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## Preemption, Prevention, and Jus Ad Bellum

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**PREEMPTION, PREVENTION, AND *JUS AD BELLUM***

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## PREEMPTION, PREVENTION, AND *JUS AD BELLUM*

### Abstract

In *The National Security Strategy of the United States of America*, released one year after the 9/11 attacks, the Bush administration asserted that “we must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.” The administration’s reconceptualization has triggered an intense debate within academic and policymaking circles about the legal and ethical distinction (if any) between anticipatory and precautionary self-defense, and thus preemptive and preventive warfare. We begin by examining the present status on international law on the question of anticipatory self-defense. We then consider how the formative texts on international law—especially the writings of Gentili, Suarez, Grotius, Pufendorf, and Vattel—might inform the current debate, and ask if contemporary legal distinctions can be sustained in light of the *jus ad bellum* principles put forward by early thinkers in the just war tradition. Our aim is to ascertain whether a review of the classic literature supports a revision of current international law and, if so, the extent to which such a revision might be compatible with the Bush administration’s doctrine of preemption.

## PREEMPTION, PREVENTION, AND *JUS AD BELLUM*

The so-called “Bush Doctrine” asserts the right of the United States to act militarily whenever and wherever necessary to prevent future violent attacks upon the United States and its citizens.

The doctrine, if such it be, has been roundly criticized for asserting a national right of self-defense on behalf of the U.S. that is in flagrant violation of the international law of warfare.<sup>1</sup>

Implicit in the charge of international illegality is the presumption that international law prohibits the use of military force by states unless (among other things) such use is necessary to preempt a violent attack by an aggressor state.<sup>2</sup>

But as we shall see momentarily, international law is hardly as clear on this matter as it might be, and as critics of the Bush Doctrine have supposed it to be. The ambivalence of international law on this point, or perhaps it is better to say the confusion that surrounds this point, obscures any clear or straightforward distinction between legitimate preemptive military action by states and illegal military action undertaken in order to prevent states from posing a serious military threat to the state electing to undertake hostilities in the name of its own self-defense. This ambivalence, or confusion if one prefers, invites theoretical inquiry in order to see if a defensible line between legitimate preemption and illegal preventive war can be drawn more clearly.<sup>3</sup> It is, however, not our intention here to attempt to achieve such clarity or to recommend a particular line of demarcation between legitimate preemption and unjustified preventive action. Instead, we intend to explore the thoughts of some of the major architects of the just war tradition to see if it is possible to discern there some governing principle that might aid the process of demarcation.

It is not possible, of course, to survey here all the historical thinkers whose work touched

on questions about the legitimate use of military force in the name of self-defense, and there must remain something arbitrary about the list of characters we have elected to consider. In defense of our list, however, the thinkers discussed below represent the major voices in the just war tradition who took up the question of the proper limits of preventive military action. We do not wish to suggest either that just war theory is consonant with the international law of war, or that a definitive view on the matter of legitimate prevention stemming from just war theory (assuming that such a view is lurking in the works of just war theorists) will put an end to the ambivalence of the international law of war on the subject at hand.

Our objective here is considerably less ambitious; we want to ask only if there are some clear principles or insights evident in the classic just war tradition that might help shed light on how best to distinguish between legally permissible preemption and legally suspicious prevention. Toward this end, we shall first develop the ambiguity that haunts the contemporary international law of war on the subject of justified preventive military action and then turn to a review of the primary architects of modern international law to see what they have to say on the subject. The list of thinkers we shall explore includes Gentili, Suarez, Grotius, Pufendorf, and Vattel. Others (e.g., Selden, Bynkershoek, and Wolff) have been omitted either because they had little to say on the subject or because they merely repeated themes explored in greater detail by the writers considered.

### **IMMINENT ATTACK AND IMMINENT THREAT**

There are two dimensions to the Bush Doctrine. The first, which is the main focus of our analysis, holds that the United States reserves the right to preempt threats to its national security using any amount of military force it deems necessary. The second dimension states that, in the

war on terrorism, the United States will target both terrorists and those states that assist and harbor them. The two dimensions are linked because the Bush administration has determined that preventing terrorist attacks may require striking state sponsors; terrorists themselves often can escape detection, and therefore preemption, while the states that host or arm them cannot.<sup>4</sup>

The preemption component of the Bush administration's doctrine has occasioned a heated debate within legal, academic, and policymaking circles. The most authoritative statement of the administration's position is presented in the *National Security Strategy of the United States of America* (NSS), released in September 2002, one year after the 9/11 attacks. As the NSS points out, "[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."<sup>5</sup> The subject of considerable dispute in the contemporary debate is: what constitutes "an imminent danger of attack"? Informed positions on this question range along a spectrum, both ends of which are identified in the NSS itself. "Legal scholars and international jurists often conditioned the legitimacy of preemption on... a visible mobilization of armies, navies, and air forces preparing to attack." This is the more restrictive end. The NSS, however, makes a case for locating U.S. policy at the more permissive end. Acute threats to national security arising in an age of global terrorism and the proliferation of weapons of mass destruction obviate a policy of inaction. Faced with such threats, the United States shall take the necessary anticipatory action to defend itself, "even if uncertainty remains as to the time and place of the enemy's attack."<sup>6</sup> Although critics of the Bush Doctrine assert that this position violates international standards for anticipatory self-defense, international law is, unfortunately, saddled with ambiguities on this very issue.

Before examining these, we ought to step back, briefly, and address the logically prior

question of whether anticipatory self-defense of any sort is sanctioned under international law, for there are those who believe it is not. The United Nations Charter, in Chapter VII, empowers the UN Security Council to identify not only acts of aggression, but also “threats to the peace,” and to undertake military action in order to maintain international peace and stability. While Article 51 reaffirms the state’s “inherent right” to self-defense, this right seems limited to instances in which an “armed attack occurs,” and only then until such time as the Security Council has made a final determination on the appropriate response. Thus, some interpret Charter law as withdrawing the customary right of anticipatory self-defense from individual states and vesting the Security Council alone with the right of preemption.<sup>7</sup>

It appears that most international legal scholars and jurists reject such an interpretation. Justice Stephen Schwebel, for instance, in his dissent from the majority opinion of the International Court of Justice in *Nicaragua v. United States*, disagreed with those who would read Article 51 as saying that states have the “inherent right of individual or collective self-defense if, *and only if*, an armed attack occurs.”<sup>8</sup> (The majority did not adopt the contrary view; it simply declined to take up the question of anticipatory self-defense since neither party made it an issue in the case.) Others believe that Charter law is perfectly compatible with customary law because an “armed attack” does not commence with the firing of the first shot; it begins before that, with the mobilization of forces for the purpose of attack. Preemptive (that is, “interceptive”) strikes by states are permitted because the armed attack is in fact underway.<sup>9</sup> Still others characterize Article 51 as an “inept piece of draftsmanship.” McDougal and Feliciano contend that the article’s main purpose, considering the *travaux préparatoires*, was to preserve the ability of regional security organizations to take action when the Security Council was immobilized by one or more of its veto-wielding members.<sup>10</sup> Its purpose was not to strip states of their customary

right of anticipatory self-defense.

We concur with the view that states retain the right of anticipatory self-defense, and we need not take a position on questions of legal consistency raised by Article 51 in order to proceed with our analysis. Virtually all contemporary discussion of preemption starts by recognizing that the use of force in anticipatory self-defense is lawful under certain circumstances. How dire must those circumstances be? The restrictive end of the spectrum of views is anchored by the so-called “Caroline standard.” The British attack on the steamship *Caroline*, which was ferrying Canadian rebels and supplies from the New York side to the Canadian side of the Niagara River, was really a case of extra-territorial law enforcement. Nevertheless, what U.S. Secretary of State Daniel Webster wrote in 1841, nearly four years after the incident, became an international legal standard for anticipatory self-defense. In a letter to Henry Fox, the British minister in Washington, Webster disputed the notion that the attack “can be justified by any reasonable application or construction of the right of self-defense under the law of nations... [for] nothing less than clear and absolute necessity can afford ground of justification.” What the British could not show in this case was “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>11</sup>

Webster’s formulation has been cited often in diplomatic forums, especially by those wanting to dispute the legitimacy of another state’s claim of self-defense, as Webster himself had done. At Nuremberg, German defendants justified the invasion of Norway as an act of self-defense designed to forestall an Allied invasion preparatory to an attack on German positions. The military tribunal rejected this justification: “It must be remembered that preventive action in foreign territory is justified only in case of ‘instant and overwhelming necessity for self-defense leaving no choice of means, and no moment of deliberation’... [W]hen the plans for an attack on

Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date.”<sup>12</sup>

The Tokyo tribunal had to consider whether Japan was truly the aggressor when it attacked the Netherlands East Indies only after the Netherlands had declared war on 8 December 1941. But in the tribunal’s judgment, “[t]he fact that the Netherlands, being fully apprised of the imminence of the attack, in self defense declared war against Japan... cannot change that war from a war of aggression on the part of Japan into something other than that.”<sup>13</sup>

Thus, both tribunals seem to have interpreted Webster’s “instant” and “overwhelming” necessity to mean an armed attack, which if not preempted, would be instant and overwhelming, or nearly so. Similar interpretations were offered during the Security Council debate following Israel’s bombardment of the Iraqi nuclear reactor at Osirak in 1981. Israel’s representative, Yehuda Blum, asserted that “[i]n destroying Osirak, Israel performed an elementary act of self-preservation, both morally and legally. In doing so, Israel was exercising its inherent right of self-defense as understood in general international law and as preserved in Article 51 of the Charter of the United Nations.” Israel faced “the stark prospect that within a very short period of time Osirak would become critical.”<sup>14</sup> Yet Israel’s right to preemptively eliminate Iraq’s nuclear weapons capability in this way was disputed by several delegates. Uganda’s representative wondered how an Israeli air raid, planned and rehearsed for many months, could have met the requirements of self-defense “well established since the famous North American case of *The Caroline* in 1837.”<sup>15</sup> Israel was not exercising self-defense, but rather aggression, said the representative of Niger, because it “was in no way facing an imminent attack, irrefutably proved and demonstrated.”<sup>16</sup> Sierra Leone’s delegate concurred: “the plea of self-defense is untenable where no armed attack has taken place or is imminent.”<sup>17</sup> And the Irish representative noted that

the premise behind Israel's claim went well beyond the right to preempt an imminent attack, for "[i]t would replace the basic principle of the Charter... by a virtually unlimited concept of self-defense against all possible future dangers, subjectively assessed."<sup>18</sup>

The preemptive strike that began the Six Day War in 1967 came closer to meeting this "imminent attack" standard. In addressing the Security Council, Israeli Foreign Minister Abba Eban listed the signs that an Arab attack on Israel was coming: "the sabotage movement; the blockade of the port; and, perhaps more imminent than anything else, this vast and purposeful encirclement movement, against the background of an authorized presidential statement [by Nasser] announcing that the objective of the encirclement was to bring about the destruction and annihilation of a sovereign state."<sup>19</sup> Although there was considerable criticism of Israel at the time—though no formal Security Council condemnation—current discussions of anticipatory self-defense often cite the Israeli action as a case of legitimate preemption consistent with Webster's formulation. It is, however, one of few instances that commentators are inclined to mention with any degree of approval.

What many find worrisome about the Bush Doctrine is that it relaxes substantially Webster's requirements for anticipatory self-defense. The United States will preempt not only imminent threats, but also "sufficient threats" and "emerging threats." This is to move away from the restrictive end of the spectrum in the direction of permitting preventive or precautionary military action.<sup>20</sup> If it is noticed that a state is actually preparing to attack another, then it is safe to infer that there is an intention to attack, even if this intention has not been specifically stated. Preventive or precautionary strikes, however, are normally understood to fall outside the Caroline standard. These strikes target states that are not yet in a position to launch a military attack, and may not even have stated an intention to do so. It may be possible to infer an

intention to attack at some future point in time when those capabilities have been fully realized, but this inference is subject to substantially more uncertainty. International law places a premium on international peace and stability and thus far states have not wanted to legally sanction a practice which so clearly undermines that purpose. The Bush administration's view is different and rests on a risk assessment forged by the experience of 9/11. For those upholding the "imminent attack" standard for anticipatory self-defense, the risk of aggression, when unchecked by preemptive action, is acceptable in order to shore up a norm promoting the nonuse of force. For the Bush administration, however, the risk is far too high.

The administration argues that the country faces a "new threat," one that requires an adaptation of the customary standards for anticipatory self-defense. The threat is new, first, in terms of its magnitude. "As was demonstrated by the losses on September 11, 2001, mass civilian casualties... would be exponentially more severe if terrorists acquired and used weapons of mass destruction." Second, these weapons "can be easily concealed, delivered covertly, and used without warning."<sup>21</sup> Taken together, the two dimensions of this new threat render ineffective a policy that would preempt an attack only once it becomes visibly imminent. The threatened attack may remain invisible until it has actually been launched, at which point it would be too late to avert mass destruction.

There are no good historical parallels to the situation as described by the Bush administration—the threat is *new*, after all—but the Cuban Missile Crisis is instructive. During the crisis, the United States defended its use of a quarantine around Cuba as a collective security action sanctioned by the Organization of American States. Other members of the Security Council preferred to see it as a blockade, which is considered an act of war, and went on to ask whether the blockade was a justifiable act of self-defense. The representative of Ghana doubted

there was, “in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, ‘a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation’?” What was missing, in his view, was “incontrovertible proof... as to the offensive character of military developments in Cuba.”<sup>22</sup> By “offensive character of military developments,” the Ghanaian delegate may have meant active preparations for an attack on U.S. territory. But it is likely that what he really meant was something less daunting: the deployment of nuclear missiles with offensive *capability*. Would incontrovertible proof of the latter have been sufficient to show necessity of self-defense? This capability, if it materialized, would have introduced a threat of mass destruction, which could be delivered without warning. If the decision was made to launch such an attack and the attack became imminent, preemption would no longer be possible.

Of course, at the time of the Cuban Missile Crisis, there were many who believed that the Kennedy administration had embarked on a reckless course of action, regardless of the character of military developments in Cuba. Khrushchev was not suicidal, and probably neither was Castro, so it stood to reason that they had no intention of ever using nuclear missiles against the United States. Why push the crisis to the nuclear brink when the United States had the ability to deter an attack by holding the Soviet and Cuban populations hostage to a devastating retaliatory strike? Whether or not the Kennedy administration could have handled the Cuban Missile Crisis differently, the Bush Doctrine rests partly on the premise that “[t]raditional concepts of deterrence will not work against a terrorist enemy... whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness.”<sup>23</sup>

If deterrence won’t work to check the new threat, and if preemption is not an option once an attack is imminent, then anticipatory self-defense cannot be exercised except at an earlier

point in time when the threat is visible and stoppable, and at a place where it is visible and stoppable. At this point and in this place, the threat is imminent, even if the attack is not. Here, following Webster, the necessity of self-defense is “instant” and “overwhelming”; preemptive military action is indeed the only available option (“no choice of means”), and it will not remain an option for much longer (“no moment for deliberation”). As Walter Slocombe puts it: “The right of anticipatory self-defense by definition presupposes a right to act while action is still possible. If waiting for ‘imminence’ means waiting until it is no longer possible to act effectively, the victim is left no alternative to suffering the first blow. So interpreted, the ‘right’ would be illusory.”<sup>24</sup>

The logic of this argument is compelling. But critics of the Bush Doctrine have reason for skepticism. Although the Bush administration justified the 2003 Iraq War as an enforcement of previous Security Council resolutions, it also emphasized that Saddam Hussein’s regime had (or was developing) WMD. Even if an Iraqi attack against U.S. interests was unlikely, the regime was willing to provide them to terrorist groups like al Qaeda, whose intent and capacity to strike the United States had already been demonstrated. Thus, Iraq seemed to be the first application of the Bush Doctrine of preemption. Nevertheless, a large portion of the international community, and a majority within the Security Council, did not believe that Iraq constituted a sufficient threat to the United States, or any other state. The information that came to light after the fall of the Ba’ath regime, especially regarding the absence of WMD programs, reinforced that view and further eroded the administration’s credibility as a standard bearer for a revised conception of anticipatory self-defense.

Critics also see in the Bush Doctrine an attempt to provide a contemporary rationale for waging preventive or precautionary war, which even the most permissive reading of customary

international law disallows.<sup>25</sup> In the classic balance of power system, preventive wars were sometimes fought to head off disadvantageous power shifts among the major European states. This was Britain's motivation (*vis-à-vis* France) during the War of the Spanish Succession and Germany's motivation (*vis-à-vis* Russia) at the outset of World War I. Preventive war, Michael Walzer notes, presupposes a danger that "does not exist, as it were, on the ground; it has nothing to do with the immediate security of boundaries.... War is justified (as in Hobbes' philosophy) by fear alone and not by anything other states actually do or any signs they give of their malign intentions. Prudent rulers assume malign intentions."<sup>26</sup> As we will show in the next section, it is not difficult to see why leading thinkers of the modern just war tradition, who sought to promote a normative order supportive of international peace and stability, would want to discredit such state practice. However, it is our contention that, despite certain similarities, the Bush Doctrine really does not amount to an assertion of the right to wage preventive war as understood here. While the doctrine may relax the customary standards for lawful preemption, the imminence of the threat (though not necessarily the attack) is what justifies military action as anticipatory self-defense. Historically, preventive wars have lacked this urgency. At the same time, when just war thinkers contemplated the conditions under which preventive action might be justified, they were inclined to introduce a notion of imminent threat not unlike the reconceptualization underpinning the Bush Doctrine of preemption.<sup>27</sup>

Mark Drumbl suggests that the international community seems receptive to the idea that the traditional criteria for anticipatory self-defense need updating. "There is more going on here than the United States going its own way through the aspirations of one particular administration. For a variety of reasons, many states in diverse parts of the world support a more liberal use of violence to curb terrorists and mitigate the risk that rogue states may assist them."<sup>28</sup> The danger

here, as illustrated by the Iraq War, is that an assessment of “the nature and motivations of these new adversaries,” as the NSS puts it, and not just their active preparation to attack, becomes the smoking gun, a subjective criterion that is obviously open to abuse.<sup>29</sup> Little in just war doctrine or international law provides guidance for establishing evil intent, or the aiding and abetting of those with evil intent, aside from visible actions. The Bush Doctrine, while framed as a plea to adapt international law to more effectively deal with today’s threats, also introduces ambiguity into the legal standards for the use of force in self-defense. “[T]he United States seeks first to secure a preexisting claim,” writes Michael Byers, “and then to stretch the resulting rule so as to render it highly ambiguous—thus enabling power and influence to determine where and when the rule applies.”<sup>30</sup> In this arena, the preferences of the United States are more likely to prevail.

### **PREVENTIVE WARFARE AND THE JUST WAR TRADITION**

We turn now to the question of whether preventive warfare is considered permissible according to the modern just war tradition. We do so not because just war thinking on the subject should be considered dispositive of the issue, but rather merely for guidance. The thinkers of the modern just war tradition sought to bring the relations of states under the guidance of moral reasoning, or in the vernacular of the early modern natural law tradition, to demonstrate how the law of nations (*jus gentium*) can be derived from the law of nature (*jus naturae*). So, if one wants to search for moral guidance in thinking about the moral legitimacy of preventive military action in the face of imminent threat, it seems reasonable to begin with a survey of modern natural law thinking.

Before turning to the arguments of the thinkers we intend to discuss, however, it is best to begin with a qualification and a disclaimer. The qualification involves emphasizing that our review of the arguments surveyed is necessarily restricted to the comments that the historical

thinkers in question advanced with regard to preventive warfare. The justness of military interventions in the affairs of another state for the purpose interdicting an ongoing injustice (the right of intervention) or for the purpose of punishing the targeted state (punitive warfare) shall not be discussed.<sup>31</sup> Instead, we will limit the discussion to the question of why and when the thinkers discussed held warfare to be permissible in order to avoid or preempt military attack by a hostile state. We should note also that we will not concern ourselves here with the problem of proportionality, although this often served as a qualification upon the right of preventive military action. There is some sympathy, for example, in both Pufendorf and Vattel for holding that preventive warfare is not justified if the moral cost of such an action would be significantly greater than the threatened attack to be anticipated from a hostile state. Considerations of proportionality impose qualifications upon the right of preventive warfare, but they do not address the justification of this warfare as such. Consequently, we shall not explore this tangent.

Our disclaimer has to do with the significant differences between the status of international law, and the nature of the international arena more general, from the seventeenth and eighteenth centuries to the present. International law was in its infancy when the thinkers of the modern natural law tradition discussed the moral relations of states with regard to the right of warfare, and the states of the period were arguably more dependent upon their own devices and resources for their national defense. Today, the presence of the UN and the existence of multilateral defense treaties complicate the legal landscape and reconfigure the nature of the political environment that characterizes the international arena. We shall assume, but assume only, that all this legal machinery has but a modest material impact on the underlying moral question of the right of a state to act militarily in the name of its own national defense. Particularly in light of the ambiguity and confusion that surrounds the current status of

international law on the right of anticipatory military action in the name of national self-defense, it makes some sense to look for moral guidance on exactly what the international law regarding preventive or preemptive state action should be. And it is just here that we intend to look for guidance from the pertinent thinkers of the modern just war tradition.

Nonetheless, it could be objected at the outset that classical thinking on the subject is rather antiquated because of the more bellicose tendencies of the thinkers of the modern natural law tradition. Following Richard Tuck, for example, one might be inclined to think that the architects of early international law tended to envision states as existing in a rather hostile, if not entirely Hobbesian, state of nature in which national self-defense was the sole responsibility of discrete states.<sup>32</sup> This less than sociable conception may have inclined thinkers, ranging from Gentili through, say, Kant, to exaggerate the rightful use of war in the name of self-defense. If one supposes that this conception of the international environment is no longer appropriate for an exploration of the proper character of the international law of warfare, then looking to the past for guidance on these matters may simply constitute a historical blunder.

This is not the place, however, to consider either Tuck's account of the general conceptualization of the international setting on display in the seventeenth and eighteenth centuries or its relation to more contemporary conceptualizations of this setting. It may be that a review of the thoughts on preventive warfare in evidence in the modern natural law tradition will demonstrate the irrelevancy of these views for modern times, but it is hardly possible to make this call until the review has been completed. And as we shall see, there is some reason to suppose that the views the thinkers to be considered held with regard to preventive warfare do not square well with Tuck's overall conclusions about the dominant attitudes toward warfare on display in the early modern period.

So much for the preliminaries; we turn now to the works of those thinkers who commented prominently on the right of states to practice preventive warfare. The classic view of a just war, which lies at the heart of *jus ad bellum* thinking, is simply that warfare is legitimate only to redress harm. In the absence of some injury, warfare is never justified. As Vitoria emphasizes, “we may not use the sword against those who have not harmed us; to kill the innocent is prohibited by natural law.”<sup>33</sup> This seemingly straightforward statement of classic just war thinking contains an important ambiguity that Vitoria unfortunately did not elaborate upon. Is someone innocent of wrongdoing up to the point where harm has actually been done? Or is the intention to do harm, or the preparation to do harm, sufficient to defeat innocence and/or sufficient to demonstrate harm for the purpose of raising the sword? Put more prosaically, must one wait for the harm to be inflicted before one can take defensive measures? If one waits, the right of self-defense is practically defeated, and war would qualify as just only as an act of retribution. By then, of course, it may be too late. Self-defense is ordinarily understood to be authorized in order to prevent or forestall harm. Once attacked—and hence harmed—defensive war is clearly justified under Vitoria’s view, but it is a cramped notion of self-defense that holds that the attack must actually take place before a defensive military response is justified.

On the other hand, the unjust causes of warfare typically identified under *jus ad bellum* thinking are rather more straightforward. Vitoria, for example, identifies three such unjust causes of war: religion, enlargement of empire, and the glory and convenience of the prince.<sup>34</sup> The second and third of these unjust reasons for war are altogether common, and Vitoria includes the first (viz., that warfare is not justified to promote religion) largely as a consequence of his concerns about the Spanish treatment of indigenous peoples in America. If such wars are unjust, it would seem to follow that warfare designed or intended to defeat or forestall unjust military

action should qualify as just. Again, however, one wants to know precisely when offensive military action designed to block the unjust designs of a hostile nation would be in order. If it was common to find that preparation for warfare was prelude to warfare, the preparation itself may be taken as an indication that a state (or its sovereign) had hostile designs; thus background information about preparation may justify appropriate offensive action in the name of national self-defense.<sup>35</sup> As we shall see, common practice, along with the general conception of common practice, are important variables in thinking about the justness of offensive military action undertaken in the name of national self-defense.

The lacuna in Vitoria's account of just war hardly escaped the notice of Alberico Gentili, whose works constitute a major contribution to the development of early modern thinking on the law of nations. Writing nearly fifty years after Vitoria, Gentili plugged the hole in Vitoria's account of a just war by arguing that war is just if the aim is good.<sup>36</sup> This meant that offensive wars (wars initiated by military action) could be waged justly if they had a defensive aspect, i.e., if they were undertaken to block a feared attack.<sup>37</sup> Prudence dictates, according to Gentili, that expedience is an appropriate ground upon which to base national defense. "We ought not," he insists, "wait for violence to be offered us, if it is safer to meet it halfway,"<sup>38</sup> Similarly, "No one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool."<sup>39</sup> In the traditional fashion of his day, Gentili lists numerous authors in defense of his view (e.g., Baldus, Cicero, Livy, Demonsthenes, etc.) and in order to demonstrate that the weight of wisdom is on his side. It is instructive to note, however, that the authorities invoked to defend Gentili's case wrote at a time when attitudes toward warfare were quite different, and considerably more permissive, than one finds in the just war tradition even of Gentili's own day.<sup>40</sup>

Still, Gentili remained mindful of his own insistence that offensive wars, to be just,

needed to have some defensive element. Expediency may counsel taking up arms, but if an offensive war was to qualify as just, Gentili understood that the fear that inspired military action had to have some basis in fact. There must be, he insisted, a just cause for the fear; mere suspicion alone was not enough to justify warfare.<sup>41</sup> And he directly engaged the question about what would constitute a just cause for fear. Importantly, although perhaps unhappily, he concluded that there can be no general rule to control this problem. Instead, he again repeated the concerns of prudence, insisting that “we should oppose powerful and ambitious chiefs.”<sup>42</sup> In a statement that looks like a recipe for eternal warfare, he contended that “it is better to provide that men should not acquire too great power, than to be obliged to seek a remedy later, when they have already become too powerful.” And quoting Baldus favorably, he endorsed the idea that “one should provide against not only what is harmful but against what may be harmful.”<sup>43</sup> And by way of conclusion, he summarized the justness of preventive military action by stating, “a defence is just which anticipates dangers that are already mediated and prepared, and also those which are not mediated, but are probable and possible.”<sup>44</sup>

Needless to say, this capacious defense of preventive warfare does little to qualify or restrain military action driven by fear. Fear would hardly be forthcoming if states were not expanding in wealth and military ability; consequently state development in these ways would naturally generate a fear in neighboring states that would justify military action on Gentili’s view. It is worth emphasizing, however, that Gentili greatly feared the emergence of Spain as a dominant state expanding beyond the other states of Europe both in wealth and military capability. His strong stand on preventive warfare thus seemed motivated by his own fear of Spanish domination of Europe, a condition he thought to be both possible and tragic. This fear inclined him to advocate a balance of power system in which the remaining European states form

alliances that would deter Spanish aggression.

Yet it is relatively easy to see that Gentili's defense of preventive warfare is little more than a prelude to ongoing military struggle in an atmosphere where the cultivation of military capability is accompanied by the concurrent belief that states expand their power only in order to use it for reasons of national aggrandizement. In the event Spain noticed that the other states of Europe were expanding their power and position vis-à-vis Spain by means of military alliance and military build-up, Gentili's own logic would justify Spanish action in the name of her own self-defense. Gentili's position, in short, does little to place significant moral or legal restraints upon a state's decision to resort to war, even with the qualification that states ought to seek a balance of power. If one turns to moral insight to inform an international legal arrangement intended to mitigate the likelihood of armed conflict, one will consequently find little solace in Gentili. Instead, one finds a rather nervous defense of military action driven by the bellicose conviction that a state surrounded by perceived enemies had best get them before they get it. Where such a conviction exists, it is difficult to think that reliance on the international rule of law for the control of military aggression will have much chance of success.

If one supposes that just war theory was driven by a desire to circumscribe and limit the scourge of war, it would seem that Gentili's view about preventive war should have become a target of criticism for those just war thinkers that followed him. Yet there is curiously little opposition to Gentili's view forthcoming in the seventeenth century. Perhaps surprisingly, the notable Spanish jurist Francisco Suarez is largely silent on the issue of preventive warfare. In his disputation, "On War," he endorsed the standard just war belief that a just war requires a just cause, thus rejecting the "old error current among the Gentiles" that war is a legitimate method for states or princes to "acquire prestige and wealth."<sup>45</sup> And he intimated that war is justified to

“ward off acts of injustice and to hold enemies in check.”<sup>46</sup> But he did not elaborate beyond this. He was, however, most sensitive to the horrors of war and argued aggressively, and in good Christian fashion, that war should be limited to the redress of injustice. But he failed to elaborate upon the question of when and under what circumstances preventive warfare would be justified.

This problem did not escape the attention of the renowned Dutch jurist Hugo Grotius, however. In his appropriately famous, *On the Law of War and Peace*, Grotius maintains a strict analogy between warfare between individuals in a non-civil state, i.e., a natural condition governed only by natural law, and warfare between states, which, by extension of the analogy, we can suppose exist in a natural condition governed only by natural law.<sup>47</sup> Grotius regarded the right of self-defense to be the first cause of a just war, for one has a right to defend against “an injury not yet inflicted, which menaces either person or property.”<sup>48</sup> But the danger to be prevented, he insisted, “must be immediate and imminent in point of time.”<sup>49</sup> By this he seems to have meant that there is no alternative response to an impending attack other than preemptive action. And he argued that “those who accept fear of any sort as justifying an anticipatory slaying are themselves greatly deceived and deceive others.”<sup>50</sup>

Here it is worth quoting Grotius at length, for he felt the need to draw the line between legitimate defense and unjustified aggression with precision:

[I]f a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambush, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay

that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences;... There are, it is true, theologians and jurists who would extend their indulgence somewhat further; but the opinion stated, which is better and safer, does not lack the support of authorities.<sup>51</sup>

Nor does Grotius leave little doubt but that this view of warfare is intended to apply to war between states as well as to the right of individual self-defense. With Gentili quite obviously in mind, he says, “Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger.... [T]hat the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.”<sup>52</sup>

These remarks anticipate the “imminent attack” view of justified preemptive strikes in contemporary international law. Not only is fear dismissed as a legitimate ground for preventive military action, Grotius also seems committed to the view that the use of military force should be considered a last resort justifiable only when faced with “immediate and imminent *in point of time*” (our italics) attack. If the temporal imminence condition is not satisfied, there are always alternative methods that can be employed to forestall attack. If the logic of Grotius’s position characterized state practice, a balance of power system would begin to be effective since states would not read a threat of attack into military expansion. There is then room for deterrence, negotiation, third party arbitration, and the like to work in the direction of forestalling actual aggression. Thus liberated from Gentili’s nervousness, states would not be inclined to regard wealth and military strength alone as threats to their security.

Although Tuck wants to move Grotius closer to a more Hobbesian conception of the international arena, where states rely upon their own military strength to defend themselves in a

hostile and uncertain setting, the Grotian stand on preventive warfare suggests that Grotius wanted to alter significantly the culture of warfare that existed in his day.<sup>53</sup> A construction of just war theory that reduced justifiable preventive warfare to a response to imminent attack would mitigate the problem of fear among law-abiding states and set the stage for more amicable interstate relations. But of course, the culture of warfare can be changed only if all states that might be otherwise viewed as hostile presences actually endorsed the Grotian view, and this gives rise to the obvious and familiar problem of trust. While Grotius may well have been right to insist that his view was “better and safer” than Gentili’s nervousness, at least from a moral point of view, the problem is to get other states to accept the point. For as independent actors existing in a condition of anarchy, and where the stakes of national security are high, it would seem to be better and safer, prudentially speaking, to practice preventive warfare. If the stakes are suitably high, it seems a cautious prudence would encourage states to shoot first and ask questions later.

So it might seem that Grotius leaves us with a quandary; the right thing to do—the right thing, that is, from the standpoint of a natural law that services the amicable relations of generally law-abiding states that recognize Suarez’s “error of the Gentiles”—doesn’t appear to square with the prudent thing to do under circumstances of distrust and uncertainty. It might seem, however, that the Grotian insight would be identified and endorsed by the natural law thinkers to follow him. Perhaps ironically, however, this was not to be the case; for the influential Saxon thinker, Samuel Pufendorf, took up the issue of preventive warfare in order to qualify the Grotian view.

While generally endorsing the Grotian understanding of the just causes of war, Pufendorf took slight exception to Grotius’s view of the unjust causes of warfare. In rather non-committal fashion, he claimed that Grotius’s belief that fear is not a just cause of war had “some

plausibility, though a rather slight one.”<sup>54</sup> Fear, Pufendorf conceded, does not constitute a just cause of warfare “unless we determine with a morally evident certitude that there is an intention to hurt us.”<sup>55</sup> Pufendorf believed that the intention to hurt was sufficient to demonstrate an “incipient injury” that could *sometimes* “be vindicated by war.” This way of putting the matter is of some importance, for Pufendorf does not suppose that acting from what might be considered a justified fear of one’s neighbor was rightly characterized as a defensive war, or as a war justified on the grounds of self-defense. Rather, Pufendorf conceptualizes such warfare as justified in order to redress an injury, albeit an incipient one.

This is, to be sure, an irritatingly vague and uncertain treatment of the question of preventive warfare—a vagueness that is also rather uncharacteristic of Pufendorf. Some help in fathoming Pufendorf’s position can be gained from his insistence that the obligation of states under the natural law to preserve the peace is mutual, and therefore any action that violates this obligation can be considered an act of offensive war. While merely building military strength is not itself an indication of preparation for war, it can, and, it seems Pufendorf wants to insist, should be considered such if it is associated with some indication of an intent to breach the peace.<sup>56</sup>

A question remains, of course, about exactly how certain a state must be that another has formed an intent, or hatched a plan, to breach the peace and take up arms against it before it can take anticipatory military action. Here Pufendorf’s assertion that states must know “with a morally evident certitude” that there is an intent to hurt takes on considerable significance.<sup>57</sup> We understand this to mean that states must have an irrefutable and demonstrable indication that a hostile state is planning armed aggression before preventive measures are justified. In a spirit of deterrence, Pufendorf held that “while an uncertain suspicion of danger can indeed persuade you

to surround yourself betimes with defenses, it cannot create a right that you be the first to bring force to bear, ...”<sup>58</sup> Moreover, it is only in the presence of a certain and unequivocal threat to harm that “the excessive swelling of the power of a neighbor” should have any bearing on a state’s decision to use military force against the neighbor.<sup>59</sup>

We take this to mean that the fear of another state caused by military build-up is a just cause for “preventive” war, for Pufendorf, only if the state contemplating military action has valid reason to be certain that this build-up is a prelude to aggressive action aimed against it. It is the certainty of the intent to strike that establishes the just cause of a preventive war, according to this construction of Pufendorf, but it is the growing fear of the power of the hostile state that necessitates anticipatory action. The intent to harm in the absence of an ability to act effectively upon this intent does not justify preemption. And while Pufendorf does not explicitly make the case, one can suppose that in the absence of this ability, states have reason to seek alternative means to diffuse the situation in the manner recommended by Grotius.

If this is a reasonable construction of Pufendorf’s view, it follows that he rejects the imminent attack position articulated by Grotius in favor of something like the imminent threat position outlined above. It follows too that Pufendorf would seem to embrace the idea that preemptive strikes are justified to eliminate military build-up by a hostile state in the event the state contemplating the strike had certain and irrefutable evidence that the build-up was under way specifically in order to take hostile action against it. States may act unilaterally to defend themselves in the event they are proof-positive that they are the target of planned hostility even though the attack itself is not yet imminent. But under the “morally evident certitude” condition, states contemplating preemptive strikes carry a strong burden of proof that a feared attack is real and certain. We take this to mean that the required burden of proof can be met successfully only

if the state contemplating preemptive strikes (up to and including general warfare, depending upon the strength of the hostile state) can demonstrate to neutral third parties that the feared threat is real, as lawyers say, beyond a reasonable doubt.

Pufendorf's position (or at least the position we are attributing to him) is somewhat weaker than the Grotian imminent attack position, but it is still a reasonably restrictive account of justified anticipatory warfare. While it allows states greater leeway to act in their own defense than one finds in Grotius, it still demands a great deal from states contemplating preemptive military action. And it is arguably morally preferable to the Grotian view, provided, of course, that there are no international mechanisms available to which states could appeal in order to seek relief from the impending threat against them. Pufendorf lived in a world without these mechanisms, of course, and we do not. This fact would seem to add strength to the Pufendorfian position, however, because the presence of such mechanisms might permit states to use them as neutral third parties for purposes of meeting the burden of proof standard required by Pufendorf.<sup>60</sup> In the event these mechanisms really qualify as neutral third parties, preemptive military action would be justified, time and circumstances permitting, in the event they were agreed that the burden of proof standard had been met by the state contemplating the action.

While Pufendorf's position seems to have much to recommend it from a moral point of view, it too received a degree of qualification at the hands of Emmerich de Vattel, who seemed to retreat in the direction of Gentili. Vattel appears, at least initially, to stand with Pufendorf by insisting that preemption is justified to "prevent an injury when [a state] sees itself threatened with one."<sup>61</sup> According to Vattel, military action is justified only if a state considers itself "seriously enough threatened" to think that preemption is necessary.<sup>62</sup> But this claim contains an important ambiguity. Is the seriousness of the threat constituted by the military might of the

“threatening” state or by evidence that it intends, at some point, to attack? Unhappily, Vattel does little to dispel this ambiguity.

On the one hand, he did emphasize that power alone does not threaten injury; “the will to injure must accompany the power.”<sup>63</sup> But the proof condition Vattel requires here is somewhat less than what Pufendorf required. States need only have “reason to think” that they are threatened with injury to justify preemptive action. Yet on the other hand, he also claimed that military build-up alone might suffice to give states “reason to think” they were threatened irrespective of any evidence about intent.

By way of reconciling the apparent contradiction, Vattel argued that “one is justified in forestalling a danger in direct ratio to the degree of the probability attending to it, and to the seriousness of the evil with which it is threatened.”<sup>64</sup> In the event the threatened evil is sufficiently great, states may take preemptive action even if they have only slight evidence that the state posing the threat actually intends to impose the injury.<sup>65</sup> If it is supposed that states generally build their military prowess only because they intend, at some point, to take aggressive action against a targeted state, build-up itself serves as evidence of an intent to injure. This supposition would have the salutary consequence of making Vattel consistent on the matter of preventive warfare, but it is not clear that it was justified even in Vattel’s day. Like Gentili before him, Vattel advocated a balance of power arrangement, based upon the construction of alliances, which would assure that “no state shall be in a position to have an absolute mastery and dominate over the others.”<sup>66</sup> And he held that states were justified in being on their guard against states that develop and maintain strong armies. This would require, of course, military build-up in its own right even in the presence of defensive alliances. But if such build-up was taken as an intent to injure it would become a self-defeating strategy and, as with Gentili, make

anticipatory action more, rather than less, likely.

What then should we make of Vattel? His qualification of Pufendorf seems driven by a prudence, defensible only under conditions of exceptional international distrust, that was recognized as problematic by both Grotius and Pufendorf. If just war theory was driven by a desire to mitigate the likelihood of warfare and erode the more heroic posture on war typical of the classical period, Vattel's rather ambiguous view seems to weaken the tradition. Both Grotius and Pufendorf recognized the natural (and prudential) inclination of states to think preventive warfare a good idea when faced with a growing military threat from abroad, and both struggled to minimize the moral justification associated with acting upon this inclination. Vattel appears to trend in the opposition direction, and insofar as the grand design of an international law of warfare, inspired by just war argument, is to lessen reliance on war, his contribution to just war theory would seem to be a step backward.

### **JUST WAR: THEN AND NOW**

In opposition to Gentili, Grotius and Pufendorf argued that from a moral point of view a valid defense of preventive war requires us to sever prudential state action from moral obligation. A too easy reliance upon prudence would incline states to act militarily upon the presumption of threat and thus exacerbate the scourge of war. But Vattel's worries will hardly fall on deaf ears, for states also have moral obligations to protect their citizens, and here prudence would recommend erring on the side of caution. So, the historic debate is perhaps tragically similar to the contemporary debate that surrounds the viability of the Bush Doctrine. The problem, then as now, is to cultivate an international culture in which resort to war is minimized, if it cannot be altogether eliminated, and still enable states the ability to protect themselves against hostile

aggression.

The new permissiveness championed by the Bush administration seems, in historical perspective, to be little more than a retrenchment in the direction of Gentili—little more than an effort to dress international law in the accoutrements of a prudence most at home in a Hobbesian environment. Yet it would seem to be the grand design of international law to move the international environment away from the Hobbesian vision and toward a more stable and rule-governed social order. As Pufendorf and Grotius before him well knew, this requires states to endorse and accept constraints upon their conduct that limit the range of legitimate actions they can take in the name of their national self-defense. So, if the moral aim of international law is to domesticate the international environment in this way, then the Grotius-Pufendorf line of reasoning seems preferable to the Gentili-Vattel line when it comes to justifying anticipatory self-defense, and prudence needs to take a back seat here to moral (and hence legal) obligation.

For reasons discussed above, we think the Pufendorf position, which mirrors the imminent threat view, is preferable to the Grotian position. If a state must await an imminent attack before taking defensive action, it may simply be too late to prevent the harm it has a right to try and prevent. If, however, one elects to endorse the Pufendorffian view, the Bush Doctrine must still be found suspect. The modern debate on the justification of anticipatory self-defense differs from the debate of the early modern era chiefly in the terms in which the discussion is couched. While contemporary discussion focuses on the *threat* of attack, the discussion of the early modern era orbited around the *fear* of aggression. This is a difference of terminology only, for if one can ask the early moderns if the fear is justified, one can also ask contemporary thinkers if the threat is real.

The Bush doctrine does not address this question. As we have seen, the focus of the Bush

administration is on the gravity of the threat coupled with the difficulties associated with its interdiction. Gentili would certainly have warmed to this package of concerns, and the administration could find a sympathetic voice in his works. But if Pufendorf is to be our guide, it is not the gravity of the threat that matters but its reality. Before states can act militarily in the name of their self-defense, they must know “with a morally evident certitude” that they have in fact been targeted by a hostile state and that plans for an attack are under way that can only be blocked by preemptive military measures. Suspicion (or fear) that something might be afoot is hardly enough to meet this standard.

In the case of the American invasion of Iraq, this standard was clearly not met; nor is it clear that it was met in the Israeli attack against Osirak, or even during the Cuban missile crisis. These latter cases aside, even if the United States had found WMD in Iraq, the action could not have been justified, in Pufendorfian terms, even in hindsight. Even if Saddam had WMD, there was no clear evidence that he could or would use them against the United States. The terrorist threat identified in the Bush Doctrine, as almost everyone understands, is driven by al Qaeda, and in the absence of solid and trustworthy information that Iraq planned to pass WMD along to al Qaeda for purposes of attacking the United States, any threat that Iraq posed to American national security could hardly be considered real.

Critics of this position can make a strong rejoinder, to be sure. It may be more prudent to rely upon suspicion and resort to caution rather than chain ourselves to a burden of proof that may not be met in time to avert an attack one has a right to prevent. The Bush administration is certainly right to notice that the stakes of the debate are rather high, and it may just be preferable to be safe rather than sorry. Anyone who finds this argument compelling has some rather prominent bedfellows in Gentili and Vattel. We want to insist only, however, that if one

ultimately finds this line of argument compelling, the moral ends of international law will suffer. Rather than attempt to stretch international law to accommodate prudential concerns, in the manner recommended by Gentili and to a lesser extent by Vattel, it seems preferable to say that at present the standards of law must still yield to political prudence.

If we understand this rejoinder, however, we do not endorse it. The just war tradition has emphasized that a just war requires a just cause, and if this tradition is to do anything to promote a more humane and amicable planet, it is best not to distort the notion of a just cause out of all proportion. And it is correspondingly important for the more powerful states of the planet to live by those rules it would have all other states live by.

## NOTES

<sup>1</sup> See, for example, Arthur Schlesinger, Jr., “The Immorality of Preventive War,” *Los Angeles Times*, 15 August 2002; Bruce Ackerman, “But What’s the Legal Case for Preemption?” *Washington Post*, 20 August 2002; Richard A. Falk, “What Future for the UN Charter System of War Prevention?” *American Journal of International Law*, vol. 97, no. 3 (July 2003), pp. 590-98.

<sup>2</sup> Among the “among other things” one finds, e.g., the right of intervention on humanitarian grounds and the right to defend the interests of other states when invited to come to their aid militarily. Since these issues are incidental to the present discussion, however, we shall not comment upon them here.

<sup>3</sup> Empirically, the distinction between the two is generally understood as follows: “A *preemptive* military attack entails the use of force to quell or mitigate an impending strike by an adversary. A *preventive* military attack entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such an attack is operational.” Charles W. Kegley, Jr. and Gregory A. Raymond, “Preventive War and Permissive Normative Order,” *International Studies Perspectives*, vol. 4, no. 4 (November 2003), p. 388.

<sup>4</sup> On the Bush Doctrine generally, see, for example, Peter Dombrowski and Rodger A. Payne, “Global Debate and the Limits of the Bush Doctrine,” *International Studies Perspectives*, vol. 4, no. 4 (November 2003), pp. 395-408; John Lewis Gaddis, *Surprise, Security, and the American Experience* (Cambridge, Mass.: Harvard University Press, 2004), chap. 4.

<sup>5</sup> *National Security Strategy of the United States of America*, September 2002, p. 15; available at <<http://www.whitehouse.gov/nsc/nss.html>>.

<sup>6</sup> Ibid.

<sup>7</sup> See, for example, Louis Henkin, *How Nations Behave: Law and Foreign Policy*, second ed. (New York: Columbia University Press, 1979), pp. 140-45.

<sup>8</sup> International Court of Justice, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America): Merits*, 27 June 1986, p. 347; available at <[http://www.icj-cij.org/icjwww/icasess/inus/inus\\_ijudgment/inus\\_ijudgment\\_toc.htm](http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_toc.htm)>; our italics.

<sup>9</sup> See Yoram Dinstein, *War, Aggression and Self-Defence*, third ed. (Cambridge: Cambridge University Press, 2001), pp. 169-73.

<sup>10</sup> Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn.: Yale University Press, 1961), pp. 234-236. See also Dinstein, p. 161. Another conclusion is that Charter law is so out of step with customary law and state practice that it should be regarded as an utter failure to regulate the use of force. See, for example, Michael J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter,” *Harvard Journal of Law and Public Policy*, vol. 25, no. 2 (2002); Anthony Clark Arend, “International Law and the Preemptive Use of Military Force,” *Washington Quarterly*, vol. 26, no. 2 (Spring 2003).

<sup>11</sup> Note from Daniel Webster to Henry Fox, 24 April 1842; available at The Avalon Project, “Webster-Ashburton Treaty: The Caroline Case,” <<http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm>>.

<sup>12</sup> International Military Tribunal, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (London: 1946-1949);

available at The Avalon Project, “Judgment: Invasion of Denmark and Norway,”

<<http://www.yale.edu/lawweb/avalon/imt/proc/juddenma.htm>>.

<sup>13</sup> International Military Tribunal for the Far East, *The Tokyo War Crimes Trial* (New York: Garland, 1981), p. 994.

<sup>14</sup> United Nations Security Council Official Records, 2280th meeting, 12 June 1981. UN Document no. S/PV.2280, pp. 8, 10.

<sup>15</sup> United Nations Security Council Official Records, 2282th meeting, 15 June 1981. UN Document no. S/PV.2282, p. 2.

<sup>16</sup> United Nations Security Council Official Records, 2284th meeting, 16 June 1981. UN Document no. S/PV.2284, p. 2.

<sup>17</sup> United Nations Security Council Official Records, 1348th meeting, 6 June 1967. UN Document no. S/PV.1348, p. ?.

<sup>18</sup> *Ibid.*, p. 3.

<sup>19</sup> United Nations Security Council Official Records, 2283rd meeting, 15 June 1981. UN Document no. S/PV.2283, p. 14.

<sup>20</sup> Our use of terminology here follows Mark A. Drumbl, “Self-Defense and the Use of Force: Breaking the Rules, Making the Rules, or Both?,” *International Studies Perspectives*, vol. 4, no. 4 (November 2003), p. 422.

<sup>21</sup> *National Security Strategy*, p. 15.

<sup>22</sup> United Nations Security Council Official Records, 1024th meeting, 24 October 1962. UN Document no. S/PV.1024, p. 19.

<sup>23</sup> *National Security Strategy*, p. 15.

<sup>24</sup> Walter B. Slocombe, “Force, Preemption and Legitimacy,” *Survival*, vol. 45, no. 1 (Spring 2003), p. 125.

<sup>25</sup> See, for example, Kegley and Raymond; also Paul W. Schroeder, “Iraq: The Case Against Preemptive War,” *American Conservative Magazine* (October 2002), pp. 8-20.

<sup>26</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), pp. 75-76.

<sup>27</sup> David Luban’s conceptualization is useful: “a preventive war is a preemptive war in which the imminence requirement is recast from temporal to probabilistic terms. Preemptive war then becomes a special case of preventive war, and the moral basis for permitting preemptive war—to defend against an enemy attack that is all but certain—applies to the general case as well as the special. David Luban, “Preventive War,” *Philosophy and Public Affairs*, vol. 32, no. 3 (Summer 2004), p. 230.

<sup>28</sup> Drumbl, p. 424; see also Jane E. Stromseth, “Law and Force after Iraq: A Transitional Moment,” *American Journal of International Law*, vol. 97, no. 3 (July 2003), pp. 628-42.

<sup>29</sup> *National Security Strategy*, p. 13.

<sup>30</sup> Michael Byers, “Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change,” *Journal of Political Philosophy*, vol. 11, no. 2 (2003), pp. 179-80.

<sup>31</sup> For a discussion of the right of intervention in modern natural law thinking, see Terry Nardin, “The Moral Basis of Humanitarian Intervention,” *Ethics and International Affairs*, vol. 16, no. 1 (2002).

<sup>32</sup> See Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999).

<sup>33</sup> Francisco de Vitoria, *Political Writings*, ed., Anthony Pagden, trans., Jeremy Lawrance

(Cambridge: Cambridge University Press, 1991), p. 304.

<sup>34</sup> Ibid., pp. 302-03.

<sup>35</sup> One might profitably read Erasmus's *The Complaint of Peace* (New York: Cosimo Books, 2004), and *The Education of a Christian Prince*, trans. Lester K. Born (New York: Octagon Books, 1973), as efforts to alter the culture of war commonplace in sixteenth century Europe by emphasizing both a religious duty to avoid self-aggrandizing practices and to practice common religious brotherhood under the Christian faith. In the *Complaint of Peace*, in particular, Erasmus extends his humanism to include the need to make an effort to live amicably even with infidels. If Erasmus could demonstrate the need for princes to follow Christian teaching, he could presumably defuse the tendency of the day to read preparation for war as a prelude to war. Given the presence of the unruly infidel, however, Erasmus could not also suppose that following Christian teaching would incline princes not to prepare for war because the infidel could not be trusted.

<sup>36</sup> Alberica Gentili, *The Law of War, Three Books*, trans John C. Rolfe (New York: Oceana Publications, Inc., 1964), p. 30. This translation is based upon the 1612 edition of *De Jure Bella*, which was initially published in 1588 and revised substantially in 1598.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., p. 61.

<sup>39</sup> Ibid., p. 62.

<sup>40</sup> Cf. Tuck, pp. 18-30.

<sup>41</sup> Gentili, pp. 62-63.

<sup>42</sup> Ibid., p. 64.

<sup>43</sup> Ibid., p. 65.

<sup>44</sup> Ibid., p. 66.

<sup>45</sup> Francisco Suarez, *Selections from Three Works*, trans. Gwladys L. Williams (New York: Oceana Publications Inc., 1964. p. 815. “On War,” (*De bello*) appeared as Disputation XIII in Suarez’s, *A Work on the Three Theological Virtues Faith, Hope and Charity*. The Williams translation is based on the 1621 edition of that work.

<sup>46</sup> Ibid., p. 804.

<sup>47</sup> Hugo Grotius, *On the Law of War and Peace*, trans. Francis W. Kelsey (Indianapolis: Bobbes-Merrill Co., Inc., 1925). Cf. Tuck, pp. 79-102.

<sup>48</sup> Grotius, p. 172.

<sup>49</sup> Ibid., p. 173.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., pp. 174-75.

<sup>52</sup> Ibid., p. 184.

<sup>53</sup> See Tuck, pp. 230-31.

<sup>54</sup> Craig L. Carr, ed., *The Political Writings of Samuel Pufendorf*, trans. Michael J. Seidler (New York: Oxford University Press, 1994), p. 258.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., p. 259.

<sup>57</sup> The phrase “morally evident certitude” comes from the Seidler translation. The Oldfathers translated the key passage as follows, “Yet fear alone does not suffice as a just cause for war, unless it is established with a moral and evident certitude that there is an intent to injure us.”

(Samuel Pufendorf, *The Law of Nature and Nations*, trans. C.H. Oldfather and W.A. Oldfather (Oxford: The Clarendon Press, 1934), p.1296.) We think the Seidler translation is preferable because it emphasizes the strength of Pufendorf's insistence that the certitude required to justify warfare be absolute; the passage makes little sense if it is supposed that Pufendorf wanted to qualify the nature of the certitude required, as the Oldfather translation suggests.

<sup>58</sup> Carr, p. 258.

<sup>59</sup> Ibid.

<sup>60</sup> Cf. Allen Buchanan and Robert O. Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics and International Affairs*, vol. 18, no. 1 (2004), pp. 1-22; Allen Buchanan, "Institutionalizing the Just War," *Philosophy and Public Affairs*, vol. 34, no. 1 (Winter 2006), pp. 2-38.

<sup>61</sup> Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, trans. Charles G. Fenwick (New York: Oceana Publications), p. 243. Vattel published his, *Le Droit des Gens*, in 1757.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., p. 248.

<sup>64</sup> Ibid., p. 249.

<sup>65</sup> Note the compatibility between Vattel's view and the Bush administration's view: "The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." *National Security Strategy*, p. 13.

<sup>66</sup> Vattel, p. 251.