debated as a moral issue as well. Many of those in support of the invasion and those opposing it made their moral case based upon the tenants of the just war tradition. Although this theory dates back to the likes of Aristotle, Cicero, and Augustine, it has been extremely influential in shaping the moral debate concerning the 2003 invasion of Iraq.

According to the just war theory, a series of criteria must be met in order for there to be a just resort to war, or a *jus ad bellum*. Although various scholars have added or withdrawn various standards from this list, it is generally agreed that a state must fulfill these six requirements: just cause, right intention, right authority, last resort, proportionality, and reasonable chance of success. The first two requirements necessitate that there be a just cause and a right intention in the decision to use force.⁸¹ According to Hugo Grotius, widely considered to be the “father of international law” and a major just war theorist, in order to sufficiently meet these requirements, the resort to war must be “rooted in the right of self-defense.”⁸² Wars must be waged to obtain a contested right, not to “show power or punish evil men.”⁸³ These requirements extend to preemptive attack if the threat is “immediate and imminent.”⁸⁴ Grotius further limits preemption and asserts that:

If a man is not planning an immediate attack, but it was been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way... I maintain that he cannot be lawfully killed, either if the danger can in any way be avoided,

⁸¹ James T. Johnson, *MORALITY AND CONTEMPORARY WARFARE*, 53 (1999).

⁸² *Id.*

⁸³ Westra, *supra* note 41, at 43.

⁸⁴ Grotius, Hugo. *THE LAW OF WAR AND PEACE*. Trans. Francis W. Kelsey, 1925, II.I.V.

or if it is not altogether certain that the danger cannot be otherwise avoided... the delay that will intervene affords opportunity to apply many remedies.⁸⁵

Just wars must also be waged by the right, or legitimate, authority, which stems from a sovereign political entity. “The subject of sovereignty is the state and not in any particular person,” as its status, responsibilities, and power are independent from the governing persons.⁸⁶ Yet Grotius notes that a state’s sovereign power originates from its people.⁸⁷ Their collective right of self-protection is represented by the state, which in turn is represented by the sovereign authority.

The decision to go to war also must be the state’s last resort; after all non-violent options have been exhausted. Further, it must be proportionate to the intended goals. Such goals must also be limited and must have a reasonable chance of success. Grotius argues that war should not be considered as the first option in response to a threat.⁸⁸ War is just if it “presents an appropriate means to reach a legitimate aim.”⁸⁹ Such a calculation involves weighing the universal goods expected against the universal evils expected. Only if the goods are proportionate to the costs will the resort to force be considered just. War cannot be justified if, when making the initial decision to use force, it will have no measureable impact on the situation. There must be a “reasonable chance of success in bringing about a more just peace than existed previously... to wage war in the certain knowledge that the damage caused will be in vain is unjust.”⁹⁰

⁸⁵ *Id.*

⁸⁶ Johnson, *supra* 78, 53.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Christoph A. Stumpf THE GROTIAN THEOLOGY OF INTERNATIONAL LAW HUGO GROTIUS AND THE MORAL FOUNDATIONS OF INTERNATIONAL RELATIONS. Vol. 44, 230.

⁹⁰ Enemark, Michaelsen, *supra* note 20, at 560.

On October 3, 2002, many of the most prominent evangelical Christian leaders sent a letter, known as the “Land Letter” (herein after “the Letter”) to President Bush, outlining their support for the invasion. These leaders included Richard D. Land, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, Chuck Colson, founder of Prison Fellowship Ministries, and Carl D. Herbster, president of the American Association of Christian Schools. In the course of the Letter, these religious leaders laid out their reasons for supporting the invasion, based on the tenants of the just war theory.

As to the just cause requirement, the Letter argued, “using military force... to disarm Saddam Hussein and his weapons of mass destruction is a just cause.”⁹¹ The Letter reasoned that such force would be necessarily a defensive measure because Hussein violated jus cogen norms (i.e. fundamental principles of international law from which no derogation is ever permitted), as he “attacked his neighbors, used weapons of mass destruction against his own people, and harbored terrorists from the al Qaeda terrorist network that attacked our nation so viciously and violently on September 11, 2001.”⁹² Similarly, as to just intent, the Letter indicated that “[o]ur nation does not intend to destroy, conquer, or exploit Iraq.”⁹³

The leaders further argued that this war would adequately be commenced as a last resort, as “[t]he world has been waiting for more than a decade for the Iraqi regime to fulfill its agreement to destroy all of its weapons of mass destruction, to cease producing them or the long-range missiles to deliver them in the future, and to allow thorough and rigorous inspections to verify their compliance.”⁹⁴ Hussein, they argued, has been given ample opportunity to fulfill his obligations after numerous UN sanctions and condemnations, however, “he stands convicted by

⁹¹ Richard Land, *Land Letter*, ¶ 3 (Oct. 3, 2002) <http://erlc.com/article/the-so-called-land-letter/>.

⁹² *Id.*

⁹³ *Id.* at ¶ 4.

⁹⁴ *Id.* at ¶ 5.

his own record as a brutal dictator who cannot be trusted to abide by any agreement he makes.”⁹⁵

Therefore, given the history of ineffective sanctions and UN condemnations, the Letter argued that the decision to invade could justifiably be considered the last resort.

The Letter also commended the decision to bring the matter before both the UN General Assembly and Security Council. Yet it argued, “as American citizens we believe that, however helpful a U.N. Security Council vote might be, the legitimate authority to authorize the use of U.S. military force is the government of the United States and that the authorizing vehicle is a declaration of war or a joint resolution of the Congress.”⁹⁶ Thus, it was argued that the requirement of authorization by a legitimate authority was also met in this case.

Lastly, as to the requirements of a reasonable expectation of success and proportionality, the Letter stated: “we believe your stated policies for disarming the murderous Iraqi dictator and destroying his weapons of mass destruction, while liberating the Iraqi people for his cruel and barbarous grip, more than meet those criteria.” It argued further that “the cost of not dealing with this threat now will only succeed in greatly increasing the cost in human lives and suffering when an even more heavily armed and dangerous Saddam Hussein must be confronted at some date in the not too distant future.”⁹⁷

Conversely, more than 100 Christian ethicists released a statement in opposition to a war with Iraq, which simply stated: “As Christian ethicists we share a common moral presumption against a preemptive war on Iraq by the United States.”⁹⁸ Many also opposed the war based on the tenants of the just war tradition.

⁹⁵ *Id.* at ¶ 6.

⁹⁶ *Id.* at ¶ 7.

⁹⁷ *Id.* at ¶ 11.

⁹⁸ Peter Steinfels, *Beliefs; Churches And Ethicists Loudly Oppose The Proposed War On Iraq, But Deaf Ears Are Many*, N.Y. TIMES, Sept. 28, 2002,

As to the requirements of just cause and intent, critics argued that the invasion failed to adequately limit force to cases of defense against aggression. Though it was not the official basis offered by the Bush administration for the invasion, the argument for preemptive use of force was perceived to be troubling.⁹⁹ Such a use of force is only permissible on occasion; in instances “where there is a clear and present danger, or a grave and imminent threat.”¹⁰⁰ However, critics submitted that the US started down a slippery slope as it “has taken this concept and used it to deal not just with imminent threats, but with merely potential or gathering dangers.”¹⁰¹ As to another informal argument for the invasion, namely Iraq’s link to terrorism, critics argued that “[t]here would be a just cause to use force against Iraq if there was clear and adequate evidence of Iraqi involvement in the attacks of September 11.”¹⁰² This, they argued, would be an act of self-defense and would be justifiable. However, “[g]iven that al Qaeda is estimated to operate in sixty countries, military action to overthrow the regime... would have to be based on evidence of substantial support.”¹⁰³ Such substantial support, however, was not produced. Critics further argued, “[t]hat the Coalition had Right Intention in invading Iraq is, at best, open to question.”¹⁰⁴ The “US depends heavily on imported oil... and the Middle East is home to the world’s richest oil resources,” thus it may be argued that the intention to go to war was shaped by economic interests, an act clearly in *violation* of jus cogen norms prohibiting wars of aggression and territorial aggrandizement. Moreover, other critics also suggested that the invasion might have

<http://www.nytimes.com/2002/09/28/us/beliefs-churches-ethicists-loudly-oppose-proposed-war-iraq-but-deaf-ears-are.html?pagewanted=all&src=pm>

⁹⁹ David Smock & Gerald Powers, *United States Institute of Peace Special Report: An Ethical Analysis of War Against Iraq*, Jan. 2003. <http://www.usip.org/publications/would-invasion-iraq-be-just-war>

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

been primarily motivated by a desire to remove the Hussein regime from power, rather than to enforce the Security Council provisions.¹⁰⁵

In reference to right authority, critics argued that the proper framework for considering the use of force was within that of the UN.¹⁰⁶ Despite the legal arguments surrounding whether the US-led coalition was actually justified under existing Security Council resolutions, opponents argued that without explicit authorization, the invasion was not initiated under legitimate authority.¹⁰⁷ Moreover, critics argued that that further sanctions would have been more appropriate, as they “provide[] necessary checks and balances, especially given the troubling precedent involved in the world’s only superpower proposing to use preventive force to overthrow other regimes,” and ensure greater support from the regional and international community.¹⁰⁸ Others, however, argued that all sanctions should have been removed and no force should have been used in order to alleviate human suffering. Such critics argued:

“[t]he humanitarian situation inside Iraq at the time was not so dire that military intervention was the only way to forestall large-scale loss of life. If anything, the most obvious measure short of war to alleviate human suffering in Iraq would have been to remove the UN sanctions imposed twelve years previously.”¹⁰⁹

Finally, it was argued that, though not taking military action could have negative consequences, invading Iraq could have “unpredictable consequences not only for Iraq but peace and stability elsewhere in the Middle East.”¹¹⁰ Given this uncertainty, critics believed that the probability of success criterion was not met. Moreover, they argued that “the attack is in no way

¹⁰⁵ See e.g. John G. Mearsheimer & Stephen M. Walt, *An Unnecessary War*, FOREIGN POLICY, 134 (Jan./Feb. 2003), pp. 50-60.

¹⁰⁶ Smock & Powers, *supra* note 95.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

proportional to the perceived original aggression of Saddam Hussein. Innocent civilians... will not be protected.”¹¹¹

Like the debate amongst the legal community, scholars of ethics and morality continue to debate the decision to invade Iraq in 2003. An ex-post analysis proves that Iraq was, in fact, not found to be in possession of WMDs. Conversely, Hussein clearly committed massive human rights violations, some of which may have continued had the US not intervened. In spite of these facts and despite using the same moral framework, namely the just war theory, these scholars continue to remain deeply divided.

VI. FINNIS, PRACTICAL REASONABLENESS AND THE INVASION

Given the controversy surrounding the invasion of Iraq, it is helpful to look to legal philosopher John Finnis’ work, *Natural Law and Natural Rights* for guidance. In this book, Finnis presents his view of the theory of natural law and, in doing so, presents several basic principles with which individuals can use to properly understand any problems of ethics, politics, and jurisprudence. This theory, then, provides a sound framework with which one may assess the 2003 invasion.

Finnis begins his work with a discussion of the good. According to Finnis, there are objective values that human beings must promote in order to have a fulfilling life.¹¹² An understanding of these values allows one to formulate principles of action that help to pursue the good. There are seven of these equally fundamental, irreducible and self-evident values.¹¹³ Each

¹¹¹ *Id.*

¹¹² John Finnis, *NATURAL LAW & NATURAL RIGHTS*, 2d Ed., 81 (2011).

¹¹³ *Id.*

of these universal goods are intrinsically valuable and their pursuit exhausts the ultimate reasons one could have for action.¹¹⁴

The first of these values is what Finnis terms “knowledge of the truth.”¹¹⁵ Truth, according to Finnis, is a basic value and knowledge of the truth, therefore, is worth pursuing for its own sake rather than “knowledge sought only instrumentally.”¹¹⁶ Knowledge is a good because pursuit of knowledge “makes intelligible... any particular instance of the human activity and commitment involved in such pursuit.”¹¹⁷ Knowledge, then, is something good to have as it serves to “orient one’s practical reasoning.”¹¹⁸ After his discussion of knowledge Finnis moves on to discuss life, the second objective value. This basic value “signifies every aspect of the vitality which puts a human being in good shape for self-determination.”¹¹⁹ Life, therefore, includes every facet of human existence that enables one to determine their own fate; including issues such as security and health. Finnis next considers the basic values of play (i.e. actions “which have no point beyond the performance itself... [and are] enjoyed for their own sake), aesthetic experience, sociability (friendship) and religion.¹²⁰ All of these, according to Finnis, are necessary for the full flourishing of each individual.¹²¹ The seventh basic good is “practical reasonableness” and refers to the ability to “bring one’s own intelligence to bear effectively... on the problems of choosing one’s actions and lifestyle and shaping one’s own character.”¹²²

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 60.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 62.

¹¹⁸ *Id.* at 63.

¹¹⁹ *Id.* at 86.

¹²⁰ *Id.* at 87–89.

¹²¹ *Id.*

¹²² *Id.* at 88.

In order to sufficiently obtain the basic good of practical reasonableness, one must meet its nine requirements. The first and second require that one form a coherent life plan and recognize the importance of each of the basic seven values, in which one must not arbitrarily prefer one over another.¹²³ Third, Finnis argues that one must demonstrate impartiality amongst persons because “the basic goods are human goods, and can in principle be pursued, realized, and participated in by any human being.”¹²⁴ The fourth and fifth requirements of practical reasonableness are “closely complementary” and require that one has a “certain detachment from all the specific and limited projects which one undertakes,” but, despite this detachment, one must “not abandon them lightly.”¹²⁵ Sixth, one must “bring about good in the world... by actions that are efficient for their purposes.”¹²⁶ Finnis argues that one must not be wasteful in the methods used to achieve such ends and that one’s acts “should be judged... by their fitness for their purpose.”¹²⁷ Finnis’ seventh requirement of practical reasonableness holds that one should not do any action which does nothing but damage any one of the seven basic forms of human good.¹²⁸ Relatedly, one must also foster the common good of one’s community.¹²⁹ Lastly, Finnis holds that one must refrain from acting as one believes one ought not to act. In other words, one must follow one’s conscience.¹³⁰ In order to pursue one’s own good successfully, one must satisfy these requirements. Further, the attempt to satisfy them, leads one to pursue the good of

¹²³ *Id.* at 103–104

¹²⁴ *Id.* at 106.

¹²⁵ *Id.* at 110–111.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 118.

¹²⁹ *Id.* at 125.

¹³⁰ *Id.*

others, or the common good. Consequently, as Finnis points out, the product of these requirements of practical reasonableness is morality.¹³¹

In his work, Finnis takes these basic principles and applies them to issues of justice and law, among others. Justice concerns the requirements of practical reasonableness in one's relationships with others. Justice, Finnis argues, requires that one "foster and favor the common good of one's communities."¹³² The common good of one's community, including the international community, entails establishing the conditions required for the full flourishing of all members of the community. This includes the protection of human rights (or the good of each member individually), an exercise of authority in a way that adheres to the requirements of practical reasonableness, and the need for law to resolve issues with the implementation of justice.¹³³ Justice is, therefore, "other directed, concerns the duty to act according to practical reasonableness and [concerns] equality of proportionality."¹³⁴ According to Finnis, there are two forms of justice, commutative justice and distributive justice. Distributive justice concerns relations between the individual and the community.¹³⁵ It requires that one's "common stock" or natural resources, products from natural resources, and incidents of communal enterprises be appropriated by individuals for the common good.¹³⁶ Commutative justice concerns "relations and dealings between persons."¹³⁷ It deals with duties owed to ascertained and unascertained persons, to governing officials and to governing officials' subjects.¹³⁸

¹³¹ *Id.* at 127.

¹³² *Id.* at 164.

¹³³ *See Id.* at 218, 231–233

¹³⁴ *Id.* at 164.

¹³⁵ *Id.* at 165.

¹³⁶ *Id.* at 166.

¹³⁷ *Id.* at 177.

¹³⁸ *Id.* at 183–185.

Finnis argues that the authority of law depends upon its justice or its ability to secure justice.¹³⁹ However “in this world, as it is, justice may need to be secured by force.”¹⁴⁰ Yet, a system of law is more than a set of prohibitions and punishments, it is “a certain form or quality of communal life, in which the demands of the common good are unambiguously and insistently preferred... [and] each is enabled to conduct his life... with a clear knowledge and foreknowledge of the appropriate common way and of the cost of deviation from it.”¹⁴¹ There is, of course, a need for the recalcitrant “to be given palpable incentive to abide by the law when appeals to the reasonableness of sustaining the common good fail to move.”¹⁴² Certain types of punishment, then, are required to avoid injustice and to maintain common good.¹⁴³ Finnis writes:

“When someone, who really could have chosen otherwise, manifests in action a preference... for his own interests, his own freedom of choice and action, as against the common interests and the legally defined common way-of-action, then in and by that very action he gains a certain sort of advantage over those who have restrained themselves, restricted their pursuit of their own interests in order to abide by the law.”¹⁴⁴

Justice, therefore, requires that such advantage is reversed and punishment is required to avoid injustice.¹⁴⁵ Inadequate or nonexistent punishment of wrongdoers must be avoided, as Finnis points out that “failure to attempt to resist by force the depredations of invaders, pirates, and recalcitrant will normally be a failure in justice.”¹⁴⁶

Finnis argues that justice on occasion necessitates punishment, or the use of force, in order to ensure the common good. Such was the argument used by the US in its decision to invade Iraq. Given its history of brutal crimes against humanity and its persistent failure to

¹³⁹ *Id.* at 260.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 261.

¹⁴² *Id.* at 262.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 263.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 260.

comply with the requirements of multiple Security Council resolutions, the Hussein regime needed what Finnis refers to as “palpable incentive to abide by the law.”¹⁴⁷ Iraq was continuously given the opportunity to choose otherwise, however it continually took advantage of such opportunities and decided not to restrict the pursuit of its own interests in order to abide by international law. Therefore, it seems clear that justice did require that Iraq be punished, due to its violations of stated law. However, what is not so immediately clear is whether the US decision to enforce such punishment was in accordance with Finnis’ theory.

In order to adequately analyze the 2003 invasion of Iraq, according to Finnis’ theory, one must apply his seven universal values to the situation. As mentioned, Finnis’ analysis begins with the knowledge of the truth and moves on into a discussion of life as a universal good.¹⁴⁸ Every actor, whether the actor is an individual or a state, must pursue knowledge and use it to orient its actions.¹⁴⁹ Further, the actor must aim to promote vitality in its actions, both vitality of the actor and the actor’s community.¹⁵⁰ As history has made clear, the US was working with limited knowledge in its decision to invade Iraq. Despite its eventually disproven belief that Iraq had stockpiled WMDs, the US did accurately consider Iraq to be in violation of numerous Security Council resolutions. Given this knowledge, the US was able to offer an explanation for its decision to invade. In other words, it seems as though this knowledge was used to “make intelligible... [a] particular instance of human activity.”¹⁵¹ Therefore, it seems as though the US had fulfilled the first requirement of Finnis’ list of universal values. Further, although there is debate as to the exact reason for the US’s decision to invade Iraq, the US officially based its

¹⁴⁷ *Id.* at 262.

¹⁴⁸ *Id.* at 60, 86.

¹⁴⁹ *Id.* at 61.

¹⁵⁰ *Id.* at 86.

¹⁵¹ *Id.* at 62.

decision to invade on its interest in preserving human life. Though it seems counterintuitive to argue that engaging in combat is necessary to preserve human life, Iraq did have a history of egregious human rights violations and, with this in mind, its posture, displayed through its resistance to UN weapons inspection attempts suggested that it had WMDs. Iraq had used WMDs, namely chemical weapons against the Kurds.¹⁵² Further, it was suspected the Iraq was supplying WMDs to terrorist groups, one of which had successfully attacked the US on September 11.¹⁵³ Even though an ex-post analysis shows that Iraq did not, in fact, possess WMDs, with the knowledge that the US, as well as the rest of the international community, had, it seems reasonable to intervene and ensure the protection of human life, both for those in the Middle East region, in the US, and elsewhere.

While Finnis' analysis of play, aesthetic experience, sociability and religion do not necessarily apply directly to the invasion, practical reasonableness does. In order to determine whether the US fulfilled this requirement, an analysis must be made of its nine sub-parts. Practical reasonableness demands that every actor have a rational life plan rather than "liv[ing] from moment to moment, following immediate cravings," and must also avoid arbitrarily preferring certain values to others.¹⁵⁴ Although this does not neatly apply to the situation in 2003, it does indicate that thought must be put into one's actions in order to ensure that one is following Finnis' fundamental values. It appears as though the US and its allies did put serious thought into the decision to invade. As noted above, debate about the invasion occurred at many levels. This had been a serious issue among the international community for over a decade and

¹⁵² *Mustard Gas*, THE COUNCIL ON FOREIGN RELATIONS, (May 28, 2008) <http://www.cfr.org/iraq/mustard-gas/p9551>.

¹⁵³ Nora Trulock, *Facing the WMD Threat? Finally*, AIM (Aug. 23, 2002) <http://www.aim.org/aim-column/facing-the-wmd-threat-finally/>.

¹⁵⁴ Finnis, *supra* note 109, at 104–105.

had been discussed heavily in the UN.¹⁵⁵ Debate occurred domestically within the government and, within the polis, legal and moral leaders debated its justification. Finally, an official vote was taken, in which both the Senate and House agreed to take action, a decision that the president approved. Given the discussion surrounding this decision, it is clear that the matter was not taken lightly but as a serious measure worthy of substantial deliberation. Consequently it appears as though Finnis' requirements, that one conduct oneself rationally and without arbitrary preferences among the goods, have been met.

Finnis also requires impartiality amongst persons to ensure the common good. Though one will reasonably have a certain sense of self-preference, one must avoid one's selfish desires that are pursued at the cost of others.¹⁵⁶ Every fundamental value is at stake in the resort to arms. The ability to attain each value is lost as one takes another's life or forces them into a warzone. Therefore, when considering whether or not to go to war, one must ensure that one is not arbitrarily giving preference for one's own good over the community's. As stated above, the fulfillment of this standard depends on the US's reason for invasion. And, while many argue that other factors were at play in its decision, one's analysis must be restricted to a justification based on the enforcement of Security Council resolutions, as it is the only official explanation given. An invasion based on economic or other selfish motives would undoubtedly not suffice to fulfill this requirement. However, an invasion based on the need to enforce Security Council resolutions, which were established to protect human life, and potentially one based on preemptive necessity, seems to meet this standard. The US, in invading for this reason, risked its own security in order to protect itself, those in the region, and the wider international

¹⁵⁵ *Powell Steps Up Iraq War Talk*, BBC NEWS (Feb. 6, 2002)
<http://news.bbc.co.uk/2/hi/americas/1805688.stm>.

¹⁵⁶ Finnis, *supra* note 109, at 107.

community. The decision to go to war, in essence, must be analyzed in accordance with the doctrine of double effect. A certain just act may have a secondary effect, that alone would not be morally permissible, so long as it is the byproduct of bringing about a primary act that is itself morally just.¹⁵⁷ The four-fold conditions of double effect require that the action be morally good or indifferent, that the bad effect not be the means by which one achieves the good effect, that the primary intent be to secure the primary good, and that the good effect outweigh the bad.¹⁵⁸ The US's decision to use force had the primary effect of enforcing UN Security Council resolutions and promoting a good in which its own security, as well as the security of those in the region and others internationally, was protected. Though the destruction of life was a byproduct of the decision to invade, it was not the means through which security was ensured. Rather, the primary good of ensuring security was obtained by enforcing UN Security Council resolutions through the removal of the Hussein regime from a place of power within Iraq. Further, the US's primary intent was to ensure security and enforce UN Security Resolutions through regime change, rather than merely the destruction of life or any other wrongfully motivated act. Lastly, the good of acting to secure one's own and many others' security is a good that outweighs the destruction of an enemy that actively endangered them. As Finnis points out, justice requires that the advantage one gains by violating the law be reversed, as one loses their right to certain goods and must be punished due to such a violation.¹⁵⁹ This decision to go to war, then, can be justifiably taken, even though its double effect was that it entailed the slaying of the aggressor (i.e. the Hussein regime), because of good end it primarily promoted. Given the ultimate good

¹⁵⁷ MARK TIMMONS, MORAL THEORY: AN INTRODUCTION, 80 (2003).

¹⁵⁸ *Id.*

¹⁵⁹ Finnis, *supra* note 109, at 263.

pursued in its decision to use force, the US can be considered to have met Finnis' principle as it displayed impartiality amongst persons to ensure the common good.

According to Finnis, a balance must be found in one's endeavors. Practical reasonableness requires detachment, to a certain extent, from one's projects, yet one must not "abandon them lightly."¹⁶⁰ Such an attitude is vital for insurgency campaigns, as the appropriate use of force is required so that one may avoid becoming indefinitely entangled in combat and, conversely, so that one does not take the matter lightly. While the US certainly found itself entangled in the situation in Iraq for an extended period of time in its attempt to stabilize the state, its initial invasion only lasted two months.¹⁶¹ Using state-of-the-art military technology, the US was able to quickly defeat the Hussein regime and complete the primary objective of the invasion. Though the decision to occupy Iraq, after the invasion, and ensure its internal stability requires further analysis, the initial invasion was so brief that it did not necessitate any deliberation as to whether or not the US should abandon the attack. It seems, therefore, that this standard was relatively easily met in the US's 2003 invasion.

Similarly, Finnis demands that one bring about good in the world efficiently and within reason.¹⁶² Certainly, the US invasion met this requirement, as it was able to quickly and effectively conclude its objective successfully. As previously noted, the US used advanced military technology, such as GPS-guided all-weather bombs, infrared technology, and unmanned reconnaissance aircraft, among others, to resolve the conflict quickly and with minimal civilian

¹⁶⁰ *Id.* at 110–111.

¹⁶¹ CNN, *supra* note 25.

¹⁶² *Id.* at 110–111.

casualties.¹⁶³ Such efficiency is further demonstrated when the Iraq campaign is compared to similar campaigns, as demonstrated above.¹⁶⁴

Practical reasonableness, according to Finnis, also requires that one refrain from acting in a way that damages any of the other forms of human good but, instead, fosters the common good.¹⁶⁵ As stated above, every fundamental form of human good is at stake when one goes to war. The attainment and use of knowledge, life, play, aesthetic experience, sociability, religion, and practical reasonableness may be lost in the resort to force. This is, then, a weighty decision and one must ensure that the common good is promoted. In a certain sense, the 2003 invasion was carried out in a way that damaged the good of certain individuals in the Hussein regime. However, Finnis argues that when one, who has been given the choice to do otherwise, consciously chooses to violate the law, one is no longer entitled to certain goods and punishment is required to avoid injustice.¹⁶⁶ The US, in its invasion of Iraq, worked toward the common good of the international community in its punishment of a known recalcitrant. Not only had the Hussein regime consistently failed to fulfill its obligations under international law, it also committed abominable violations of human rights by using chemical weapons against its own population.¹⁶⁷

Finally, Finnis argues that practical reasonableness demands that one follow one's conscience.¹⁶⁸ Again, if the invasion was motivated by economic or other selfish motives, the US may have not met this standard as Finnis envisages it. However, according to the official position taken, it does seem as though the US was following its collective conscience. Given the

¹⁶³ Kahl, *supra* note 29, at 14.

¹⁶⁴ See Leland & Oborocea, *supra* note 27; Kahl *supra* note 29, at 7–46.

¹⁶⁵ Finnis, *supra* note 109, at 118–125.

¹⁶⁶ *Id.* at 160.

¹⁶⁷ Yoo, *supra* note 49.

¹⁶⁸ Finnis, *supra* note 109, at 125.

widespread support of the polis before and even during the invasion, it appears as though this element is satisfied. While the fact that an even greater majority supported the invasion, had the US received explicit authorization by the UN, a majority supported the invasion without it.¹⁶⁹ Further, the decision was voted on and approved by the Senate, the House, and the President. This indicates that Americans generally believed that the invasion was the right course of action, given the Hussein regime's past action. Thus, in its invasion, it appears as though the US was acting in accordance with its collective conscience and, therefore, can be considered to have fulfilled the last requirement of practical reasonableness.

Justice required that Iraq be punished, as it had violated international law, in its failure to comply with multiple Security Council resolutions and in its abuse of human rights. A failure to use force and punish the regime would have resulted in injustice and a breakdown of international law. The US, however, fulfilled a duty required under commutative justice in its decision to invade Iraq. Not only was Iraq in need of a "palpable incentive to abide by the law," but the US also met the standards necessary in order for the invasion to be considered just under Finnis' theory of the good. The invasion met each applicable universal good, as well as the standards required for it sufficient in terms of Finnis' conception of practical reasonableness. Considering the fact that justice required that Iraq be punished and that the US acted in accordance with the Finnis' universal values, it appears as though the invasion would have been acceptable under the framework of Finnis' theory of practical reasonableness.

¹⁶⁹ GALLUP/CNN/USA TODAY, *supra* note 73; Tyler & Elder, *supra* note 75; Keeter, *supra* note 76; CNN/ORC, *supra* note 77.

VII. CONCLUSION

As has been shown, controversy surrounds the US's decision to invade Iraq in 2003. Despite a general consensus at the outset of the invasion and despite the fact that it was generally agreed that Iraq had, on multiple occasions, severely violated international law, debates raged among legal and moral scholars. Even the application of a moral framework based on the just war theory has yielded diverse opinions on the US's justification for action. However, as has been demonstrated, the US invasion was justifiable under Finnis' theory of practicable reasonableness, as found in *Natural Law and Natural Rights*. A formal analysis based on the application of Finnis' universal values and his conception of justice indicates that the US was justified in its decision to invade. Though it will clearly not end the debate surrounding the invasion, Finnis' theory provides a useful framework for analysis and shows that the US decision to invade Iraq in 2003 was a use of force necessary to ensure the continuation of justice in the international community.