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By

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SIRKING FIRST: EFFICACY, LEGITIMACY AND MORALITY OF PREEMPTIVE AND PREVENTIVE ACTS OF STATE

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ABSTRACT

Preemptive and preventive acts of state often decide the issue of peace or war—basic human values are risked on the outcome. The current debate about preemption and prevention, however, is sometimes marred by partisanship and biased inquiries. Moreover, often-times contemporary works on preemption and prevention focus only on the use of armed force and ignore any meaningful discussion of how other instruments of national power can be used. The discussions also sometimes eschew assessments of actual acts of state thus making the arguments academic when stripped of their historic context. This work addresses the efficacy, legitimacy and morality of preemptive and preventive acts and the ways in which those factors bear on policy- and decision-making. It is, by design and by necessity, an inter-disciplinary work that relies on decision analysis, history, law, military history, morality, philosophy, and political theory to put these actions in their complete context. Preemption and prevention are distinctly different strategic responses to threats of harm to a state or its people. Preemption and prevention occur across ‘a spectrum of anticipation.’ Along this spectrum, states respond to threats with various strategic means: diplomatic, informational, military and economic. There is a moral quotient to these means. Moreover, there is an evolving theory in the works of the canonical, early modern and modern authors of the Just War Tradition of the morality of preemptive and preventive use of force in self-defense. This defense, however, is only legitimate in exceptional cases where failure to act would result in
grievous harm to a state or to its people. Preventive action, to include the use of force, has been a staple feature of American political strategies since the founding of the nation. Criticisms of the so-called ‘Bush Doctrine’ as misguided doctrine, and as a radical departure from American tradition and history, are unfounded. Preventive and preemptive actions—to include the first use of force—are strategies deliberately chosen by decision makers after a three-phase process of recognition, deliberation and decision. The likelihood of the success, or efficacy, of these actions actuates the decision-making process. In addition, a new international consensus on the use of preventive action is emerging, as is evidenced by both the actions and resolutions of the United Nations. This international norm has, at its roots, Just War criteria that restrict the use of preventive acts to those which are efficacious, legitimate and moral.
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This work would not have been possible without the support and encouragement of colleagues and mentors, of friends and family.

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I am grateful to Dr. Jan Goldman, Georgetown University, for sparking my interest in Just War Theory and, moreover, for encouraging me to probe its continuing relevance for contemporary issues. He was also most supportive in the preparation and publishing of my article, “Intelligence, Ethics and Preemption and Prevention,” encouraged me to further pursue this area of study, and to develop this thesis. I am very deeply indebted to Dr. Brian Smith, Montclair College, for his diligence in both carefully reading and constructively criticizing earlier drafts of this work. He was enormously generous with his time. He was also both skillful in editing and insightful in his remarks. His comments were extremely worthwhile in helping me focus my arguments. Dr. David Luban, Georgetown University, served as my chair for this work and had previously been my thoughtful guide through a directed reading on various facets of preemption and prevention. His contribution to my work here was invaluable and I am deeply grateful for the direction and guidance he provided. I am also grateful to him for making time to
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I have also come away from this work with the knowledge that this is a beginning and not an end of my study in this and related areas. In that regard I am inexpressibly grateful to faculty, colleagues and friends—who supported me in this endeavor and even now encourage me to continue to me to write and to teach and to share what I learn with others.

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INTRODUCTION

The world had hardly greeted the twenty-first century with a renewed and welcome optimism when all its best hopes collapsed along with the World Trade Center towers in New York. The terrible and tragic events of 9/11 were all too grim a reprise of the ruin and the wreckage of the confrontations, the violence and the wars of the century past. The Cold War that ended the short twentieth century ended a terrifying confrontation between nuclear-armed superpowers only to be replaced by the constant threat of a world of terror.¹ The bi-polar certainties of the decades-long stand-off between the Soviet Union and the United States were displaced by the uncertainties of clashing civilizations. Whatever sureties existed in the wary deterrence practiced by the Soviets and the Americans vanished along with the ambitions of states—especially those of Iran and North Korea—to develop nuclear arsenals and the long-range missiles needed to hurl an apocalyptic fury at their enemies. A rising wave of ethnic, ideological, and religious strife washed from the last into the new century and brought with it the continued proliferation of biological, chemical and nuclear weapons. Terrorists with a new-found global reach and a legion of suicidal followers found inviting targets outside the Middle East in Africa, the Americas, Asia and Europe.

States threatened by these terrors and uncertainties recoiled and then resolved to strike back and, sometimes, to strike first. The threats posed by rogue states, non-state

¹Historian Eric Hobsbawm coined “Short Twentieth Century” to refer to the period between 1914 and 1991, from the beginning of the First World War to the fall of the Soviet Union. Hobsbawm used the term to define the era marked out by significant changes to world history.
actors and suicidal ideologues—threats beyond the reach of containment or impervious to deterrence—became the sobering reality of clear and present dangers to peace and security in the new century. Realists in international relations and a host of their critics now debate the morality, legitimacy and efficacy of economic sanctions, preventive strikes and preventive war—tools of statecraft for justifiably fearful states anxious to find a formula to ensure their own security and the safety of their citizens.

If the events of the decade just past, indeed if the events of centuries past are truly not past but prologue, then preemptive and preventive actions will remain viable tools among the various means states choose to deal with threats to their security. The long history of preemptive and preventive acts by states, and the promise they hold for preventing harm in the face of threats to the sovereignty of the state and the safety of its people, assure their future consideration as strategic responses to these threats. For this reason these acts of statecraft continue to warrant thoughtful, deliberate and nonpartisan discussion. The complexities and the controversy attending the actions undertaken in the last decade alone, and especially the U.S. led war in Iraq, have previously provoked an unedifying partisanship that has often clouded any meaningful debate and discussion of these actions.\textsuperscript{2} The debates, however, did raise important, troubling, and often vexing

\begin{footnote}
\textsuperscript{2}This work will not elevate the U.S.-led war in Iraq to the level of the ultimate test of the legality, morality or political efficacy of preventive war. It is not the focus of this work. The debate surrounding this particular preventive action has already been skewed by raw partisanship. To address the issues of preemption and prevention with a dispassionate detachment requires, instead, that the Iraq war be treated in its proper context as one of a number of preventive actions that can and have been exercised by states seeking to ensure their long-term security. For an example of extreme partisanship and hyperbole which has often precluded serious discussion of the use of preventive means see Noam Chomsky, “Preventive War, the ‘Supreme Crime,’” http://www.informationclearinghouse.info/article4416.htm (accessed February 12, 2011).
\end{footnote}
questions about the morality and the efficacy of the use of these preemptive and preventive means of statecraft.

Those questions remain.

It is not the purpose of this work to answer these questions and end, for all time and at once, this debate. If anything, this work will demonstrate the continued necessity of a reasoned and thoughtful debate about courses and purposes of preemptive or preventive action. These are, admittedly, complex, confusing and contentious issues. Moreover, this is no small task. In the past decade, scholarly works on the various dimensions of preemptive and preventive actions have become truly voluminous. The explosion of on-line publishing, the traditional venues of the media and academic press and the intense interest of scholars in fields that include diplomacy, foreign affairs, government, history, international relations, language, law, military affairs, political science, and public policy-making (to name a few areas) have resulted in numerous and worthwhile studies that have a well-deserved place in further inquiry that are far beyond the scope of this effort.

This work is intended to put preemptive and preventive acts of states in the appropriate historical, moral and political contexts. Its purpose is to replace many of the abstractions that characterize the discussion of preemption and prevention by citing actual, rather than hypothetical examples. It is also intended to shed light on the evolving tenets of the Just War Theory and its continued relevance and applicability to contemporary moral issues raised by preemptive and preventive acts of state, and especially by those actions involving the use of armed force. Moreover, this work will
explore the decision-making process that leads to preemptive or preventive action to illustrate the ways in which efficacy, morality and legitimacy influence these outcomes. This effort is, by design—and by necessity as well—an interdisciplinary work. As such, it is woven from threads in decision analysis, foreign intelligence, history, law, military history, morality, philosophy, and political theory.

Chapter One defines terms and frames the basis of preemption and prevention as strategic, rather than doctrinal, tools of state. Despite the huge and growing body of work on preemptive and preventive acts of state, the terms *preemption* and *prevention* require definition because of the confusion caused by their repeated misuse. Clear demarcations are also needed because some authors have conflated these terms so far as to strip them of their critically important distinctions. The failure to make the needed distinctions between preemptive actions and preventive actions puts all such actions—regardless of intent, design, proportionality or effect—in a single over-broad category which belies the complexities of these actions and defies a more thoughtfully nuanced approach to assessment of their efficacy, legitimacy, and morality.

In addition, the conflation of these terms has led some authors and commentators to make genuinely perplexing claims. International relations scholar, Dan Reiter, and scholar Karl P. Mueller, for example, describe *preemptive wars*, that, for reasons explained in Chapter One, simply cannot occur.³ The ability to preempt occurs in a very

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narrow temporal window and cannot be sustained over time as war. This chapter also
demonstrates that preemptive and preventive actions are strategies that involve means
other than armed force and, instead, use all the elements of national power: diplomatic,
informational, military and economic. Colin S. Gray’s work was influential in framing
this approach to include these various means as preemptive and preventive actions.4
Scott Silverstone’s taxonomy describing the ways in which states respond to shifts in the
balance of power also proved a useful construct.5 An adaptation of Silverstone’s model
is used to categorize the ways in which states use preventive actions and add to his
taxonomy by describing and illustrating two more categories he overlooked: acceptance
and preventive strike. Finally, this work reviews and incorporates the seminal ideas of
Michael Walzer that frame a ‘spectrum of anticipation’ to explain preventive and
preemptive actions and demonstrate the validity of his idea of ‘sufficient threat’ as a
justification for these actions.6

The second chapter explores the continued relevance of the canonical principles
of the Western Just War Tradition in the discussion of preemption and prevention. The
argument made here is that the early modern authors in the Tradition came to recognize
two classes of injury—namely those which have already occurred and those which are
threatened. Furthermore, these authors and scholars recognized that threats of harm can

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materialize long before they are realized and made manifest as harm, and so justify preemptive and preventive actions in self defense. Chapter Two also traces the development of contemporary thought on the morality of preventive action in self-defense in the thinking of scholars including Jeff McMahan, Brian Orend, and Walzer. This chapter will show that the evolution of Just War Theory, from its canonical roots to the works of more modern authors, reflects a conscious attempt to draw a line between a moral cause for preemptive and preventive action and naked aggression. There is in this body of work the persistent idea that self defense when attacked is morally right and should be undertaken in the defense of the innocent. What emerges over time in these works is the corollary idea that one need not wait to be struck to act morally in self defense, but can prevent injury by striking first in certain circumstances. Moreover, this corollary reasonably follows from the standing definition of self-defense as protection from harm.

Chapter Three is intended as a fuller investigation of the exceptional nature of those circumstances which justify the use of preventive actions, to include the just use of armed force in the face of threatened harm. The argument made in this chapter is that modern states now face palpable security threats of catastrophic consequences, irreparable harm and even, in fact, of threats to the very existence of the state. Absent the ability to act preventively in the face of these threats, the state is effectively denied its

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inherent right to self defense. Each of these threats—the threat of catastrophic consequences, the threat of irreparable harm and existential threat—is discussed in a case history. This chapter also reviews the arguments of a number of contemporary scholars, academics across a variety of disciplines, to include David Rodin, Susan Uniacke and Neta C. Crawford—who condemn preventive war as acts of intolerable aggression, immoral in every case, or as a radical deviation from international norms that gives states license to wage innumerable wars.\(^8\) Typically those who find no justice in preventive uses of force make either a consequentialist or absence of harm argument to defend their positions. There are, as will be shown, reasonable grounds on which to challenge those positions. Moreover, the arguments in opposition to the use of preventive force, and especially those against preventive war, fail to address the overriding obligation of the state to protect its people from harm.

The purpose of Chapter Four is to discuss acts of preemption and prevention as means of statecraft and, historically, not uncommon as strategies employed by states seeking to protect their security and defend their sovereignty. These are acts of diplomacy and negotiation as well as acts that involve the use of compelling measures to include the use of armed force. The argument made here, contrary to positions taken by

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George C. Herring, John G. Stoessinger, and Arthur Schlesinger, Jr.,⁹ is that American leaders have a long history of using preventive actions—to include the threat of and the use of preventive force and war—to achieve national security objectives. This is the essence of the argument advanced by Gray who finds it remarkable that scholars can claim no historical precedent for the American use of preventive force.¹⁰ To prove Gray’s claim, a number of historical examples are cited in this chapter—from the beginning of the Republic through the twentieth century.

This chapter will also explore the decision-making process to act preemptively or preventively. This exploration includes the original proposition that decision-making for preemptive and preventive actions occurs in three distinct phases beginning with recognition of the threat, followed by deliberations that lead to the decision to act. Each of these phases will be explored as part of the larger process. Public policy-making and decision-making for preemptive and preventive actions are rarely accomplished by fiat, and especially so in modern democracies. Instead this process is usually highly collaborative as decision makers engage both the military and the government in an assessment of capabilities and means, discussion of the risk of action or inaction, and a weighing of the prospect for success of various courses of action. In addition, the decision to adopt preemptive or preventive courses of action now plays out on a world stage; both domestic and international political considerations come into play. Decision


¹⁰Gray, Implications, 27.
makers and their advisors during this process also address both moral and legal considerations. This chapter then explores American decision-making in the Cuban Missile Crisis (1962) to illustrate this process. The historical record of the Crisis is unique and, arguably, the only case of its kind in that it lays bare the decision-making process for anticipatory action. The record includes contemporaneous sound recordings of the deliberations of the advisory group formed to advise President Kennedy during the crisis. This primary source will be extensively mined throughout for keys to the decision-making process.

The last chapter of this work argues that conventional tools of statecraft—deterrence, diplomacy, sanctions—will continue to be strained beyond their capacity to deal with new forms of aggression, with terrorism, with the proliferation of weapons of mass destruction, and with the unpredictable actions of rogue states and non-state actors. States facing this new and increasingly formidable battery of threats to their peace, prosperity and security have responded in the decade past with both preemptive and preventive actions and will continue to do so in the decades to come. Against this backdrop there is an evolving international norm for broader acceptance of preemptive and preventive actions, to include the use of armed force. As evidence of this evolving norm, this chapter reviews as a case in point the UN report, *A More Secure World: Our Collective Responsibility*, to assess both the current threats to international peace and the

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11The only full transcript of the secret recordings made during the Crisis is found in Ernest R. May and Philip D. Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, MA: Harvard University Press, 1997).
use of force in confronting those threats. The 2005 report is remarkable for its frank appraisal of the nature of threats to world peace and security and also for its recognition of the legitimacy of preventive action. The report also identifies several criteria—a framework—by which to assess the legitimacy of the preventive use of force. These criteria have clear antecedents in the Just War Tradition and, as such, underscore the evolutionary nature of the moral theories of justice of war that are shaped by the context of a world facing troubled and uncertain—but not unhopeful—times.

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CHAPTER ONE

PREEMPTIVE AND PREVENTIVE ACTS OF STATE

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is 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. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.

— National Security Strategy of the United States
September, 2002

After more than a decade of terrorist attacks and the nearly constant roil of low intensity conflict around the globe, the attacks on the United States on September 11, 2001 finally stripped away the hopes that the end of the Cold War would also end the menacing confrontations that perpetually threatened world peace. The community of nations is now confronted by terrorists, rogue states armed with weapons of mass destruction, and the likelihood that the proliferation of engines of great destruction—chemical, biological, cyber, and nuclear—will continue to go unchecked. In the face of these confrontations the United States, seared by the memory of the 9/11 attacks, issued its revised National Security Strategy a year later in September, 2002. The strategy was in many ways unremarkable. Its stated commitment to the growth and preservation of democracy echoed that of earlier American pronouncements. Its readiness to link free
trade and stable economies with international peace and security is a recurring theme in American foreign relations strategy.

What was new to many political observers, what was remarkable to others and alarming to some, was the candid, even pointed public statement that Washington was prepared to act “preemptively” to counter “sufficient threats” to the nation’s security and to prevent attacks on Americans before they occurred.¹ This preventive posture, this acknowledgement that Washington was prepared to take anticipatory action to prevent harm from befalling the nation, sparked a debate that has continued to this day. At its core, the debate centers on the morality, the legality, and the efficacy of the use of preventive force, and especially armed force, in self-defense. The debate is often heated. Ardent proponents of the use of preventive force see it as a just use of the inherent right of self-defense; opponents brand it as naked aggression. Other opponents reject a right of unilateral prevention, while the Secretary General’s High-level Panel report to the UN recognizes a growing necessity for an authorized collective use of preventive force. Prevention is deemed impermissible for rogue nations and a first strike with nuclear weapons is almost universally condemned. Some of what could be worthwhile debate has become a discourse tangled in its own vocabulary. That tangle begins with the National Security Strategy itself as it argues that anticipatory self defense calls for preventive action to preempt the hostile acts of adversaries of the United States.

Subsequently, a number of authors have resorted to coining phrases that do not carry the

¹These include attacks by rogue states, state-less actors and terrorists. Washington is concerned about mass casualty attacks, and especially attacks with nuclear, biological and chemical weapons.
moral and legal baggage some now associate with prevention. Those misleading and misleading phrases include ‘early military attack’ and ‘anticipatory attack.’ More misleading and misleading phrases include ‘early military attack’ and ‘anticipatory attack.’ More misleading and misleading phrases include ‘early military attack’ and ‘anticipatory attack.’

Unfortunately, an unedifying partisanship has colored the debate and stripped much of the discussion of the dispassion needed to make sound judgments of preemptive and preventive acts in theory and of their efficacy in practice.

To bring any clarity to this debate it is necessary to narrowly define and distinguish the differences between preemption and prevention and place these strategies in a proper historical context. The two terms have often been conflated. Whether or not by design, the drafters of the 2002 National Security Strategy commit the United States to act “even if uncertainty remains as to the time and place of the enemy’s attack” and to “forestall or prevent such hostile acts” the United States will first “act preemptively.”

One of the most acerbic critics of this conflation, Colin S. Gray, founder of the National Institute for Public Policy and a member of the Reagan administration’s General Advisory Committee on Arms Control and Disarmament, complains that the debate has contributed to “maximum obfuscation:”

To cite but a few of the all but willful sources of contemporary confusion: (1) the concept of preemption has been misused; (2) the vital character of the political context, and of the U.S. role in it, has not been debated realistically; (3) largely irrelevant legal and moral issues have been given their traditional outing; and (4)

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2Henry Shue uses the phrase “early military attack” to avoid what he claims is the moral baggage associated with the word ‘prevention.’ Henry Shue, “What would a Justified Preventive Military Attack Look Like?” Preemption: Military Action and Moral Justification, ed. Henry Shue and David Rodin (New York: Oxford University Press, 2007), 222. Orend writes that he prefers the term ‘anticipatory attack’ to avoid confusion and because the distinction between “‘pre-emptive,’ as opposed to ‘preventive,’ war” is too refined to be helpful. Brian Orend, The Morality of War (Ontario: Broadview Press, 2006), 75. As will be argued later in this chapter the refinement is, in fact, useful. The confusion here is that Orend makes the same mistake as have other authors by accepting the idea of a preemptive war. As will be shown, it is not possible to wage a preemptive war.
stunningly obvious arguments, typically critical of the idea and practice of preemption and prevention, have been advanced as if they were pearls of eternal strategic wisdom. Six years of confusion and nonsense is more than enough.\footnote{Gray, Implications, 2.}

While Gray’s frustration is apparent, his remarks also warn of the pitfalls of the misuse of the terms of the debate and the dangers of discussing these important issues bereft of context.

This chapter is intended to define terms and frame the basis of preemption and prevention as strategic tools of state. Despite the huge and growing body of work on preemptive and preventive actions of state, there exists real confusion as to the definition of these terms. The terms *preemption* and *prevention* require definition because of the confusion caused by the misuse of the terms. Clear demarcations are also needed because some authors have conflated these terms so far as to strip them of their useful distinctions treating both as the same. This is an issue that must be resolved early on in this discussion. As will be shown, the failure to make the needed distinctions between preemptive actions and preventive actions puts all such actions—regardless of intent, design, proportionality or effect—in a single over-broad category which belies the complexities of these actions and defies a more thoughtfully nuanced approach to assessment. This chapter will also establish the basis for broadening any assessment of preemptive and preventive actions beyond a narrow view of preemptive statecraft as a first strike by force of arms and of prevention as preventive war. This chapter will use historical examples to show that preemptive action can and has included means other
than the resort to force of arms. In like manner, preventive actions include diplomatic, economic, informational and military means.

Preemption and Prevention Defined and Differentiated

Preemption

Preemption is an act of state taken to forestall or blunt the imminent blow of an adversary. Preemptive action is measured at the moment of danger—or just before it—when the adversary has demonstrated the capacity and intent to strike. By acting preemptively, especially with the use of force, a state seeks to strike the first blow in the coming conflict, or more prosaically, to land the first punch in a fight that is inevitable.

Reduced to its essence, a preemptive attack is one that is launched based on the expectation than the adversary is about to attack, and that striking first will be better than being attacked. The benefit of preempting the enemy attack may be so great that it is expected to make the difference between victory and defeat, or it may be more marginal, merely promising to reduce the amount of damage to be expected from the resulting conflict. In either case, the fundamental consideration driving preemption is the belief that it is preferable to strike the first blow than to allow the enemy to do so.4

Preemption, then, is an act of defense in the face of an anticipated attack that is imminent, a blow that has all but landed. The use of preemption relies entirely upon a state’s ability to assess the evidence of an imminent attack, specifically by gauging the threatening actor’s capability, intent and timing. Preemptive actions, to include those actions involving armed force, are acts undertaken by a state seeking to parry the blow of

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an adversary known to be ready and poised to strike, but before that adversary acts. A state that acts preemptively seeks to end the threat of harm or mitigate the harm which will be caused when the threat is made manifest.

Lawful preemption in the face of an unjust attack is an act of self-defense of the rights of a state. Scholars define the legal principles of self-defense as those actions motivated by a concern for defense and not reprisal, as designed to stop an armed attack or reverse it, as directed only against the threatening actor (not a third party), and as proportional to the threat.⁵ A state has rights under international law, per the UN Charter, and these rights include sovereignty, territorial integrity, independence and the right to exist.⁶ A state that seeks to protect its territory, its political independence and the safety and security of its people from armed attack acts in self-defense. Preemptive action in the face of an unjust attack on the sovereignty, territory, independence or people of a state is then a lawful exercise of the individual state’s right to defend itself from these harms.

Preemptive action is not a new tool of statecraft. It is one of a number of strategies—including concession, defense and negotiations—a state might adopt when confronted by an adversary poised to attack. Neither is preemption a doctrinal concept applicable in every case: it is not, as the U.S. Department of Defense defines doctrine, “a fundamental principle by which the military forces or elements thereof guide their actions in support of national objectives.” As a strategy for national security, preemption is only

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one way of employing the various means of national power in a synchronized and integrated fashion to achieve a political end.

**Prevention**

In contrast to a preemptive action the state takes in the face of immediate danger, a preventive act is one designed to forestall a distant harm; it is an action that anticipates a coming threat to the security of the state and seeks to avert that danger. The traditional view, as expressed by international relations scholar Jack Levy is that prevention is driven by the competition for power and the shifting balance of power between states.\(^7\)

It is driven by the anticipation of an adverse power shift and the fear of the consequences, including the deterioration of one’s relative military position and bargaining power and the risk of war—or of the extensive concessions necessary to avoid war—under less favorable circumstances later. The incentive is to forestall the power shift by blocking the rise of the adversary while the opportunity is still available.\(^8\)

The state taking preventive action, then, acts opportunistically and chooses both the timing and the nature of its intervention to eliminate the risks poses by another state. A state acts preemptively—perhaps more to the point a state *reacts*—when the timing and means of hostile action against it have been chosen by another state. The state acting

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\(^7\)This traditional ‘balance of power’ explanation for the use of preventive acts, and especially for preventive war, can be found in the writings of numerous authors including the works of Richard K. Betts, *Surprise Attacks: Lessons for Defense Planning* (Washington, DC: Brookings Institute Press, 1983); Samuel P. Huntington, “To Choose Peace or War: Is there a Place for Preventive War in American Policy?” *United States Naval Institute Proceedings* 83 (April 1957): 359-369; Scott A. Silverstone, *Preventive War and American Democracy* (New York: Routledge, 2007); and Walzer, *Just and Unjust Wars*.

preventively can choose from among a variety of ways to achieve its ends. These ways include, but are not limited to, diplomatic initiatives, an active defense, deterrence, preventive strikes and preventive war. “Preventive war is based on the concept that war is inevitable, and that it is better to fight now while the costs are low rather than later when the costs are high. It is a deliberate decision to begin a war.”⁹ All political decisions in this regard are deliberate—both the decision to act preemptively and the decision to act preventively. The context that distinguishes the preemptive act from the preventive act is timing. The state faced with imminent attack has a narrow temporal window in which to respond preemptively to that threat. A state that spies a more distant threat has time to consider a range of preventive responses before choosing courses of action.

Michael Walzer has modeled both preemptive and preventive actions on “a spectrum of anticipation: at one end . . . reflex, necessary and determined; at the other end is preventive war, an attack that responds to a distant danger, a matter of foresight and free choice.”¹⁰ Walzer here makes a decided distinction between preemption and prevention. He implies that preemption is an automatic response, reflexive, seemingly one without choice. By contrast, he sees prevention — in this case preventive war — as wholly a matter of choice, and moreover, implies that in responding to a distant danger the state has time to weigh and consider its options. As Levy explains:

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¹⁰Walzer, Just and Unjust Wars, 75.
Prevention is a response to a future threat rather than an immediate threat. It is driven by the anticipation of an adverse power shift and the fear of the consequences. Including the deterioration of one’s relative military position and bargaining power and the risk of war—or of the extensive concessions necessary to avoid war—under less favorable circumstances later. The incentive is to forestall the power shift by blocking the rise of the adversary while the opportunity is still available.11

The strategy of prevention is not new to statecraft. It was a state practice among the ancient Greeks and Romans. Thucydides in his history of the Peloponnesian War tells his readers “the growth of the power of Athens, and the alarm which this inspired in Sparta made war inevitable,”12 and Cato the Elder’s call for preventive war in his repeated remonstrance, “Carthago delenda est,” was finally realized in the absolute destruction of Carthage in the Third Punic War. Even through the late Middle Ages and into the Renaissance, the strategy of prevention was widely understood: Machiavelli, a masterful strategist, cautioned his prince that any ruler who foresees evil, but who waits to wage war, cedes advantage to his enemy and does so much at his peril.

Thus it happens in affairs of state, for when the evils that arise have been foreseen (which it is only given to a wise man to see), they can be quickly redressed, but when, through not having been foreseen, they have been permitted to grow in a way that every one can see them, there is no longer a remedy. Therefore, the Romans, foreseeing troubles, dealt with them at once, and, even to avoid a war, would not let them come to a head, for they knew that war is not to be avoided, but is only put off to the advantage of others.13

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In his enduring treatise *On War*, the modern military philosopher Carl von Clausewitz argued that waiting to deal with a threat was ‘absurd:

Supposing that a minor state is in conflict with a much more powerful one and expects its position to grow weaker every year. If war is unavoidable, should it not make the most of its opportunities before its position gets still worse? In short, it should attack—but not because attack itself is advantageous (it will on the contrary increase the disparity of strength) but because the smaller party’s interest is either to settle the quarrel before conditions deteriorate or at least to acquire some advantages so as to keep its efforts going.  

Clausewitz’s sagacious assessment of the use of preventive actions—he recognizes the inherent risk in the use of force and the necessity of acting to gain advantage—was influenced by his knowledge of history. Clausewitz was influenced by the actions of Frederick the Great of Prussia, who ignited the Seven Years War when he attacked Austria in 1756 as part of a larger preventive strategy to defend his kingdom. Frederick saw the threat to Prussia posed by the newly joined Austro-Russian alliance and realized that France would side with that alliance in any future hostilities. Prussia would then be menaced by the might of three armies and would be vulnerable to assault.

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15 This is one interpretation of the historical record. Frederick himself wrote: “At my father’s death I found all Europe at peace.... Besides, I found myself with highly trained forces at my disposal, together with a well-filled exchequer, and I myself was possessed of a lively temperament. These were the reasons that prevailed upon me to wage war against Theresa of Austria, queen of Bohemia and Hungary. Ambition, advantage, my desire to make a name for myself—these swayed me, and war was resolved upon.” As quoted from Frederick’s 1792 *Denkwürdigkeiten*, in Gerhard Ritter, *The Sword and the Scepter: The Prussian Tradition, 1740-1890*, vol. 1 of *The Sword and the Scepter: The Problem of Militarism in Germany*, trans. Heinz Norden (Miami: University of Miami Press, 1969), 18-19. I thank Dr. David Luban, Georgetown University, for bringing this interesting note to my attention.
on three sides. Frederick faced nations conspiring to attack and he acted before that
conspiracy could be fully formed.\textsuperscript{16}

His solution was to attack first, before the alliance could coordinate its actions. His decision was deemed to be adroit more than unethical: confronted with the possibility of a war in which the very survival of his kingdom would be at stake, Frederick had behaved prudently and wisely. The 1756 example shaped the understanding of preventive war in Europe at least until 1914, and probably until 1941.\textsuperscript{17}

Prevention—and especially preventive war—has been a strategy of great and lesser states for centuries. There is nothing new about preventive strategies involving the use of armed force and they are most certainly not matters of state doctrine to be applied in every instance where a state faces a growing, but as yet not fully formed threat of harm to its sovereignty or its people. Preventive action is taken when a state foresees a future harm and resolves to act—not necessarily with immediacy, and not always with force—but in every instance before it deems that risk of harm has grown too great. This stands in sharp contrast to the imminent threat that necessitates a reflexive response, a preemptive response. Here the state is confronted by a stark choice: to wait for the first blow to land, or to strike first. The timing of the preemptive act is not left to choice, but dictated by circumstances. Preemptive acts and preventive acts, then, can be easily distinguished as distinct security strategies by the context in which these strategies are employed. Yet in every context, there often remains the fact that the state acting


preemptively and the state acting preventively, seek—by some means—to strike the first blow and to justify that first strike as a anticipatory act of self-defense. Therein lay the source of confusion.

**Anticipation**

**Anticipation, Self-Defense and Preemption**

The precedent frequently cited as the legal basis for an international convention of anticipatory self-defense by force of arms is found in the *Caroline* case. In 1837, Americans supplying the Canadian insurrection against the British made use of the steamer *SS Caroline* to send arms and supplies from the United States to Canada. British troops crossed the border into the United States, seized the ship, set it afire and cast it adrift to careen downriver and over Niagara Falls. One American was killed in the incident. In 1841, with a diplomatic note explaining the role of British troops in the incident, and as an exculpatory remark, the British Special Minister in Washington claimed the action was necessary in self-defense. U.S. Secretary of State Daniel Webster replied that to exercise a legitimate right of self-defense Britain would have needed:

> To show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. . . . (And) also, that the local authorities . . . did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. ¹⁸

Webster here cites the necessity to act in the face of an imminent danger as the most important impetus for the first use of force in self defense. Webster also claimed that the use of force employed should be ‘nothing unreasonable or excessive’ and limited to that action necessary for defense. Webster’s criteria of imminence, necessity and proportionality became standards of international convention. This so-called *Caroline* standard establishes the most restrictive circumstances under which the use of force in anticipatory self-defense is broadly recognized as lawful. For this reason “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.”  These criteria still frame much of the contemporary understanding of what constitutes preemptive action in self-defense. While the *Caroline* criteria are well-known and frequently cited in the literature about self-defense and the use of force, these criteria are not beyond criticism.

Many argue that these criteria are too restrictive, having been written in an era when an enemy literally had to be massed on the border to be a threat. With nuclear weapons and rapid delivery techniques, the requirement that no action be taken until ‘force be overwhelming, leaving no choice of means and no moment for deliberation’ is seen by some commentators as unrealistic in today’s world.  

Webster’s construct also relies heavily upon the concept of the imminence of harm creating the necessity to act, or perhaps more correctly *react*, in self defense. Walzer, with a broadly cited and seminal argument, suggests that Webster’s

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acknowledged standard of imminence is no longer wholly useful. Walzer, instead, argues that grounds for a legitimate first strike—in other words, action in self-defense—is based not on actual attack or even the threat of an imminent attack, but in the face of a sufficient threat:

The line between legitimate and illegitimate first strikes is not going to be drawn at the point of imminent attack but at the point of sufficient threat. That phrase is necessarily vague. I mean it to cover three things: a manifest intent to injure, a degree of active participation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.

Walzer proposes here three distinct criteria that constitute the sufficient threat: intent, active participation or preparation to injure, and risk.

The intent to injure can be demonstrated in a number of ways. A history of hostility to include cross-border raids and other incursions, the demonstration of offensive military capabilities and even sporadic armed attacks demonstrate this manifest intent to injure. The ongoing Arab-Israeli conflict is marked by this kind of demonstrated hostile intent and the actions of North Korea towards South Korea (including off-shore artillery barrages, raids by special operations forces, the launching of long range missiles, and attacks on naval vessels) also manifest intent to injure.

It would be a mistake, however, to regard a demonstration of intent to injure as being restricted to only those actions involving the use of armed force. The intent can

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21 This is the heart of the preventive action espoused by the National Security Strategy and it is more than likely that the authors of that strategy were so persuaded by Walzer’s argument that ‘sufficient threat’ is actually cited as part of the rationale for the strategy.

22 Walzer, Just and Unjust Wars, 81.
also be expressed, and often is, in public pronouncements by heads of state. When Soviet leader Nikita Khrushchev promised Western diplomats that ‘we will bury you’ his words were widely perceived as a threat to the safety and security of Western states. Adolf Hitler wrote of his intent to destroy European Jews and Slavs in Mein Kampf, larded his speeches with threats, and then made good on his threatened intentions. The sobering lesson to learn from this awful history is that the words of heads of state cannot be lightly dismissed as mere posturing or as only pandering to a political audience. There is often reason to take these words at face value. British statesman Edmund Burke recognized this reality when he observed that “there is no safety for honest men, but by believing all possible evil of evil men, and by acting with promptitude, decision, and steadiness on that belief.”

To determine active participation or the preparation to make manifest the threat of harm usually requires intelligence, surveillance and reconnaissance. The massing of troops on the border, the call-up of reserve forces, increased patrols and intense training can all be signs of active participation. This participation is not always readily apparent,

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23 Khrushchev made this remark to Western diplomats at the Polish embassy in Moscow on November 18, 1956. The day before, after Khrushchev’s tirade that branded Britain, France and Israel as bandits, twelve NATO ambassadors walked out on him. Khrushchev lashed out the next day, saying “About the capitalist states, it doesn't depend on you whether or not we exist. If you don't like us, don’t accept our invitations, and don’t invite us to come to see you. Whether you like it or not, history is on our side. We will bury you!” Played out against the tensions in Europe, the nuclear arms race, and the stalemate in Berlin, the story and fallout from the remark that betrayed hostile Soviet attitudes towards the West made headlines. “Foreign News: We Will Bury You!” Time Magazine, November 26, 1956. http://www.time.com/time/magazine/article/0,9171,867329,00.html#ixzz15AqAiFdG (accessed 12 November 2010). In 1963, Khrushchev backtracked, saying his remark was only a reference to the Marxist saying “the proletariat is the undertaker of capitalism.”

however. States that seek the advantage of surprise attack will often go to great lengths to mask the physical evidence of their preparations. Chinese Communist forces preparing to cross the Yalu River and engage UN forces in Korea in 1950, for example, successfully masked the movement of three divisions. Chinese troops used exceptional march and bivouac discipline, traveled only at night, and camouflaged men, animals and equipment to conceal their movements from U.S. aerial reconnaissance.²⁵

Walzer’s criterion of risk is both a political and a military calculation. Some political judgment of the extent of the harm that would befall the state and its people would need to be made to assess one part of the risk. In like manner, it is also possible that by failing to act preemptively the state is fatally weakened. Failure to act may expose to attack an irreplaceable defensive capability, that is, some military asset largely vulnerable to the attacker’s first strike. The risk calculation is also figured on the basis of the ability of the threatened state to effectively preempt attack. This is often an assessment of the military capability to use armed force to repel the threatened attack or to deflect the blow. A state without the means to strike first cannot preempt with military means.

Anticipation, Self-Defense and Prevention

Walzer’s model of sufficient threat has utility not only for understanding the context of preemptive actions; the criteria are also useful in gauging the context of

preventive actions of state. Walzer, however, denies that there is any practical way of making out this context for preventive actions, given the radical uncertainties of power politics. Yet, in the same argument he advances the notion of a spectrum along which anticipatory acts occur ranging from those that are reflexive “to those that are a matter of foresight and free choice,” where “danger is a matter of judgment and political decision is unconstrained,” matters to debate “in strategic more than in moral terms.”

Brian Orend has suggested that Walzer wants to walk the fine line “between two extremes: denying that anticipatory attack by one state on another—or on a non-state actor—is ever justified; and supporting the doctrine of preventive war.” Walzer, to Orend’s point, acknowledges that:

States may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence. Under such circumstances it can be fairly said that they have been forced to fight and are the victims of aggression.

Orend further argues that defense from aggression is construed either descriptively or normatively. This is a useful distinction. A descriptive defense forces a state to wait and be not the first, but the second actor to use force. Orend argues that limiting self-defense against aggression in this way forces a state to wait—unreasonably so—to be attacked and suffer the consequences of a possibly debilitating or catastrophic first strike. By contrast, a normative approach to self-defense concedes there are

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26 Walzer, *Just and Unjust Wars*, 75.


circumstances in which force can be used first against an aggressor. This is force used to resist and repel aggression and can employ tactics that are both defensive and offensive.\textsuperscript{29} In this scheme, a state facing a grave, credible threat would be justified in using what Orend positions, normatively, as defense from aggression. 

\begin{quote}
Defense—as in defence from aggression—can be construed either descriptively or normatively. Descriptive defense means you must wait to be, empirically, the second one to use force—that your use of force comes \textit{after} that of the aggressor’s. . . . Normative defence, by contrast, means there \textit{might} be circumstances where, empirically, one’s use of force can come first against an aggressor. A just war is one which is \textit{normatively} defensive—it defends people from aggression and seeks, in response, to resist and repeal it—whereas the tactics which may be employed, within the context of such a just war may be either empirically defensive or offensive (emphasis in the original).\textsuperscript{30}
\end{quote}

The decision to act, to choose which tactics may be employed, is the outcome of both consideration of the risk of harm and the assessment of the ability to mitigate that harm. Further, the decision to respond with armed force is wholly constrained by a number of factors, not the least of which is the degree to which the state’s forces are ready to act, and is often possible only under unusual conditions. This is especially true for the preemptive use of armed force.

\textbf{Preemption, Armed Force and Self Defense}

Preemptive action in self-defense, and especially action involving the use of armed force, can occur only in exceptional cases. This is true for the reasons cited above. 

\textsuperscript{29}Orend, \textit{The Morality of War}, 76.

\textsuperscript{30}Ibid.
in the discussion of Walzer’s argument of sufficient threat which identify the context in which preemptive acts occur. It is also the case that there is a very narrow temporal window in which preemptive actions are possible—especially so for the preemptive use of armed force. The difficulty of determining a sufficient threat—bearing in mind each of Walzer’s criteria—and the truly limiting nature of the time in which a state can use force preemptively are distinctions often either ignored or unrecognized in the debate on the use of preemptive armed force. The argument advanced here is straightforward: It is possible to use armed force preemptively only under circumstances in which the state can determine with some certainty the timing and nature of a threat, and can respond with the capability of force of arms to deflect or ward off the coming blow and so mitigate its harm.

Once the adversary’s attack is well underway no preemption is possible as the “use of force to repel an attack in progress is defence, simplicitier: no qualifier is required.”31 After the state has been attacked, it can only react—retributively or punitively—but not in a first act of self-defense: the state cannot defend itself from a blow which has already been landed. Further offensive and defensive actions, both strategic and tactical, will likely follow but these actions are not preemptive. They are intended, instead, to deny the aggressor the capability to launch further attacks or to degrade that capability. At this point the state has passed the time for acting

31McMahan, “Preventive War,” 170.
preemptively in self-defense and has become engaged, instead, as a belligerent actor in war. This does not imply that the state has somehow abandoned its right to self-defense in the face of aggression because it has become a belligerent. It merely states the obvious nature of war and the constant interplay of forces for attack and for defense. It is for these reasons that preemptive wars—often mistakenly cited and debated in the voluminous literature of preemption and prevention—cannot be fought.\textsuperscript{32} The preemptive use of armed force in the face of armed aggression is a preemptive \textit{strike}, not a preemptive \textit{war}. This is not an action to address a coming change in the balance of power between states. Nor is it an attempt to mitigate threatened harm and so achieve a more distant political end. Preemptive strike is, instead, a highly directed action purposefully executed to achieve a military end and, thereby, gain an operational advantage, perhaps even a decisive one.

One such case occurred on June 5, 1967, when Israel launched a preemptive first strike on the Egyptian air force at the onset of the Six Day War. As arguably one of a handful of such cases, and often regarded as the \textit{locus classicus} of justified preemptive use of force, this action merits extended discussion. In the weeks preceding the Israeli action, Egypt had moved to isolate Israel, improve its military force disposition and consolidate its Arab alliances in the region. On May 16, Egypt expelled the United Nations Expeditionary Force in the Sinai Peninsula and the Gaza Strip and subsequently began moving hundreds of tanks, artillery and armored vehicles and thousands of troops

\textsuperscript{32}The confusion here is persistent in the literature. For example, in an otherwise balanced and thoughtful discussion, Mueller, et al., classify the Six Day War as a ‘preemptive war.’
to the Israeli border. On May 23, Egypt, with the tacit cooperation of Saudi Arabia, closed the Straits of Tiran to all Israeli-flagged shipping. Then on May 30, Jordan signed a mutual defense pact with Egypt of which Syria was already a party and Jordanian forces were placed under the command of the Egyptian General Staff. All of these moves forced Israel to mobilize its reserve forces, a total call-up that virtually shut down the country’s economy and therefore could not be sustained.

Arab leadership was also implacably bellicose and publicly so. Gamal Abdul Nasser, president of Egypt, hoped to “annihilate Israel”; Syrian Prime Minister Yusuf Za’ayyin pledged to create “a final grave for Israel”; and Iraqi President Abd al-Rahman Muhammad ‘Aref declared his goal to “wipe Israel off the face of the map.” Official Cairo radio poured out anti-Israeli rhetoric and Arab newspapers in the region published cartoons of burning buildings in Tel Aviv, mounds of skulls and bones, and of tanks attacking Israel.

Threatened by the leaders of Arab states that had previously attacked, denied access to international waters, stripped of the buffer provided by the UN mission, seeing all the signs of active preparation for attack, and forced to mobilize a reserve force it could not long sustain, Israel launched a first strike air attack that destroyed most of the Egyptian air force on its own airfields. In the subsequent fighting in the Six Day War, Israeli ground forces operated under skies controlled by the Israeli air forces and

34Reproductions of the cartoons are illustrated in Oren, Six Days of War, between text pages 142-143.
achieved stunning success. Israel gained control of the Sinai Peninsula, the Gaza Strip, the West Bank, East Jerusalem, and the Golan Heights and destroyed any possibility of an enduring Pan-Arab alliance.

The Israelis had faced a threat that wholly conformed to Walzer’s criteria: hostile intent was clearly and repeatedly expressed by Arab leaders, Israel faced Egyptian troops massed on its border in a clear sign of active participation to make the intent a reality, and Israeli leaders could not risk facing the combined might of the existing Egyptian, Jordanian, Syrian and Iraqi forces. Moreover Israel faced the risk of continued mobilization to the utter ruin of its economy or a stand-down that mortally weakened the Israeli defense. For Israel, waiting, doing anything but fighting and striking first was a terrible risk.

**Diplomatic and Informational Dimensions of Preemption**

**Diplomacy and Preemption**

Gray claims that preemption is the first use of *military force* and moreover, that “preemption is a political question that is utterly dependent on for its feasibility on military prowess.” It would be a rare instance, however, if that first use of military force were to be the end of it all, if in fact, the preemptive use of military force was so powerful and complete as to wholly deter the adversary from follow-on attacks. Even in the case of the successful first strike by the Israeli Air Force in 1967, that strike was

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followed by six days of war. McMahan, a moral philosopher, points out that the consequences of wars are so disastrous that “it may not be imprudent for a state threatened with attack by another state to make every effort to avoid war by diplomatic means and thus to defer military action.”36 If a preemptive act is intended to ward off or mitigate the harm of a threat sufficient to justify action, then actions other than the use of armed force should be viewed as preemptive as well.

A diplomatic initiative taken in the face of a sufficient threat would then constitute a preemptive act of state. While this is often regarded as one of the routines of diplomacy, negotiations before an armed attack ought to be seen in the larger context of strategies that states might employ to respond to threats to their security and their people. To consider anything less would be, in effect, to create a default strategy embracing only the use of armed force. Clausewitz was more than prescient in this regard, then, when he noted that war was the extension of diplomacy with added means. In addition, diplomatic initiatives in these circumstances are not without precedent. In 1939, for example, after the German occupation of the Sudetenland in 1938, the president of the rump state of Czecho-Slovakia, Emil Hácha, met with Adolf Hitler in Berlin. With the rump state hemmed in on three sides by Germany, Hitler informed Hácha that Nazi troops were preparing to invade. Faced with invasion and the threat of Luftwaffe bombing of the nearly defenseless Czecho-Slovakian capital, Prague, Hácha capitulated. He agreed to the establishment of a German protectorate in return for a promise of toleration and

36 McMahan, “Preventive War,” 169.
autonomy. Hácha’s capitulation preempted an armed attack, but opened the country to Nazi occupation. Czecho-Slovakian Foreign Minister František Chvalkovský said of the capitulation, “our people will curse us, but we have saved their existence. We have preserved them from a horrible massacre.”

Informational Preemption

Another example of preemptive action without resort to force of arms would have been unthinkable in an earlier age. Today modern states and their armed forces rely heavily on electronic communications and cyberspace capabilities to wage war. Those communications are critical to command and control functions exercised by political and military leaders. A computer network attack on a state which poses a sufficient threat of harm could be wholly debilitating even if this information attack were made without firing a shot in anger. The idea that states will now make ‘cyber war’ has moved beyond the realm of possibility to the reality of modern hostilities. Before the start of the 2008 South Ossetia War, while Moscow was massing troops and before Russia invaded, Georgian web sites were already under attack by ‘zombie computers’ in a distributed denial of service attack. “Russian viruses had seized hundreds of thousands of computers

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around the world, directing them to barrage Georgian web sites, including the pages of
the president, the parliament, the foreign ministry, news agencies and banks.”

While the Russians launched their cyber attack in advance of an offensive, it
should be remembered that computer network operations can be both defensive and
offensive. Had Georgia launched its own cyber attacks to cripple and degrade Russian
command and control, it is possible this effort would have served to mitigate the harm of
the coming Russian attack and even deter it in its entirety. In future conflicts, an
adversary may attempt to preempt U.S. military action, launching kinetic or non-kinetic
attacks against the network of military surveillance, reconnaissance and communications
satellites and computers, and stripping U.S. forces of their ability to exercise effective
command and control.

Diplomatic, Military and Economic Dimensions of Prevention

Political scientist and international relations scholar Dan Reiter has argued that
“preventive action means attacking to forestall a rising threat.” States, however, have
other means than attacks by which they attempt to control rising dangers to their security.
Other authors persist in using the term preventive war, but the reality as will be
discussed, is that preventive actions can be actions short of war.

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39Travis Wentworth, “You’ve Got Malice: Russian Nationalists Waged a Cyber War against
.com/id/154965 (accessed February 15, 2010).

40Dan Reiter, Preventive War and Its Alternatives: The Lessons of History, (Carlisle, PA:
Strategic Studies Institute, United States Army War College, 2006), 2.
Silverstone, an international relations scholar, argues for a realist approach to prevention and the recognition that all international relations are characterized by a struggle for power and reactions to shifts in the balance of power:

As prominent realist scholars have acknowledged, the material base of realist theory does not determine a single solution for what should actually be done in response to a power shift. In fact, realist theory may provide the basis for a range of policy options that includes defense against direct military challenge, deterrence or appeasement of the rising state to keep it from actually using its increasing power, and preventive action to stop the power shift before it creates the potential for some type of challenge.41

Silverstone’s approach regards both defense and deterrence as common strategic responses to the threatening rising power of another state. These are strategies that allow the state to accept the shifting balance of power by increasing their capacity for self-defense or for retaliation so that whatever gains an adversary might expect from exercising its increased power would not be worth the costs. Appeasement is a strategy of making concessions to the rising power so as to preclude the resort to force. While strategies of defense, deterrence and appeasement accommodate the rising power of a threatening state, Silverstone argues that preventive actions are attempts to arrest the rising power of a state through negotiations, sanctions or war. While Silverstone’s taxonomy is useful, it overlooks two other options a state might exercise in the face of the rising power of another state. A state may accept the rising power of another state and forgo efforts to defend, deter, negotiate or resort to force. In addition, this taxonomy should include the use of strikes among the preventive actions used to arrest the rising

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41 Silverstone, Preventive War, 6.
power of a state. Silverstone’s approach also positions the taxonomy of prevention as one of options involving the use of degrees of force: moving from negotiations, to more coercive sanctions, and then to war, an action that compels the state to surrender its power. This does not mean that states routinely follow an escalatory pattern in their relations with a rising power. Rather, these strategies are viewed as alternative, and sometimes as complementary courses of action selected with deliberation as to their risk, political cost and prospect for success. This theme will be more fully developed in a later chapter.

**Diplomacy and Prevention**

The preventive measures states use to negotiate include agreements to limit arms, to increase the transparency of their capabilities and intentions, and to pursue confidence-building initiatives that reduce fear. These diplomatic measures go to the heart of Walzer’s criteria of a sufficient threat of harm for agreements of these kinds can relieve hostile intent, slow active preparations and reduce risk. Even so, Silverstone acknowledges that mutually acceptable agreements are preventive actions that wholly depend for their success on voluntary compliance. Compliance of that kind requires either special trust and confidence or some form of verification—perhaps by a third party—lest another risk factor be introduced into the relations between states. The Strategic Arms Limitations Talks (SALT I) between the United States and the Soviet

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Union from 1969 to 1972, for example, resulted in both an Anti-Ballistic Missile Treaty and an Interim Agreement on strategic arms. However, to make the treaties possible “intensive research had gone into ways of verifying possible agreements without requiring access to the territories of the other side.” The result was the development and deployment of ‘national technical means’ or imagery satellites that could record evidence of compliance or non-compliance.

Preventive diplomacy is a means to an end that can only be achieved over time and that, in and of itself, presents strategic challenges. Tendentious negotiations, often with the intercession of a third party, can heighten the risk that one party—or both—will continue to strive to enhance its power. A state that employs a strategy of playing for time can easily hide its real intentions behind a thin veneer of diplomacy. Whatever transparency is required after a diplomatic settlement has been reached is not necessarily available during the often lengthy negotiations that precede an agreement. Regardless of the merit of preventive diplomacy, these initiatives have a recent poor track record. Attempts at preventive diplomacy did not end North Korea’s nuclear weapons program. Saddam Hussein made a game of international inspections scheduled to pave the way for a diplomatic settlement that would have precluded the Iraq War. When these voluntary measures fail, states turn to more coercive actions.

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43Federation of American Scientists, “Strategic Arms Limitation Talks, (SALT I),” Weapons of Mass Destruction. http://www.fas.org/nuke/control/salt1/intro.htm (accessed February 21, 2010). The treaties stipulated that compliance was to be verified by ‘national technical means’ and both sides agreed to neither interfere with these means or to use deliberate concealment mechanisms to avoid verification.


Economic Sanctions and Prevention

When the attempt to achieve voluntary cooperation and compliance via negotiation fails to reduce the threat of harm, then compulsory measures can be taken. Sanctions are those measures taken to “compel rising states to forgo enhanced power with indirect punishment as incentive to change behavior.” Typically these are economic sanctions that deny the offending state goods or services, access to markets, or freeze its financial assets in the global financial system. Some sanctions embargo technologies to prevent a state from acquiring advanced weapons. The intent of this form of preventive action is to convince the leadership of the state targeted by sanctions that the cost of achieving a new military capability or increased power is far greater than any gain they might expect. Many times, however, these sanctions—especially those involving trade goods, medical supplies or fuel—fall far more heavily on the innocent people of the state than they do on their recalcitrant leaders. So-called ‘smart sanctions’ designed to target the government leadership and avoid harm to the people of the state have achieved a spotty track record:

But whatever the purpose or form of a particular sanction, the reality is that economic sanctions are unlikely to achieve the desired results if the aims are large or time is short. Sanctions—even when they were comprehensive and enjoyed almost universal international backing for nearly six months—failed to get Saddam Hussein to withdraw from Kuwait. In the end, it took nothing less than Operation Desert Storm. Nor could sanctions dissuade Serbia and Bosnia’s Serbs to call off their military aggression for several years.

44Silverstone, Preventive War, 6.

When negotiations and other compulsory preventive actions fail, or are not viable options, Silverstone argues that states attempt to compel the actions of other states by waging preventive war. For Silverstone, preventive war is the direct use of military force to destroy or neutralize the source of one state’s power before it rivals or eclipses the power of another. It is in this way that preventive war attempts to achieve a defense of the political state with offensive military means.

**Preventive Strike**

Although Silverstone omits preventive strike from his taxonomy of preventive actions, strike is in a category of its own. A preventive strike is an action, short of war, which uses armed force to achieve its end. As with all preventive actions, the preventive strike is intended to reduce or eliminate a threat before it is made fully manifest as harm that befalls the state or its people. Moreover, a preventive strike is an action that targets a specific but not yet fully formed threat or other active preparations to harm. A preventive strike differs from a preemptive strike in that the preventive strike aims at a threat wholly visible but not wholly prepared. Here again Walzer’s three criteria are applicable. The preventive strike is a political decision made in the face of hostile intent, when active preparations are underway to realize that intent to harm, and when there is an unacceptable risk in waiting to act.

Unlike Silverstone’s preventive acts that target states, however, a preventive strike can also target non-state actors. It is for this reason that the concept of prevention rooted solely in balance of power politics between states is inadequate in the larger
discussion of prevention. In the case of non-state actors, where no bilateral balance of state power issue is at stake, preventive acts are intended to address future threats of harm. Preventive strikes that target terrorists or international criminals supported by their own private armies aim at these more distant threats; neither sanctions nor diplomacy can be effective in these cases.

The preventive strike is a political decision to act while there is still time to mount a defense of the state. The risk inherent in these situations is the risk of delaying action until defense is not possible. For example, a preventive strike could target terrorists building a bomb. Once the bomb is built there is the risk that it will be used surreptitiously against its intended target. The preventive strike is also made against actors who have demonstrated intent to harm, either through previous actions—an attempted bombing in this case—or threats to harm. Finally, the preventive strike is intended to be a single and decisive action that eliminates the threat, even if only temporarily.

The Israeli raid on the nuclear reactor at Osirak, outside Baghdad, Iraq, in 1981, is perhaps the textbook example of a preventive strike. Iraqi leader Saddam Hussein began building the reactor in 1977 and made no secret of his intention to develop weapons with which to attack Israel. The reactor was built with the help of French technicians, and France also supplied uranium for the project. Israeli leaders opened negotiations with the French to withdraw from the project and later, to urge the French to substitute reactor fuel

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that could not produce weapons grade plutonium. When these negotiations failed, Israel planned its preventive strike.

The precision air attack by Israeli aircraft bombed only the nuclear reactor and destroyed its cooling rods. That action denied Hussein the capability to process enriched uranium and build an atomic weapon. In addition, the attack was timed to minimize civilian casualties (only one French technician at the reactor site was killed) and launched before the reactor was fully operational to ensure that innocent civilians would not be exposed to deadly radioactive fallout as a result of the attack.

**Preventive Actions, Negotiations, Sanctions and War**

Japan’s rise to power in the Pacific in the years 1936-1941, and the resulting war with the United States and its Allies, is pointedly illustrative of Silverstone’s taxonomy of preventive actions and so merits extensive discussion here. It is also a telling example of the limitations of the utility of both diplomatic negotiations and sanctions used to check the rising power of an aggressor. In 1936, Japan developed a national strategy that called for massive economic exploitation of Manchukuo (Manchuria) and Japanese occupied territories in northern China, long-term preparations for war with the Soviet Union, and control of the resources of Southeast Asia and the South Seas region. In mid-1937, Japan launched a full-scale invasion of northern China and pushed Chinese forces south beyond the Yangtze River all the way to Nanking. The Japanese assault on Nanking resulted in widespread destruction and the death of more than 200,000 Chinese civilians. Western
nations called for negotiations to end the conflict at a Nine-Powers Treaty Conference in Brussels in November, 1937. Japan refused to attend.

Fighting continued throughout 1938 and 1939. The United States in July, 1939 announced economic sanctions against Japan refusing to renew the U.S.-Japan Treaty of Commerce and Navigation. Aviation gasoline, bunker fuel oil for ships and thousands of tons of scrap metals—all essential to the war effort—would be denied to Japan. In 1940, the U.S. Congress passed the Export Control Act and these sanctions then effectively deprived Japan of chemicals, minerals, oil, copper, tin, machine tools and aircraft parts. With few natural resources, no indigenous supply of oil and no refining capability, Japan depended almost entirely on the United States for these materials so essential to the Imperial war effort. Japan upped its troop strength in China from a force of a quarter million to two million men and laid plans to attack Southeast Asia and the South Seas region to secure a source of supply for rubber, tin and oil. By July 1941, Japan had occupied all of French Indochina. That same month the Roosevelt Administration froze all Japanese assets in the United States and closed the Panama Canal to Japanese shipping.

With the realization that its drive into the South Seas, past the U.S.-held Philippines, would ultimately mean war with the United States, Japan began a plan to launch a preventive war in the Pacific. Fully apprised of the strength of the American Navy in the Pacific, and mindful of its own diminishing resources, Japanese leaders determined to eliminate U.S. power projection capabilities and redress the balance of power in the Pacific Rim before Japan was weakened by the crippling sanctions. Japan
launched a preventive war against the United States with the surprise attack on Pearl Harbor in December, 1941.\textsuperscript{47}

Actions by the United States to arrest the rising power of Japan in the Pacific demonstrate the preventive acts of state identified by Silverstone including negotiations and sanctions. His taxonomy of actions is a useful model, then, in several respects. First, the model shows that a range of preventive options exists outside of the use of armed force. Second, when the model is applied to an actual case, as has been done here, it demonstrates the risks inherent in preventive actions that eschew the use of force to rein in the rising power of a belligerent actor. Finally, the case demonstrates the way in which subsequent preventive acts of state can become increasingly coercive as the initial acts prove ineffectual or as they meet with increased resistance from the targeted state. The case is also ironic, not that preventive actions short of war failed to check the rising power of Japan, but that the sanctions \textit{were} increasingly effective. The effectiveness of these sanctions convinced Japanese leaders that their power was on the wane. Believing themselves stronger than the Americans and convinced that war with the United States in the Pacific was inevitable, Japan resolved to, and did, strike first. U.S. non-military preventive action drew Japanese preventive military action in response. Both nation’s

\textsuperscript{47}Japan’s catastrophic decision to declare war on the United States is not universally regarded as an example of preventive war. Scholars disagree. Strachan (see note at 17) argues that to call Japan’s action a preventive war stretches the point, but that the Japanese attack on Pearl Harbor was a preemptive strike. A more discriminating analysis that supports the categorization of Japan’s decision as one for preventive war—because Hirohito and his War Council recognized Japan’s power would diminish over time and because Japan chose the nature and the timing of its use of force—can be found in Alan Schom, \textit{The Eagle and the Rising Sun} (New York: Norton, 2004), Chapters 3 and 4; and in Dan Van der Vat, \textit{The Pacific Campaign} (New York: Simon and Schuster, 1991), Chapter 1.
attempts to use preventive action failed: the United States failed to deter Japanese aggression in Asia and Japan’s surprise attack failed to prevent U.S. power projection in the Pacific.

**Preemption and Prevention: A Summary**

Preemptive and preventive acts of state are decidedly distinct strategies states employ to deal with threats of harm to their security: their sovereignty and the safety of their people. Preemptive actions, which can include diplomatic, informational, economic and military acts, are intended to mitigate or wholly deflect the harm threatened by the actions of an adversary, a harm which is often seen as imminent. Because the threat of harm is imminent, the ways in which a state might employ preemptive means are extremely limited. The threatened state may have little or no time in which to act in self-defense. In many cases, the threat of harm from an armed adversary ready to attack can only be mitigated or deflected by a first strike, that is, a preemptive strike by military means.

By contrast, preventive actions are strategies employed by the state to achieve its political goals for state security in the face of a rising, but more distant threat of harm. Because the threat of harm is more distant, states may deliberate and choose the ways in which they will use the elements of national power to meet this threat. States then can develop and adopt strategies that range from defense and deterrence to prevention. Preventive acts of state in the face of these threats on a more distant horizon can range from diplomacy to sanctions to preventive strikes and preventive war.
Most scholars view preventive acts of state as the ways in which states respond to threats to the balance of power, that is, to the status quo and the current arrangement of the relative power of states. While this is a useful construct in explaining why states act preventively, it cannot be regarded as the sole explanation for preventive acts of state. States also act preventively to protect their sovereignty and their people from attacks by non-state actors.

Both preemptive and preventive acts of state are anticipatory in nature. These are acts taken in the context of sufficient threats to state security, threats marked by the hostile intent of an adversary, by that adversary’s active preparations to harm, and by the risk associated with that harm. The greater the risk of harm, the more likely it is that a state will act to protect itself from that expected harm. This is the basis for the idea of an anticipatory self-defense for states that act preemptively and states that act preventively but seek to strike the first blow and justify that first strike as an anticipatory act of self-defense.

Whether that strike is justifiable and whether it will withstand a test of moral rightness, are other facets of the discussion of preemptive and preventive acts of state. The moral aspects of both preemption and prevention are the focus of the discussion of the next chapter.
CHAPTER TWO

MORALITY, PREEMPTION AND PREVENTION

Self-defense is Nature’s eldest law.

— John Dryden, Absalom and Achitophel

The span of preemptive and preventive actions, from diplomacy and sanctions through to actions which involve armed force, bridges a range of political choices that are intended to convince or coerce an adversarial state to change its behavior. At the point where a state resorts to force of arms these actions are then political choices made to wholly compel an adversary to change its behavior. These compelling acts, as was discussed in the first chapter, are made to preempt the attack of an adversary, or to prevent the adversary from making its threats manifest as harm. In both instances, the preemptive and the preventive, the threatened state purposefully uses force against the adversary state—in extreme cases against its territorial integrity, its political independence, its security and the safety of its people. The measure of the rightness of these actions is of the actions themselves and not solely in the political ends they are intended to achieve. For this reason, purely pragmatic arguments will founder when considering cases of preemptive and preventive actions, and especially those that involve the use of force. It is a mistake to confuse political efficacy with the morality of acts of state and yet, in some sense, efficacy cannot be wholly divorced from morality in these cases.
This, then, is the root of the Just War Tradition: that acts of state—and especially acts involving the use of force—cannot be justified unless they achieve their just political ends in moral ways. Acts of self-defense, and especially those acts in the face of unwarranted aggression, are broadly understood to be moral. Dryden in his famous remark claimed “self-defense is nature’s eldest law,” and cited thereby the sense that natural law affirmed this right. A truly preemptive act, made in the face of an imminent threat, is widely regarded as a moral or rightful self-defense. Orend describes an act of this kind as normatively defensive and more succinctly, as one that “defends people from aggression and seeks, in response, to resist and repeal it.”¹ That is not necessarily the case for preventive actions which seek to forestall future aggression and this is where the moral debate begins. The authors of the Just War Tradition have long debated the moral propriety of preventive actions. Their assessments have ranged from more nuanced views that endorse the morality of some preventive actions in prescribed circumstances to an absolute moral prohibition of preventive war. These divergent views inspire a debate that continues to this day and influences the design of national security strategy and the military defense and policy decisions made across the community of nations. In every case, however, the discussion of the morality of the action of the state ought to be rooted in the right of the state to be at peace and free from harm and, further, of the right to defend itself from harm, to then redress those injuries suffered and restore peace.

¹Orend, The Morality of War, 76.
The purpose of this chapter is not to merely restate the arguments surrounding preventive acts of state in the Just War Tradition. The intent here is to demonstrate the consistent threads in the theories of Just War Tradition that morally justify action—readily distinguishable from naked aggression—taken to prevent harm to the innocent and injury to the state. There is, admittedly, ambiguity in the various theories advanced over two millennia of moral consideration of the acts of state, and especially of acts of force. This discussion, however, is intended to demonstrate that a moral basis for preventive action flows from moral arguments for self-defense, and especially a just resort to war in protection of the innocent. Moreover, this chapter will argue that the dynamic nature of the Just War Tradition results in evolving, not static, concepts of the moral acts of states. The nature of these acts is not driven solely by the moral question, but by the actual political and military facts that put morality at issue; moral judgments cannot be made as abstractions. “Empirical dependence is evident in the very criteria that just war theory employs in its analysis of war, criteria that cannot be applied in practice without reference to the facts and without the exercise of political and military judgment.”

Simply put, changing circumstances and the nature of the new threats to the state legitimately call for a positive application of moral casuistry when considering the morality of the use of force.

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Preemption, Prevention and Just War Tradition

As has been discussed in the previous chapter, there is a marked distinction between those acts of state which are preemptive and those which are preventive. Preemptive actions, and especially those actions involving armed force, are acts undertaken by a state seeking to strike first an adversary readied and poised to attack, acts taken in the face of a sufficient threat of harm. By contrast, a preventive act is one designed to forestall harm; it is an action that anticipates a threat to the security of the state and seeks to avert that danger.

This distinction is not contemplated in the writings of the earliest Western Christian exponents of the theories of just war. The ideas of Augustine of Hippo (354-430), writing in the fourth century for the Roman Church, and of Aquinas (1225-1274)—who drew his inspiration from Augustine—writing in the thirteenth century, are the most influential sources of classical just war theory and have been the basis of all the subsequent theories of just war in Western culture. For this reason that work merits review here.

The foundation for the argument that any use of force can be just is the simple idea that the state should protect the innocent from harm. Writing at a time when Christianity was a state religion and when the state was under assault from without, Augustine struggled to reconcile his faith’s beliefs in love of neighbor and in non-violence with the need to protect the people of the state from harm. As Orend summarizes Augustine’s doctrine:
A just ruler might permissibly use force to protect the innocent (i.e., ordinary civilians) from aggressive attack. A Christian ruler has to show love for his own people. But such a ruler must order war only with the greatest reluctance, and not with any pleasure or hatred for the enemy whatsoever. The right intention must be love for, and desire to protect, the endangered innocents.\(^3\)

Augustine’s work was then amplified in the work of Aquinas, who also recognized the necessity to sometimes use force to protect the innocent. This sobering recognition, however, led Aquinas to categorize and identify specific circumstances and conditions under which it was morally right to use force and to conduct a just war. Aquinas expresses these circumstances and conditions, as he cites the previous work of Augustine, in three canonical principles of just war:

In order that a war may be just, three things are necessary.

First, the authority of the sovereign by whose command the war is to be waged. . . . And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. . . and for this reason Augustine says: ‘The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.’

Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault. Wherefore Augustine says . . . ‘A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly.’

Thirdly it is necessary that the belligerents should have a rightful intention so that they intend the advancement of good, or the avoidance of evil. . . . ‘True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good.’ For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. . . . ‘The passion for inflicting harm, the cruel thirst

for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war.\

For both Augustine and Aquinas, war could only be waged in a just cause, which in the canonical tradition implies that war is made against those who have committed some aggression, some fault, and have deserved by this fault to be attacked. That fault results in injuring the innocent. Just wars are wars which avenge wrongs, redress unpunished transgressions, or seek reparation for losses to the innocent. The right intention of these wars is to restore the good that once was; to repress evil, that is, the absence of peace, and to regain the peace of the innocent. To do so with the right intention is to refrain from inflicting undue harm, to avoid cruelty, to eschew vengeance or revenge, to retain good order and discipline, and not to subjugate those attacked. To avenge is to exact satisfaction for a wrong, or to redress an injury. Vengeance, or revenge, metes out harm as a way to punish. Right intention strips away ulterior motives, blood-lust and revenge. In short, the canonical injunctions imply the need for protection of the innocent, proportionality of the acts undertaken to do so, and the institution of, or the return of, a just peace. Both Augustine and Aquinas see war as an interruption of ‘the natural order of peace,’ and just war is pursued only after some harm has befallen the state that ends that peace.

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5There is a subtle nuance to be considered when reflecting upon the canonical admonishment to eschew vengeance but to avenge injury. To avenge is to exact satisfaction for a wrong, or to redress an injury. Vengeance, or revenge, metes out harm as a way to punish. “Avenge is generally used in the sense of achieving justice, whereas revenge (verb) stresses retaliation.” William Norris, ed., *The American Heritage Dictionary of the English Language* (Boston: Houghton Mifflin Company, 1976), note at ‘avenge.’
Augustine and Aquinas both seem to argue that a war fought to end a moral wrong being perpetrated by a nation or its citizens is also just. Aquinas makes the broad statement under this second principle, that ‘a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault.’ Finally, the motive for going to war must be just. In other words, no matter what the cause — even if attacking the most evil of regimes — there can be no motives ulterior to attacking that evil.\(^6\)

Augustine and Aquinas argue that the just war is undertaken only after the state is injured and then only to restore what was lost. This is, in its essence, the intended consequence of self defense: to ensure that no injury is so severe that the peace that was lost cannot be regained. It is plain that neither author condones actions taken when no fault or injury was given; this, after all, would violate the natural order of peace. The resulting Thomist tradition of jus ad bellum, then, offers limited moral guidance for those states that were forced to confront the realities of losses for which no reparation can be made. Nor does the tradition offer clear rubrics for the state that sees the need and duty to prevent harm from befalling it or its people. These are issues that the later scholars of the just war tradition address as they confront the changed circumstances of both the state and of war.

**The Evolution of the Just War Tradition**

Aquinas’ three principles of just war from his thirteenth-century work were well known to the Christian scholars of succeeding generations who sought to fashion their ideas inside this Thomist tradition of the morality of war. Francisco Vitoria (1492-1546),

a sixteenth century Catholic priest in Spain, taught both theology and politics and derived much of the foundation of his thought from the earlier works of Aquinas. In his treatise, *On the Indians or On the Law of War*, he echoes the judgment of Aquinas that “there is a single and only just cause for commencing a war, namely, a wrong received,” and further, that an offensive war is waged only for the purposes of avenging, that is righting, a wrong, “but there can be no vengeance where there is no preceding fault and wrong.”7

But Vitoria also expands on the Thomist tradition by making noteworthy exceptions to the right of sovereigns to wage war and by creating absolute moral prohibitions for war-making. He denies the state any right to make war for the aggrandizement of its ruler:

For a prince ought to subordinate both peace and war to the common weal of his State and not spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account. Herein, indeed, is the difference between a lawful king and a tyrant, that the latter directs his government towards his individual profit and advantage, but a king to the public welfare . . . . Also, the prince derives his authority from the State. Therefore he ought to use it for the good of the State. Also, laws ought ‘not to be enacted for the private good of any individual, but in the common interest of all the citizens,’ . . . . Therefore the rules relating to war ought to be for the common good of all and not for the private good of the prince.8

In addition, with a four-part argument, Vitoria purposefully demolishes any claim to the morality of war waged for religious purposes—and especially in this case on the aboriginal Americans. In another argument, he denies the moral claims for war to expand

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an empire. Here, then, is the restriction of the rights of a sovereign state to make war and an explicit moral prohibition on making war for religious purposes and of making war to gain territory. This argument is grounded in Vitoria’s reasoning from natural law and, in this respect, is not much removed from the Aquinas’ ideas of the common nature of man and of the natural order of man in peace.

The work Vitoria undertook was made at a time of great historical shifts in Europe. The growing Spanish dominion in the New World, and especially the conquest of the Aztecs by Cortés, the emergence of the great nation-states, and the Protestant Reformation influenced Vitoria’s thinking and his writings. Moreover, Vitoria’s efforts were made at a time when leading thinkers of the church and the ruling classes were actively debating the morality of the Spanish Conquista and of Spain’s role in the world. Charles V, Emperor of Spain and arguably the head of the most powerful state in Europe at that time, ordered a one year halt in 1550 to the conquest in the Americas and instructed a jury of theologians and counselors—among them Vitoria—to debate and resolve the issue of Spain’s treatment of the American Indians. The work Vitoria produced was more than an abstract moral treatise; it was hugely influenced by the context in which he weighed the issues. His work was meant to be a practical guide to influence the policy of the state and, indeed, of the statesmen of Europe:

For Vitoria was as concerned about moderating imperial conflicts between Spain and England as about restraining the depredations of Spanish Conquistadors of Indians of the New World. Not only did he attempt to divert religious wars between Protestants and Catholics by restricting the causes of war to reasons of

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state; he stipulated that only because of invincible ignorance, these reasons could give what Johnson has termed, “simultaneous ostensible justification,” to both parties to a conflict.\footnote{William F. Murnion, “A Post Modern View of Just War,” in Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory, ed. Steven Lee (New York: Springer, 2007), 27.}

Vitoria and other moralists of the era were concerned with prevention. After having addressed the moral prohibitions in cases regarding the killing of the innocent (and here he means legitimate non-combatants), he confronts the question of whether the killing of “guiltless persons is lawful when they may be expected to cause danger in the future.”\footnote{Vitoria, “The Second Relection,” §38.} The case in question is whether Christians should kill Muslim children for fear that as adults they will make war on Christians. In reply, Vitoria is unequivocal:

My answer is that although this killing may possibly be defended, yet I believe that it is in no wise right, seeing that evil is not to be done even in order to avoid greater evil still, and it is intolerable that any one should be killed for a future fault. There are, moreover, other available measures of precaution against their future conduct, namely, captivity, exile, etc., as we shall forthwith show. Hence it follows that, whether victory has already been won or the war is still in progress, if the innocence of any soldier is evident and the soldiers can let him go free, they are bound to do so.\footnote{Vitoria, “The Second Relection,” §38.}

Richard Sorabji, a scholar of ancient philosophy, has suggested that in this passage Vitoria is stating a blanket prohibition against the killing of innocents.\footnote{Invincible ignorance’ is a theological term to describe persons who are ignorant of the Christian message because they have not been in a position to hear it, and therefore blameless of acts Christians would consider immoral. Some Spaniards had claimed that killing even of peaceful American Indians was just because they engaged in immoral practices to include human sacrifice. Vitoria, however, claimed invincible ignorance for the Indians and, thereby, sought to check the worst excesses of the Conquistadors in the Americas. Richard Sorabji, “Just War From the Ancient Origins to the Conquistadors Debate and its Modern Relevance,” in The Ethics of War: Shared Problems in Different Traditions, ed. Richard Sorabji and David Rodin (Burlington, VT: Ashgate Publishing, 2006), 21.} This
interpretation is possible, however, only if the context here is passed over and if the condition Vitoria sets is then ignored. This is a passage about preventing wars, not about preventing executions after a just war: the proposal to kill ‘Saracen’ children is to prevent them from becoming warriors and avenging their fathers in another war on Christians.

The argument here, while patently unequivocal, is still conditional. In prohibiting the killing of those who may be thought a source of future harms, Vitoria suggests that other available ‘measures of precaution,’ or preventive acts, can be taken to ensure against injury in the future. He is here proposing an expansion of the theory of just war, that is, the use of preventive actions to forestall future harm, and in this case, actions short of war. His allusions to ‘measures’ are a reference to the then common practices of hostage keeping or exile which were included as terms imposed by the victor on the vanquished to ensure the peace. These were among the actions taken by the Spanish during hundreds of years of war against the Muslims in Spain and in its conflicts with other European powers. Vitoria would have been wholly knowledgeable of the Reconquista, or the 800-year Spanish effort to reclaim the Iberian Peninsula from the Muslims, and the more recent Granada War (1482-1492) which resulted in the exile of the last Muslim prince from Spain.\(^{14}\) In addition, Vitoria was also aware that the Princes François and Henri, sons of Francis I, were kept in Spain as hostages in exchange for their father and his continued pacifism after his defeat and capture at Pavia (1525).\(^{15}\)


Vitoria was knowledgeable about current customs and conventions of war which included preventive actions and in these passages he implies that those actions are morally acceptable, and especially as alternatives to killing those who might make war in the future.

The Dominican Vitoria’s work is among the last expressions of a Just War Theory that sought to address the moral issues raised by the actions of state in an exclusively religious context. The emergence of the modern nation state in Europe and the rise of secular governance in Vitoria’s time were accompanied by the growth of the need for law among nations. So, much of the work done in the Just War Tradition in following centuries begins to address issues not only of morality, but of law. Indeed, even Vitoria’s work is said to be an attempt to use morality to craft a law among nations and he is regarded by some as among the fathers of international law.  

It is no surprise, then, those later authors who make a contribution to Just War Theory, address jus ad bellum in the context of what is both ‘just’ and therefore lawful and what is ‘right’ and therefore a moral obligation or a moral prohibition.

The approach of one of those authors, jurist Alberico Gentili (1552-1608), stands in sharp contrast to that of Vitoria. Gentili embraces the idea of the use of preventive force:

I call it defence on the grounds of expediency, when we make war through fear that we may ourselves be attacked . . . No one is more quickly laid down than one who has no fear and a sense of security is the most common cause of disaster.

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This to begin with. Then we ought not wait for violence to be offered to us, if it is safer to meet it halfway.\textsuperscript{17}

This is the argument not of a shallow pragmatist, but instead the deliberately framed argument of a realist and a jurist. A Protestant who fled Italy in the face of religious persecution, Gentili traveled widely in Europe before immigrating to England where he taught civil law at Oxford and practiced law in the High Court of Admiralty. Gentili argues that a just defense can be mounted against “dangers which are mediated and prepared, and also those which are not mediated, but probable and possible.”\textsuperscript{18} The basis for this just defense is self preservation, in other words, the preservation of the peace of the state threatened by harm. This argument for the use of preventive force implies the harm that will befall the state is greater if the state waits, and therefore less likely to be wholly redressed if it is not met ‘halfway,’ or before it is fully formed. That argument is not unreasonable but it turns on the pivotal point of the ‘fear’ of violence and harm. The moral objection to the use of force in this case is in those instances in which the fear is unjustified and the feared violence does not materialize.

Among the early modern just war theorists, Gentili’s is the most ardent voice for the preventive use of force. He admits, however, that no general rule can be developed to define fear and that fears have more than one justifiable cause. But he also offers a statement “which has always been a powerful argument . . . namely that we should oppose powerful and ambitious chiefs. For they are content with no bounds and end by


\textsuperscript{18}Gentili, \textit{The Law of War}, 65, 66.
attacking the fortunes of all.”

Gentili’s argument now introduces not only the specter of the capability to harm, but also the intent to harm driven by ulterior motives: lust for power and ambition.

The Dutch jurist Hugo Grotius (1583-1645) in writing De Jure Belli ac Pacis (The Law of War and Peace) in the seventeenth century, and at the onset of the Thirty Years War, describes the right of man to defend himself and defend his property and throughout this work ascribes these same rights, no less, also to the state: “The right of defending one’s person and property relates chiefly to private war, but should likewise be applied to public wars, allowing for differences of circumstances.”

For Grotius, those conditions shift from the temporary right of the individual to use force in the defense of an immediate threat to life or property, to the enduring right of the state to use force:

Public authorities have the right not only of defense but of punishment as well. Wherefore they may act to forestall an aggression that is not immediate, but seems to be threatening from a distance. They may not act directly for that, as we have said, would be unlawful, but indirectly, by exacting penalty for a crime started but not yet completed.

McMahan has suggested that Grotius here is not addressing preventive war but, instead, a belligerent and means that once a state “has begun a criminal war, it can then be permissible in the course of the war to use force to eliminate more distant threats,”

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19 Gentili, The Law of War, 64.


21 Ibid., 76-77.
from that state.\textsuperscript{22} This interpretation is mistaken; Grotius is saying more than that if an unjust war has already begun the aggrieved state has every right to use force against any and all threats posed by the aggressor, whether those threats be near or distant. Grotius is making the case, as did Vitoria, for the right of the state to take preventive action. This is the right of a state to forestall aggression that is not immediate but threatening from a distance. Like Vitoria, recognition of this threat does not automatically confer upon the state the right to act directly, that is to make war on the threatening actor but, instead, to act with other preventive means. Whatever ambiguity this represents can be explained by recalling that in the seventeenth century sureties for the conduct of states could still be had in hostage holding, indemnities and treaties, all of which are coercive acts of preventive negotiation and diplomacy.\textsuperscript{23} The growing body of accepted international practice, and the exchange of court nobles—what would today be viewed as the ambassadorial corps—also led to the practice of making treaties, airing grievances and, if unresolved, openly declaring war in the monarchial courts. Grotius, then, makes the argument here that preventive acts of the state are, in fact, permissible, provided they are acts short of war. Grotius also took pointed exception to the argument framed by Gentili. Grotius makes plain that wars fought to check the threat posed solely by the growing

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23 Taking hostages as a means of enforcing peace terms or deterrence against rebellion was an ancient practice, still common in medieval warfare, and not unknown in early modern warfare in Asia and in Europe. . . . In Europe, hostage-taking and killing was upheld as legal and proper by leading jurists including Johann Moser and Emmerich Vattel well into the early modern period.” Cathal J. Nolan, \textit{The Age of Wars of Religion, 1000-1650}, vol. 1 of \textit{An Encyclopedia of Global Warfare and Civilization} (Greenwood Press, 2006), 415.
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power of another state cannot be included among those acts of public war that are permissible:

Quite inadmissible is the doctrine proposed by some, that by the law of nations it is right to take up arms to weaken a rising power, which, if it grew too strong, might do us harm. I acknowledge that in councils of war such a question does come up, but not on the ground of justice, only of expediency. If for any other reason a war would be justified, for this reason it may seem prudent to undertake it. The authorities cited on the subject say nothing more. But the bare possibility that violence may be some day turned on us gives us the right to inflict violence on others is a doctrine repugnant to every principle of justice.  

Grotius is making a clear distinction between those threats which are at a distance, but are sufficiently well understood that the state can take action to forestall the threat, and the growing power of another state which may, at some point, pose a threat. In the latter case, Grotius is addressing what statesmen in the years to come—and especially those of Great Britain—regarded as balance of power politics in Europe. The alliances of the eighteenth and nineteenth centuries relied on the willingness of the allies to wage preventive war to maintain that balance. 

So, while Grotius acknowledges the right of the state to take some preventive actions, he denies that a state has the right to make war simply because it fears the power of another state. This is a telling point and one often overlooked. Grotius makes it plain that the right of a threatened state to take preventive actions flows, not from fear of another state, but from the right to take measures in self defense when the power of another state is coupled with the intent to harm:


Fear of a neighbor’s power is not a sufficient ground for war. In order that defensive measures should be lawful, they must be necessary, as they are not unless we are certain not only of our neighbor’s power but of his intentions, and certain with the certainty required in a matter of morals.  

The necessity of acting in the face of certain harm creates the conditions for the lawful use of force. Grotius further explained: “Three justifiable causes for war are generally cited: defense, recovery of property, and punishment . . . The first just cause of war, then, is an injury, which even though not actually committed, threatens our persons or property with danger.” Grotius is here making an argument for preventive wars in the defense of life and of property in the face of a threat so far identified as to ascertain—with certainty—both the intent and the capability of a formidable neighbor.

Grotius has argued two points. The first point is for preventive acts of state short of war in the face of looming aggression. He has also advanced an argument for preventive war, not for fear of the rising power of another state, but in self defense when the power of that state and its malevolent intentions can discerned with certainty. This second point of argument is not irreconcilable with the first if war is seen as a last resort:

If a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, 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.

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27 Ibid., 72.

Deadly force, which would include acts of war, cannot be lawful if the danger against which that force is directed can be avoided by other means. However, absent a certainty that the danger can be avoided, Grotius argues that deadly force can be used.

Writing 50 years later, and after the end of the Thirty Years War in Europe, Samuel Pufendorf (1632-1694), in On the Law of War, begins his argument for preventive action by acknowledging, as did Grotius, that the wars of individuals (private wars) and the wars of the state (public wars) have a common ground. For Pufendorf, as for Grotius, that common ground is self-defense: to “preserve and protect ourselves and our belongings against the unjust invasion of others.” Yet self defense does not include cases in which the act of making war flows only from fear of the growing strength and power of a neighboring state, for “fear alone does not suffice as a just cause for war unless it is established with moral and evident certitude that there is an intent to injure.”

Here, in Pufendorf, is a restatement of Grotius’ injunction, and of his caveat that some other justification must be added to the fear of a state’s growing power to create a just cause for war. Moreover, for Pufendorf, the injunction of acting from fear alone is both moral and cautionary:

For an uncertain suspicion of peril can, of course, persuade you to surround yourself in advance with defenses, but it cannot give you the right to be the first to force the other by violence to give a real guarantee, as it is called, not to offend . . . For so long as a man has not injured me, and is not caught in open preparation

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to do so (for sometimes an incompleted injury can be avenged by war no less than a completed one), it should be presumed he will do his duty in the future . . .  

Proper caution in the face of rising suspicions of the power and intent of another state should prompt defensive measures, but the very uncertainty that accompanies the rising peril cannot justify the first use of force. Pufendorf, as do those authors who preceded him in addressing this issue, cites the necessity to redress an injury as a cause of action. Pufendorf’s argument, however, includes important caveats that represent further expansion of the cause of just war and a justification for preventive action. The notion that open preparations to injure constitute a just cause for war and that ‘incompleted injury’ can be avenged by war is a clear acknowledgement that states can act in self-defense without having first suffered harm if there is a moral certainty that an intent to injure exists. The requirement is a two-part test for demonstrable evidence of the capacity to injure and the certitude of the intent to injure. The incomplete injury exists when the two part test is met but the harm has not, as yet, befallen the targeted state.

Pufendorf’s works were hugely influential in Europe and were used as textbooks for nearly the next hundred years. There is a thread then that runs from the medieval Christian philosophy of the Just War Tradition that inspired the foundational work of Vitoria, to the influence of Vitoria on the works of Grotius. Grotius, in his turn influences the work of Pufendorf. The eighteenth century work of Emmerich Vattel owes much to works of both Grotius and Pufendorf, as well as the canonical authors. For Vattel, as for the Thomist traditionalists, it was a foundational assumption that the only  

31Ibid., 90.
lawful authority to declare war rested with the ruler of the state. The exercise of that authority, however, was to be taken only in extremities and furthermore only, as Vattel explains, for reasons “justificatory,” or in a just cause that gives the sovereign the right to make war for reasons of good “motive,” or right intention.\footnote{\text{Emmerich Vattel, “Of the Just Causes of War,” in \textit{The Laws of Nature and of Nature’s God}, under Book Three, Chapter Three, §25, http://lonang.com/exlibris/vattel/vatt-303.htm (accessed November 13, 2009).}} Just cause in Vattel’s argument is initially narrowly defined:

The right of employing force, of making war, belongs to nations no farther than is necessary for their own defense, and for the maintenance of their rights. Now if any one attacks a nation, or violates her perfect rights, he does her an injury. Then, and not until then, that nation has a right to repel the aggressor, and reduce him to reason. Further, she has a right to prevent the intended injury, when she sees herself threatened with it.\footnote{Vattel, “Of the Just Causes of War,” §26.}

Here Vattel echoes both Augustine and Aquinas and makes outside aggression resulting in injury to the state the just cause for war, and restricts war making to that force necessary for defense and the restoration of the rights of the state. This argument also implies that the intent of war-making is to restore the peace by forcing the aggressor to find ‘reason’ to return to man’s natural order. But Vattel sees just cause for war in responding not only to overt acts of aggression which result in injury and, thereby, compel a just defense, but also in preventing an injury which, were it to occur, would justify war. This, then, is an expansion of the canonical theory of Just War, extending the principle of just cause beyond the redress of an actual injury to circumstances in which a threatened injury to the state can be justifiably acted upon, with armed force, and thereby
prevented. This is the argument made by both Grotius and Pufendorf, and is hardly an
afterthought in Vattel’s argument for he expands on this concept:

Let us then say in general, that the foundation, or cause of every just war is injury,
either already done or threatened. The justificatory reasons for war show that an
injury has been received, or so far threatened, as to authorize a prevention of it by
arms. It is evident, however, that here the question regards the principal in war,
and not those who join it as auxiliaries. When, therefore, we would judge whether
a war be just, we must consider whether he who undertakes it has in fact received
an injury, or whether he be really threatened with one. 34

The arguments Vattel made in this work were crafted in the wake of the attempt
by Louis XIV of France to unite the Kingdoms of France and Spain, an alliance which
was opposed by both England and Holland. Mindful of the religious wars of the
seventeenth century, the Protestant nations of Europe feared the creation of an alliance
uniting the two largest nations of Europe, and especially, two Catholic states. This was
the impetus for action, and further evidence that the development of the moral theories of
just war evolves in the face of challenges to its legitimacy and applicability.

The arguments made that recognize the rightful exercise of some preventive
actions, by a succession of authors, were intended not to expand an abstract theory of just
war, but to make a practical application to the realities of their age. In fact, each of the
pivotal authors made his contribution in the wake of, or in the midst of, historical shifts.
Vitoria, it should be remembered, launched his studies during Spain’s great period of
exploration and conquest in the New World, and his principal work on warfare was a
study launched at the behest of a sovereign deeply concerned about the morality of the

34Ibid.
actions of his state. The Protestant Reformation and the Thirty Years War made Grotius and Pufendorf mindful of the nature of religious wars mounted by fearful states. Those two authors, among others, made it abundantly clear, as was discussed above, that fear of the growing power of a state, in the absence of injury, is not a just cause for war. There is, however, a distinct difference between fear of the growing power of a hostile state and fear of the injury that state can then inflict. This is the distinction that Vattel draws when making his unambiguous argument for an injury that is so far threatened as to warrant a justifiable force of arms to prevent it.

The authors of the early modern age who advanced expanded theories of Just War understood and accepted the canonical arguments that an injury to the state or its citizens that was not previously and adequately redressed, that is to say unpunished or uncompensated, was, prima facie, a just cause for war. Drawing on the canonical works, these writers came to recognize two classes of injury, namely those which had already occurred and those which were threatened. Moreover, these theologians and jurists knew enough of war and of the growing power of the modern state to realize that threats to the security of the state could materialize long before they were realized.

Contemporary Views of Prevention and Morality

There is no argument and there has been no argument, save for that of the absolute pacifist, that self defense by force of arms following an unjust armed attack is fully justified. A self defense by force of arms in the face of a threatened harm is, and has been, a far more problematic moral issue. This is a result, in part, of the tendency by
many authors to argue the inherent right of self defense is justified only in those cases where the defense is mounted after an attack. A defense after attack, however is retaliatory and defensive only to the extent that it can prevent further harms and restore, to the extent practicable, what was lost. McMahan has suggested there is good reason to recognize that defense against future aggression is also an instance of self-defense.

The reason is that there is a clear sense in which all defence is preventive. One can defend oneself only against future harm. There is no defence against harm that one has already suffered or that one is already suffering. One can, of course, defend oneself against the continuation of harm that is being caused by an attack in progress, but it is still only harm that one will otherwise suffer that one can defend oneself against. Any harm that has already occurred or is occurring now is a fait accompli. It seems, indeed, a conceptual truth that successful defence consists in preventing harm from occurring.\(^\text{35}\)

The issue has been made even more problematic because some authors have persisted in equating, indeed even defining, preventive war as merely the tool of balance of power politics. Walzer, for example, has claimed:

\begin{quote}
Preventive war presupposes some standard against which danger is to be measured. That standard does not exist, as it were, on the ground; it has nothing to do with the immediate security of boundaries. It exists in the mind’s eye, in the idea of a balance of power, probably the dominant idea in international politics from the seventeenth century to the present day.\(^\text{36}\)
\end{quote}

Walzer’s concept however is far too narrowly drawn, and he places unwarranted emphasis on the influence of the War of Spanish Succession on Vattel’s justification of preventive action. To be fair, Walzer also introduces later in his argument some conditions that could justify preventive actions and which seem to undercut his claim that

\(^{35}\)McMahan, “Preventive War,” 172.

\(^{36}\)Walzer, Just and Unjust War, 76.
preventive action is merely an expression of balance of power politics. Orend, as discussed in Chapter One, has suggested that Walzer tries to walk too fine line in his arguments. Orend claims that Walzer accepts the idea of an anticipatory attack in the face of a sufficient threat of harm, yet denies the justice of preventive war. This, too, roils the debate.

There is also a problem of language as noted by George P. Fletcher and Jens David Ohlin. Those authors distinguish between the concept of self-defense and the terms used to express it, and further note that the term ‘self-defense’ is not used universally; some states use the term ‘necessary defense,’ others ‘légitime défense’ or ‘legitimate defense.’

The distinction between self-defense and légitime défense also exists in international law . . . . The French-language version of the United Nations Charter, whish is just as authoritative as the English-language version, uses the phrase droit naturel de légitime défense to refer to what is termed in the English version ‘the inherent right of self-defense.’ The ‘inherent right’ becomes a ‘natural right’ in French, even more intriguingly, ‘self-defense’ the more generalized concept of légitime défense.

Fletcher and Ohlin rightfully point to the confusion that is caused by using the descriptive approach to self defense to determine the character of the defense of the state, and in this way they echo the arguments made by Orend and reviewed in Chapter One. This approach flows, as they recognize, from civil laws that describe the right to self-defense for individuals who have been harmed. The moral problem of preventive action

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37 Orend, The Morality of War, 75.

38 George P. Fletcher and Jens David Ohlin, Defending Humanity: When Force is Justified and Why (New York: Oxford University Press, 2008), 64.
by force cannot be wholly resolved by construing the defense of the state as emanating only from the rights of self-defense exercised by an individual and the narrow descriptive constructs this then presents; the issue of defense of the state is broader:

The argument for the moral use of preventive acts to secure the safety of the state and its people from injury turns on issues of normative defense articulated by Orend:

Normative defense, by contrast, means that there might be circumstances where, empirically, one’s use of force can come first against an aggressor, A just war is one which is normatively defensive—it defends people from aggression and seeks, in response, to resist and repeal it—whereas the tactics which may be employed, within the context of such a just war, may be either empirically defensive or offensive (emphases in the original).39

This argument realistically recognizes circumstances where the first use of force can be justified. The conditions under which a state might justifiably resort to the first use of force are also not so broad as to bring on what some critics of preventive action have decried as a constant state of war. Moreover, these conditions recognize that the right of the state to defend itself from the threat of attack transcends merely the fear of the ‘growing power’ of another state, an approach that was rightfully condemned by Grotius and other authors of the Just War Tradition. Those authors conceded the necessity for action came only when this fear was coupled with other overt acts; that the right to strike first is preceded by unmistakable threats of aggression. Modern authors also concede this point. Walzer, for example, as was discussed in the first chapter, believes that the point of legitimacy in the use of a first strike is reached not when the threat to the security of the state is imminent, but when it is sufficient. In so doing, Walzer provides a starting

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39Orend, The Morality of War, 76.
point for the moral consideration of the right use of a preventive action, in other words, a rightful self-defense not only in the face of an attack or only even imminent attack, but in the face of a sufficient threat. He proposes, as was discussed, three criteria that constitute the sufficient threat: hostile intent, active participation or preparation to injure, and risk.\(^{40}\) Walzer’s argument, however, does not define the ways in which a state might morally respond to the sufficient threat in self-defense with the moral use of force.

In the normative case argued here, there are three related issues inherent to self-defense of the state and the moral first use of force in the face of a sufficient threat. One issue is to determine what constitutes a threat so real, or severe, on the part of an aggressor as to justify preventive action and, especially, to justify the use of armed force. This is what Walzer means by a positive danger, the combination of hostile intent and action on the part of the threatening state. The state that strikes first against these threats must have compelling reasons to believe the combination has been affected. This is the issue addressed by Pufendorf when he argues for the necessity of establishing, with moral certainty, the intent—and by implication the capability—of the threatening state. The second issue is to decide when a moral use of force in self defense will be truly preventive. The action taken in striking first must, of necessity, prevent the threat from being fully realized. The third issue is one of proportionality, that is, to decide how much force or what applications of force may be morally used to prevent the threat from

\(^{40}\text{There is in Walzer’s second condition of active participation or preparation to injure, the unmistakable imprint of Pufendorf’s argument for the uncompleted injury described centuries earlier. This is no mere coincidence and it is pointed out here to show the evolutionary nature of the moral theory of prevention.}\)
manifesting itself as an injury. This is Vattel’s argument for a state to use no more force than is necessary for its defense and restoration of its rights. It is also the argument of Augustine and Aquinas. Each of the issues, or tests, which must be addressed have distinct historical antecedents in the discussion of the morality of just war, and especially the moral use of force.

**Preventive War and Self Defense**

The evolution of the Just War Theory, from its canonical roots to the works of more modern authors, reflects a deliberate attempt to draw a line between a just defense of the innocent and aggression. There is in this body of work spanning almost two millennia the clear idea that self defense when attacked is morally right and should be undertaken in the defense of the innocent. What emerges over time is the corollary idea that one need not wait to be struck to act justly in self defense. A just self defense can be mounted in anticipation of an attack. The early modern authors in the Just War Tradition saw and understood that some threats of harm could be anticipated. Gentili argued for the expedient use of preventive force to meet burgeoning threats before they were fully formed. Gentili’s idea of acting in anticipation of a threatened harm was later qualified in the work of several authors with conditions intended to ensure the justification for those acts were not merely a mask for aggression. While Gentili argued for preventive war on the grounds of its expediency, the careful counsel of Grotius and Pufendorf created exceptional grounds for the use of preventive force: morally certain evidence of the capacity and the intent to harm. By the time of Vattel, there was clear recognition that a
state could use preventive force in just self defense in the face of intended harm vice immediate harm.

In contemporary literature, the arguments advanced by Walzer and others in describing a threat sufficient to morally justify the anticipatory use of force, owe much to the work of these early modern authors. Pufendorf’s ‘incomplete injury’ is wholly recognizable in Walzer’s three part test of ‘sufficient threat’ being comprised of harmful intent, active preparation and risk. The contemporary idea of a legitimate defense, and the proportional use of force implied therein, has as its heritage the carefully constructed arguments of Vattel. Modern authors who grapple with the morality of the use of preventive force—and especially with preventive war—will find that earlier authors grappled with the same issue. The formative texts in the corpus of work in the Just War Tradition chart the way forward in drawing a line between a just preventive war and an immoral and illegal war of aggression masquerading as self-defense. A normative view of self defense recognizes certain conditions in which the first use of force in the face of sufficient threat of harm is both just and right. Those conditions—conditions which may well be said to be exceptional—are considered in the next chapter.
CHAPTER THREE

PREVENTION AND THREATS OF HARM

Self-defense? What greater act of self-defense could there be than to demolish Saddam Hussein’s weapons of mass destruction, designed to bring Israel to its knees, kill our people, vaporize our infrastructure—in a word to destroy our nation, our country, our existence?

— Menachem Begin, Prime Minister of Israel

Modern states now face palpable security threats of catastrophic consequences, irreparable harm and even, in fact, of threats to the very existence of the state. Absent the ability to act preventively in the face of these threats, the state is effectively denied its inherent rights to defend itself from attack and to truly protect the innocent. This is the essence of McMahan’s argument that just war theory should recognize prevention of future aggression as an instance of self-defense. No state can be reasonably expected to stand and wait for the first of such terrific threats to manifest itself as injury and especially so if this injury would result in widespread devastation. “A state would be derelict in its duty to protect its members if it did not reserve the right to make well-grounded anticipatory attacks in this regard.”¹ The nature of the threat, then, drives the state to action against an aggressor, action that is both preventive and in self-defense. This argument recognizes Walzer’s conditions for a legitimate first strike—intent, active

¹Orend, The Morality of War, 76.
preparations and risk—but also the moral quotient of an appropriate response to the threat:

When we stipulate threatening acts, we are looking not only for indications of intent, but also for rights of response. To characterize certain acts as threats is to characterize them in a moral way, and in a way that makes a military response morally comprehensible.²

To characterize these acts as threats makes a military response morally comprehensible but also makes the response a justifiable and legitimate use of the powers of the state to protect its people from harm. The following sections discuss three categories of harms so grave that they may justify preventive use of military force: existential threats, irreparable harms, and threats that, while not existential, are nevertheless catastrophic.

**Existential Threat**

The Existential Threat is that which its name implies. This is a threat to the very existence of a state or of its people. Augustine and Aquinas saw states as divinely ordered, as was the authority of their sovereigns. Therefore both the state and its people were part of the natural and perpetual order of a world at peace. The destruction of an entire state, or of its entire people, could only come about as a result of cruelty or a desire for revenge and these motives were deemed unjust by the canonical authors. Vitoria recognized and repudiated the existential threat of harm to the Indians during the Spanish conquests in the Americas. The prospect of the immorality of those actions was enough

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²Walzer, *Just and Unjust Wars*, 79.
to give even the most powerful sovereign in Europe reason to pause. These acts are not merely historical footnotes. For evidence that the Existential Threat remains real even in the modern age, one need look no further than the Nazi Holocaust, the Killing Fields of Cambodia, the ethnic cleansing in the Balkans, or the slaughter in Darfur.

The existential threat to the state or its people posed by another state, or even a non-state actor, justifies a preventive action of legitimate self-defense on several grounds. The first, as has previously been argued, is the duty of the state to defend its members. The organization of every polity has as its reason for being the self preservation and the safety and protection of its members and their right to exist in peace. This is the natural order of states and the peace, described by the canonical authors as worth defending and protecting, and of restoring after it has been lost. “It is not, therefore, the mere subordination of war to peace, but its conception of the peace to which war is subordinate, that marks the just war tradition off from other approaches to war.”

The second justification flows from the recognized obligation to protect the innocent. The existential threat aims not just at combatants in the field or the people who provide the means of arming and supplying the combatants. The existential threat targets an entire people—including the old, the infirm and handicapped, women and children—for indiscriminate, complete destruction. No reasonable argument has ever been made to justify killing the innocent and no reasonable argument can be made to preclude a state from acting preventively to protect the innocent from indiscriminate destruction.

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³Coates, The Ethics of War, 274.
The just state may also exercise a legitimate self-defense in the face of an existential threat to the polity itself. Here the threat aims to exterminate the actual state its government and its institutions. The Lincoln administration, for example, faced just such a threat when confronted by the southern secessionists and the ultimate dissolution of the Union. Lincoln, determined to defend the U.S. Constitution and to the protect Federal property, led the country to war to prevent the dissolution of the Union. Finally, the state is justified in taking action to preserve the natural order of peace. The existential threat is the ultimate threat to just peace because it denies a state and its people the very right to life and instead seeks to impose the peace of the dead.4

It was on this basis that Israel was morally right in exercising preventive action when that state attacked Iraq’s nuclear reactor site in 1981. Iraqi President Saddam Hussein had repeatedly threatened to destroy Israel and a continued state of hostility existed between Iraq and Israel. Iraqi ground forces had invaded Israel in the Independence War of 1948, the Iraqi Air Force tried to attack Tel Aviv in 1967, and Iraqi artillery shelled Israeli towns during the War of Attrition (1969-70). In 1973, France agreed to build a nuclear reactor in Iraq and by 1977 work had progressed to the point where Israeli leaders recognized that the facility would be capable of producing material suitable for nuclear weapons.5

After engaging the French government in a failed diplomatic mission to prevent the shipment of fissionable material to Iraq, the Israelis attempted to sabotage the


shipment of critical reactor components from France to Iraq. That preventive action slowed, but did not stop the progress of the nuclear program in Iraq. Ultimately Israeli Prime Minister Menachem Begin authorized the use of force against Iraq. As described in Chapter One, the Israeli preventive strike on the nuclear reactor at Osirak, just outside of Baghdad, Iraq, successfully destroyed the reactor with few casualties.

The attack was seen world-wide as naked aggression and not as a preventive action. Open debate in the UN General Assembly resulted in the consensus that Israel had violated the UN Charter and international norms of conduct, using force to violate the territorial integrity of another state. Israel’s strike was condemned by the UN Security Council.\(^6\) United States Ambassador to Israel Samuel Lewis expressly told Begin that the White House was furious because the F-16 fighter aircraft used in the attack were authorized for sale to Israel only for use in self-defense:

‘Self-defense? What greater act of self-defense could there be than to demolish Saddam Hussein’s weapons of mass destruction, designed to bring Israel to its knees, kill our people, vaporize our infrastructure—in a word to destroy our nation, our country, our existence? Over these past months I’ve told you again and again, Sam, that either the US does something to stop that reactor, or we will have to.’\(^7\)

Begin’s sharp retort to Lewis left no question but that Israel saw its action as fully justified and taken in the face of a truly existential threat: the ultimate destruction of Israel.


Threat of Irreparable Harm

The Irreparable Harm is one for which no redress is possible. The irreparable harm is one which deliberately causes needless suffering, pain and death on a broad scale. This harm makes an impossibility of the canonical principle of righting a wrong and of restoring the peace; by definition there is no righting the wrong of the irreparable harm. Action then to prevent this harm is, therefore, morally justified on at least this basis. The threatened use of a weapon of mass destruction (WMD), for example, creates a situation of Irreparable Harm and this is especially true when those weapons target non-combatants or are used in the absence of a state of war. This is threat to “ourselves and our possessions,” as Pufendorf has suggested, and is on this traditional basis a moral justification for the use of force to protect both life and property. In this case, the protection of property is truly at issue, too. The irreparable devastation caused by WMD and the accompanying radioactive or biological contamination robs the state of the use and habitation of its territory and threatens its people with generations of sickness and death. Any state that waits to suffer a vast and irreparable harm to itself and to its people before acting—when nothing can make up for its loss—makes self-defense in response to the attack meaningless.

No one could reasonably propose a doctrine of self defense that was limited to striking back only after being struck by a phalanx of bombers or guided nuclear missiles. Indeed there would be an obvious contradiction in requiring the states to wait until the missiles were underway or had struck their targets. Justifiable self-defense would then automatically
qualify as a reprisal, inflicted after the attack was over. This would turn the entire notion of self defense on its head.\textsuperscript{8}

The use of preventive action—which included the use of force—was justified, for example, during the Cuban Missile Crisis of 1962. The CIA provided intelligence and later supplied irrefutable photographic evidence that the Soviet Union was constructing sites for surface-to-surface, SS-4 Medium Range Ballistic Missiles (MRBMs) and SS-5 Intermediate Range Ballistic Missiles (IRBMs) in Cuba. Both Soviet missile types could be armed with nuclear warheads. The missiles put virtually the entire U.S. within range of a nuclear strike for which there would be no defense after launch. MRBMs had the range to strike targets on an arc from Dallas, Texas to Washington, D.C.; IRBMs could reach the U.S. West Coast and the heavily populated U.S. Northeast Corridor, including New York City. These nuclear strikes could be landed within minutes on the United States after launch from western Cuba.

In the face of this threat of irreparable harm, the Kennedy administration coupled secret diplomacy with the use of armed force. U.S. Navy warships established a cordon at sea around Cuba and enforced a naval quarantine, intercepting and turning back approaching Eastern Bloc vessels and preventing them from entering Cuban ports. The intent of the Administration was to prevent the Soviets from landing nuclear warheads and other materials that would have made the missiles in Cuba fully operational. In this case, the Administration’s use of force was a hostile act; long-standing international convention regards a blockade as an act of war, which differed from the naval quarantine

\textsuperscript{8}Fletcher and Ohlin, \textit{Defending Humanity}, 155.
imposed by the United States in name only. The action, however, was successful and the use of preventive force and diplomatic initiatives resolved the crisis. The Eastern Bloc vessels turned back and the Soviets, in a secret quid pro quo, agreed to remove the offensive missiles from Cuba in return for a U.S. pledge to remove its missiles from Turkey.\(^9\)

**Catastrophic Threat of Harm**

The Catastrophic Threat is one which results in widespread devastation and suffering of a people or the destruction of the government as an independent organ. The fully realized Catastrophic Threat destroys the independence of a people and the sovereignty of the state. This threat is distinguished from the existential threat in that the aggressor state seeks not to eradicate the state or its people but, instead, to subject it and them to domination. So, for example, occupation by a foreign power, and especially a hostile occupation, would be one injury or harm that manifests itself after the realization of a catastrophic threat. This was the situation in Nazi-occupied Eastern Europe where the captive nations and their peoples were exploited for labor and stripped of the freedoms they had known under their own forms of government. The catastrophic threat is also distinguished from the threat of irreparable harm in that it is still possible to restore the peace or make reparations after the realization of the Catastrophic Threat. The Liberation of the Philippines from the occupying Japanese by U.S. forces in 1944 is one

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example of the restoration of peace and the ruling polity after the realization of Catastrophic Threat.

The just state is morally justified in acting preventively in the face of the Catastrophic Threat because the just state has the inherent right of self-preservation. The preservation of a peaceful polity and the safety and security of its citizens is at the center of the concept of the canonical concept of peace among nations. Indeed, it would be impossible to conceive of a peace among nations if states had no way to safeguard their independence and the safety of their people. Political independence is also central to the arguments of the philosophers and jurists who developed theories of the Just War Tradition. Simply put, in a world of sovereign nation-states there can be no discussion of jus ad bellum without presupposing the independence of the polity. Moreover, the state has both a right and a duty to defend the innocent from injury. The catastrophe that overwhelms the dominated state knows no limits and so washes over non-combatants and combatants alike; all are subjugated to the unjust rule of another. These factors are what make the morality of civil war such a complex question: it is often unclear at the outset whether the attempt to destroy a state and replace it with an alternative, equally indigenous state is a Catastrophic Threat. The Cuban Revolution, for example, toppled the corrupt Batista regime with a promise of a just democracy only to replace it with an oppressive communist dictatorship.

States that choose preventive actions and go so far as to wage preventive war to avoid catastrophe do so in circumstances that require political judgments no less keen than those made in the face of an Existential Threat or the Threat of Irreparable Harm.
The distinction here is that the Catastrophic Threat is usually seen as so far distant that the state often can pursue, albeit with increasing risk, a number of preventive actions before morally resorting to war. This was the situation that both France and Britain encountered before the outbreak of World War II. Both countries recognized the growing menace of Hitler’s Germany. In fact, France during the interwar period so feared a resurgent Germany that it built, at huge cost, a gigantic defensive works along the Maginot Line fronting the German border—a fully and morally justified defensive act and, as was seen in the taxonomy advanced in the first chapter, a preventive action. Britain and France in the pre-war period also attempted to make a series of political adjustments with Germany to forestall conflict and accepted both German re-armament and German remilitarization of the Rhineland. 10 These were diplomatic actions both nations hoped would appease the Germans. Most infamously, British Prime Minister Neville Chamberlain would declare “peace in our time” after surrendering Czechoslovakia to Hitler at Munich; a negotiated agreement and preventive act which did nothing to appease the Nazi leader but only whetted his appetite to consume all of Western Europe.

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10 British Foreign Secretary Sir Anthony Eden proposed in 1936 a ‘general settlement’ plan to resolve the German grievances flowing from the Versailles treaty that ended World War I. The plan included remilitarization of the Rhineland. Hitler took advantage of the settlement proposal, and specifically that of the Rhineland, to act and present the Western powers with a fait de accompli. Ian Kershaw argues that Hitler recognized the weakness of the British negotiating position, calculated that the West would not intervene, and retook the Rhineland to score a foreign policy triumph and so distract the German people from a deepening economic crisis. See Ian Kershaw, Hitler: 1889-1936, Hubris (New York: Norton, 1998), 582-586, and A. J. P. Taylor, The Origins of the Second World War (New York: Antheneum, 1962).
The United States in this same period, moved from an official policy of cautious neutrality to a war-time footing, mounting an all but declared preventive war. After the Fall of France, and alarmed by the still growing might of Nazi Germany, the Roosevelt administration in 1941 began to openly assist beleaguered Britain. The Administration threaded through a contentious Congress the Lend Lease Act (March 1941) which extended generous credit to the British to purchase war materiel and permitted American-flagged vessels to ship that materiel. Roosevelt then issued an order in April, 1941 to expand the Pan American Security Zone—which since 1939 had banned belligerent acts in waters from 300 to 1,000 miles east of the North and South American coasts—to an area across the Atlantic Ocean nearly to Iceland (Longitude 26 degrees West), some 2,300 miles east of New York. Roosevelt also ordered the U.S. Navy to begin neutrality patrols to escort convoy ships through the Security Zone and broadcast warnings of the sighting of any German submarines.11

It was on one such patrol in September, 1941 that the American destroyer U.S.S. Greer was attacked by a U-boat. The German submarine fired torpedoes and missed, but the incident was sufficient to move Roosevelt to announce a new policy in the Atlantic of attacking German warships on sight. The preventive war intent of that executive decision was made unmistakable in a famed ‘Fireside Chat’ radio address broadcast to the nation. After describing the attack on Greer as a “determined step,” Roosevelt assured his

listeners that the Nazi danger to the West was no longer a mere possibility. Instead

Roosevelt saw Nazi Germany as a catastrophic threat aimed at world dominion:

There has now come a time when you and I must see the cold inexorable
necessity of saying to these inhuman, unrestrained seekers of world conquest and
permanent world domination by the sword: ‘You seek to throw our children and
our children's children into your form of terrorism and slavery. You have now
attacked our own safety. You shall go no further.’ 12

He also saw and told the American people that other acts of prevention, including
diplomacy, would not suffice in the face of this threat. Roosevelt clearly chose in this
crisis to take preventive military action and he explained his decision by noting that the
United States had no other options:

Normal practices of diplomacy—note writing—are of no possible use. . . . One
peaceful nation after another has met disaster because each refused to look the
Nazi danger squarely in the eye until it had actually had them by the throat. The
United States will not make that fatal mistake. . . . The time for active defense is
now. Do not let us split hairs. Let us not say: ‘We will only defend ourselves if
the torpedo succeeds in getting home, or if the crew and the passengers are
drowned’. This is the time for prevention of attack.13

Roosevelt’s unambiguous intent to use preventive force was clear in this address made on
September 11, 1941. What followed was an undeclared naval war with Germany in
which U.S. Navy warships and ships of the British Royal Navy began the long battle for
the control of the Atlantic sea lanes that linked the United States and Great Britain.

12 Franklin Delano Roosevelt, “Fireside Chat (on the Greer Incident),” September 11, 1941, in The
American Presidency Project, ed. John T. Woolley and Gerhard Peters (Santa Barbara, CA) http://www

13 Ibid.
Within days of his address, U.S. destroyers were attacking German U-boats at sea inside the Security Zone.\(^{14}\)

Roosevelt in this address also identified the moral justifications for preventive war that meet Walzer’s criteria of intent, active preparation and participation and risk. By the late summer of 1941, Hitler’s intentions were transparent: all of Continental Western Europe was conquered or subdued, Britain was besieged and German forces were crushing the Soviet armies. German U-boats were ranging the Atlantic sea lanes, striking at will, and their actions now targeted U.S. ships at sea.\(^ {15}\)

Finally, Roosevelt made plain that the risk of not acting was to suffer the same fate as the peaceful nations of Europe that the Nazis had “taken by the throat.” Roosevelt here makes a moral argument for the use of preventive force citing not only the obvious intent and capability of the threatening state but also by demonstrating that other nations that had failed to act met disaster.

**Contemporary Counter-Argument: The Immorality of Preventive War**

The works of a number of contemporary scholars across a variety of disciplines condemn preventive war as acts of intolerable aggression. Oxford moral philosopher David Rodin, for example, argues bluntly that “preventive wars are not morally


justified.”\textsuperscript{16} Ethicist Suzanne Uniacke brands as immoral the “misrepresentation of aggressive, preventive force as self-defense.”\textsuperscript{17} Other authors find reason to damn a so-called ‘Doctrine of Prevention,’ claiming this represents a radical and dangerous step that would license innumerable wars with a legitimacy both wholly undeserved and in no way morally justified. Neta C. Crawford, professor of political science at Boston University, argues that a preventive war doctrine blurs the line between “actual present and possible future, war and peace, self and other, combatant and noncombatant.”\textsuperscript{18} A chorus of dissenting voices, raised since the publication of the National Security Strategy of 2002 and the American-led invasion of Iraq, has offered numerous arguments against prevention and made demands for moral restraint. The objections raised in the face of preventive doctrine and actions have numerous facets but, in essence, center on two keystone arguments: the consequentialist argument and the absence of harm argument.

\textbf{Consequentialist Argument}

The consequentialist argument claims that the wholly speculative character of preventive war is flawed. Preventive action is rooted in the idea that it is better to act sooner, when the risks are lower, than to delay action and accept the consequences of greater risk in the future. According to opponents of this preventive argument, no state

\textsuperscript{16}Rodin, “The Problem with Prevention,” 170.


\textsuperscript{18}Crawford, “False Promise,” 116.
can know with sufficient certainty what the future may hold and it is therefore immoral to justify actions based on a prediction of the future that likely as not, may ever come to pass. Walzer, for one, cites the “radical uncertainties of power politics” and argues there is no practical way of undertaking the calculations and doing the experiments to determine, empirically, when to fight and when not.\textsuperscript{19} Allen Buchanan, professor of philosophy and public policy at Duke University, however, makes the point that this consequentialist label is wholly misleading because it consists of two different objections:

The first objection, which more properly warrants the title ‘consequentialist’, appeals to the supposedly bad consequences, not of the particular preventive act, but of the general principle that allows preventive war. . . . Call this the ‘bad practice’ objection. The second objection that is lumped together with it under the label ‘consequentialist’, unlike the ‘bad practice’ objection, does not rely upon any prediction about the bad consequences . . . Rather, it holds that, given the inherently speculative character of the preventive-war justification, it is morally irresponsible for state leaders to invoke it to undertake anything so morally momentous as war. Call this the ‘irresponsible act’ objection.\textsuperscript{20}

Adherents of the bad practice argument against preventive war claim that the consequences of its broad justification would lead to abuse. Predictions of future harms would lead to too many wars or could be used as a pretext for aggression. David Luban, an ethicist and expert on international law at the Georgetown University Law Center, for example, argues that legitimizing the first use of force “unravels whatever precarious

\textsuperscript{19}Walzer, \textit{Just and Unjust Wars}, 77.

equilibrium a broadly-asserted norm against first use of force establishes,” and “makes rival states into potential threats to each other by permitting preventive invasion of potential adversaries based on risk calculations.”21 The bad practice argument fails on several points. The first point is that acceptable justifications for preventive war will not necessarily result in more wars. A range of preventive actions, as described in the first chapter, exists for states that face the threat of harm and the more predictable the threat, the more likely it is that states will initially undertake actions short of war to mitigate those risks, as did Britain and France before the outbreak of World War II. Moreover, the target state may well be more likely to respond to these actions knowing that resort to arms is a legitimate option. In addition, there is no certainty in war. The costs and the risks associated with the resort to force of arms constrain most policy-makers excepting perhaps those in the most militaristic regimes.

Although it is not his main concern about aggressive war, Luban also raises the objection that a permissive rule of preventive war could be used in bad faith by aggressors. Yet the pretext of harm is already used as a justification for aggressive war. Hitler had his ‘cause’ to invade Poland after SS troops in Polish uniforms staged a phony attack on the border town of Geliwitz and broadcast inflammatory messages to the Polish minority in eastern Germany to take up arms against Hitler. The bodies of some concentration camp victims dressed in Polish uniforms were left behind as further proof of Polish aggression for the benefit of journalists brought to the scene. The charade

fooled no one. Broader acceptance of the morality of preventive war will not necessarily lead to more—or fewer—instances of these subterfuges. The immorality of aggression cannot be fully cloaked in a preventive justification. Such bald attempts are readily discerned. The aggressor state does not rely upon legitimate moral justifications for its actions; for the aggressor the mere appearance of a just cause will suffice.

Rodin is among those who argue against prevention with both bad practice and irresponsible act objections. Rodin claims that consequentialist arguments that support preventive actions, and especially preventive war, are undermined by the difficulty in making assessments of future harm and of the “near impossibility of accurately determining the long-term balance of consequences of engaging in war.” There is some truth in these assertions. Any attempt to make an assessment of the threat of future harm is admittedly fraught with difficulties as are attempts to predict with certainty the consequences of any actions taken to address those threats. States that present a threat of future harm to their neighbors often go to great lengths to hide their preparations and so veil the threat, making it difficult to accurately assess both the extent of the threat of harm and the means by which to mitigate those threats.

In addition, political leaders are not assured of omniscience simply by gaining public office. This is not to say, however, that lack of omniscience wholly precludes statesmen from acting morally in choosing to take preventive actions including war. In fact, by virtue of their office, these leaders are called upon to make these judgments.

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Rodin is asking for the impossible with his argument and, in effect, he is demanding that statesmen have perfect knowledge, even prescient knowledge, before acting in the face of threatened harm. That would be a prescription guaranteed to induce political paralysis. He also claims that the consequences of preventive war are so far unknown as to make preventive war always morally objectionable if one is a rigorous consequentialist. In fact, this argument makes all wars morally objectionable. Rodin discounts entirely the fact that nearly all political decisions made by state leaders are made based on consequentialist arguments. They are inescapable part of political decision-making. Leaders weigh the empirical evidence from which they draw conclusions and infer consequences. Walter Sinnott Armstrong offers a pointed rebuttal to the argument made by Rodin:

The process is hardly mechanical, but it is still based on evidence. . . . People do somehow succeed in making decisions by weighing together many and varied long-term consequences (or, at least, by using defeasible heuristics). . . . Since we make such choices reasonably in everyday life, it is not clear why we cannot also make such choices reasonably in war.\(^\text{24}\)

Rodin takes his consequentialist arguments to their rhetorical extreme and concludes that all preventive wars are not morally justified.\(^\text{25}\) His argument rests heavily on his assertion that consequentialist claims are a dubious basis on which to determine a just cause for preventive war. To illustrate this point, Rodin castigates consequentialist arguments for the justness of the Allied war on Germany. Rodin goes to some lengths to

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then demonstrate that the cost of fighting Nazi Germany in World War II was likely far more costly than not fighting “even allowing for the expanded genocide that would certainly have taken place had the war not been fought.”  \(^{26}\)

The problem with Rodin’s illustration is that it does not address the obvious historical case that can be made here for a moral preventive war. European leaders, as was discussed earlier in this chapter, attempted a number of actions short of war to deter Hitler. The historical record is clear: those actions failed. European leaders with dreadful memories of the carnage and catastrophe of the First World War knew full well what consequence would result from another war with Germany and they worked mightily to avoid that conflict. They may also have miscalculated in thinking that Hitler’s Germany would be a useful buffer against the Soviet Union. Whatever the reason, it is an historical fact that the Western Powers failed to check Hitler’s ambitions as he violated the Versailles Treaty, engaged in an unchecked arms build-up and re-militarized the Rhineland. The consequences of having not acted in those instances are very well known in hindsight: the subjugation of Central Europe, the eventual Axis occupation of much of Continental Europe, and the loss of millions of lives in the war that followed.

The better question here then is not that of the cost of fighting or not fighting Nazi Germany in World War II. The question—imposing as it does all the historical counterfactuals which Rodin decries—is what would likely have been the consequences of taking preventive action in 1936 or 1937 or even in 1938. Historian Harold Deutsch has speculated that a military coup would have deposed Hitler and a new government

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\(^{26}\) Rodin, “The Problem with Prevention,” 146.
come to power that would pursue Germany’s revisionist aims without resort to war.\textsuperscript{27}

Admittedly, historical hindsight is perfect vision, but one could argue that a preventive use of sanctions or force by France and Britain would have checked the Nazi agenda and likely prevented the depredations that took place after the remilitarization of the Rhineland.\textsuperscript{28} A preventive war against Germany would not have involved the Soviet Union and would have also contained the future suffering and the devastation visited upon Europe. There was no question about this point in the mind of British Prime Minister Winston Churchill, who was certainly in a position to both make this judgment and to understand its consequences. Writing after the war in which he led Britain to victory over the Axis Powers, Churchill addressed the moral issues that confront leaders in a way that Rodin overlooks:

\begin{quote}
The Sermon on the Mount is the last word in Christian ethics. Everyone respects the Quakers. Still, it is not on these terms that Ministers assume
\end{quote}

\textsuperscript{27}Harold Deutsch and Dennis Showalter, eds., \textit{What If? Strategic Alternatives of WWII} (Chicago: Emperor’s Press, 1997), 9-14.

\textsuperscript{28}The German force sent into the demilitarized zone numbered not more than 30,000 troops, the majority being sent to positions east of the Rhine. Some three thousand troops advanced deeply into the zone with orders to withdraw in the event of likely military confrontations with French troops. ‘Had the French then marched into the Rhineland,’ Hitler was to have reported to have commented more than once at a later date, ‘we would have had to withdraw again with our tails between our legs (mit Schimpf and Schande).’ The military force at our disposal would not have sufficed even for limited resistance.’ The forty-eight hours following the entry of German troops into the Rhineland were, he claimed, the most tense of his life.” Ian Kershaw, \textit{Hitler: 1889-1936 Hubris} (New York: W.W. Norton and Company, 1999), 588. Later, had both Britain and France stood by Czechoslovakia, it is likely that Hitler would have faced those three nations in an alliance and two-front war. Leonard Mosley, \textit{On Borrowed Time: How World War II Began} (New York: Random House, 1969), 48-50. Hitler also rightly feared the power of the British Royal Navy to blockade Germany by choking off the Baltic Sea. The German plan to prevent this was to engage in unrestricted submarine warfare and yet, in 1938, the whole of the \textit{Kriegsmarine} subsurface force numbered just 36 commissioned boats. Clay Blair, \textit{Hitler’s U-Boat War: The Hunters, 1939-1942} (New York: Random House, 1996), 43-49. The historical record, then, shows that Hitler was not prepared for war in the period 1936-38 and despite the lack of preparedness on the part of either Britain or France, concerted action other than appeasement would likely have checked Hitler early on.
their responsibilities of guiding states. Their duty is first to so deal with
other nations as to avoid strife and war and to eschew aggression in all its
forms, whether for nationalistic or ideological objects. But the safety of
the state, the lives and freedom of their own countrymen, to whom they
owe their position, make it right and imperative in the last resort, or when
a final and definite conviction has been reached, that the use of force
should not be excluded. If the circumstances are such as to warrant it,
force may be used. And if this be so, it should be used under the
conditions which are most favourable. There is no merit in putting off a
war for a year if, when it comes, it is a far worse war or one much harder
to win. These are the tormenting dilemmas upon which mankind has
throughout its history been so frequently impaled. Final judgment upon
them can only be recorded by history in relation to the facts of the case as
known to the parties at the time, and also as subsequently proven.\textsuperscript{29}

It must be remembered here that the Just War Tradition reserves to the lawful
ruler the right to make the decision of war or peace and it is then incumbent upon them to
act with the right intention. The Just War Tradition also seeks to restore just peace to
ensure the safety of the state and the lives and freedom of its people. This is precisely
Churchill’s eloquent argument citing as it does the need to act with right intention,
eschewing aggression, protecting the lives and the freedom of the innocent, and making
use of force as a last resort. There is in his argument, too, the grimly realized conviction
that war is made no less terrible by waiting to mount a defense when such defense has
been made a necessity by circumstances. The harm that will befall the state by not acting
under conditions that are most propitious for its defense, is the urge to action that can
come only with the final and definite conviction that war cannot be avoided.

\textsuperscript{29}Winston S. Churchill, \textit{The Second World War: The Gathering Storm} (New York: Houghton
Mifflin, 1948), 320.
Absence of Harm Argument

Rodin also argues, as does Crawford, from the perspective that “the use of preventive force necessarily violates the just war and international law prohibition on harming noncombatants.” There is in this argument the reaffirmation of the long-standing just war prohibition of doing harm to innocents and, in this instance, those who have taken no action, committed no fault, to make them liable to harm. This is the argument advanced by both Vitoria and Grotius. The argument is persuasive but not wholly so. The maturation of the just war theory, as has been shown, allows for the just use of force in those instances in which the aggressor state demonstrates by its intent and by its active preparations to harm, that it is no innocent actor. The preparation for inflicting grave harm, though the injury is incomplete, is a fault which justifies action. On this basis, there is no aspect of the Just War Tradition which creates inviolable conditions such as would result in the blanket prohibition of preventive war as always immoral, provided that political rulers act with the right intention and with means proportional to the threat of harm.

Such was the case, for example, when Prime Minister Begin directed Israeli forces to attack the Osirak nuclear reactor in Baghdad. Begin and his advisors judged the consequences of a nuclear-armed Iraq as a threat too great for Israel to risk. Begin, his cabinet, and his military advisors also correctly judged that a surgically delivered preventive strike would not be the opening blow in an Iraqi-Israeli war. Begin made the

political decision to attack only the unfinished reactor and did so with a plan that minimized casualties during the attack and before the reactor was activated to eliminate the possibility of radiation spill casualties. In this case, both the bad practice and the irresponsible act arguments against preventive war come up short. It is tempting here to say that the exception proves the rule, but it is sufficient only to demonstrate that a blanket prohibition on the preventive use of force does not stand up well in light of an actual case. The leaders involved were able to properly assess the threat, and to foresee the consequences of their actions. Moreover the attack was executed without deliberate intent to harm the innocent. “Although this preventive attack (which, though technically an act of war, did not progress to full-scale war) was clearly illegal and was universally condemned at the time, a very strong case can be made that it was an instance of legitimate prevention.”

31 McMahan, “Preventive War,” 183.

The Morality of Preemption and Prevention

The rightful self-defense that characterizes preemption—and especially those actions directed at an adversary who is fully armed and readied with an attack to violate another state’s sovereignty and threaten its people—has been broadly accepted as morally right. Both natural law, as has been discussed in a previous chapter, and traditional just war theory do not require one to suffer the first blow to act in self defense. The notion of a legitimate defense in the face of imminent harm is also a recognized international
norms of conduct. “They allow that one can act in self-defense against an imminent
attack by, for example, using force (including lethal force) against an enemy who takes
up arms with the manifest intention of using them.”

As discussed earlier, far less moral approbation has traditionally been afforded to
states that act preventively and yet the rationale for a blanket prohibition on preventive
war cannot flow, as was discussed previously, from the evolution of the theory of jus ad
bellum. No absolute prohibition of prevention exists in the Just War Tradition; rather, the
various theorists of Just War identify circumstances in which states can take preventive
action with moral justification. Moreover, the idea of acting preventively is reasonable
on its face. Conceptually, the only successful defense results from the prevention of any
harm. To react, even with armed force, after being struck is an attempt to ward off future
harm by disabling or disarming the aggressor or by making the cost of additional action
too great for the aggressor to bear. At this point, however, it is too late to avoid the harm
that has already been caused; that blow has already been landed. There is no reasonable
prohibition to using force to defend against a harm in the future vice that which will
occur when an attack in underway.

Circumstances proscribe rather than enable the scope of moral action in this
regard. Walzer, as has been discussed here, has suggested that the intent of the aggressor,
the preparations made to act on that intent, and the risk inherent in being struck first, all
must be gauged to distinguish between a legitimate and an illegitimate first strike. The


33 Buchanan, “Justifying Preventive War,” 128.
argument for the moral justification of preventive action, and especially for preventive
war in a self-defense, is not standard less. This and the preceding chapter argued that
these standards are established by the political and military judgments that flow from the
empirical case. Moral absolutists and others who argue from general and abstract
principles to govern the conduct of states ignore the fact that the individual case always
informs the moral judgment.

This is why democratic states choose political and military leaders and invest in
them the authority to make decisions to safeguard the security of the state and its people.
The political and military decision to make war is not made in the abstract: political and
military leaders can and do make moral choices. Moreover, it must be remembered, from
the discussion in the first chapter, that states make a political decision to choose from
among a number of preventive actions. These actions are intended to be and do become
increasingly coercive. By both intention and by design, the resort to preventive war is the
deliberate choice to move beyond those actions which are coercive to that which is
wholly compelling. To propose a blanket moral condemnation of all preventive uses of
force—in the abstract—is to ignore the hard reality that real moral decisions are made in
actual circumstances. This condemnation also ignores the sobering fact that not all actors
weigh the use of force in the moral balance.

This chapter has argued not for abstract criteria of what would justify a moral
preventive act in self-defense, but that specific circumstances can warrant preventive
acts, including preventive war. A state that faces an existential threat—the extinction of
its people—especially in an age where modern weapons of mass destruction make this
possible, has a right to act in its own defense before that threat becomes a reality. In like manner, a state threatened with irreparable harm, a blow that cannot reasonably be expected to be absorbed given the duty of the state to defend its citizens, may act, morally, with the use of force to prevent that injury. The cost to peace of the catastrophic threat, the loss of state sovereignty and of that state’s territorial integrity, and of the subjugation of its people, is also a circumstance which warrants preventive action.

The Just War Tradition stretches back across two millennia to a time when the threat to the peace of nations moved at the foot speed of a soldier or the wind speed of a sailing ship. The threats to peace now include nations with missiles having intercontinental range and nuclear warheads that can reach their targets in minutes, and rogue actors and terrorists who can mount devastating strikes from within and will do so without warning. In the face of these threats, the moral injunction to protect the innocent simply cannot be realized if the state must suffer the first strike to then act morally in self-defense. That first strike can now be of such fury and devastation that it would be impossible to mount an effective defense.

The arguments in opposition to the use of preventive force, and especially those against preventive war, fail to address the overriding obligation of the state to protect its people from harm. The objections to the last resort of preventive action, that of preventive war, flowing from arguments of both bad practice and irresponsible act, do not stand up to serious scrutiny. It is possible to act morally in making the decision to wage preventive war but the conditions under which this is possible are, as has been demonstrated, narrow. Preventive wars are moral in certain circumstances and certainly
so where inaction creates a morally objectionable risk of grave harm to the innocent.

This chapter has argued the actual circumstance of the need to act in defense of the state and its people informs the moral and political judgment of when and how to take preventive action. The actual process of making those judgments is the subject of the next chapter of this discussion.
CHAPTER FOUR

PREEMPTION AND PREVENTION: ISSUES OF STATECRAFT

Were we to do nothing until the knife was sharpened? Were we to stand idly by until it was at our throats?

—Adlai Stevenson, United Nations Security Council Address on Soviet Missiles in Cuba

The essence of ultimate decision remains impenetrable to the observer—often, indeed, to the decider himself . . . There will always be the dark and tangled stretches in the decision-making process—mysterious even to those who may be most intimately involved.

—John Fitzgerald Kennedy, Decision-Making in the White House

Preemptive and preventive acts of state are undertaken as a result of political decisions made in the face of threat of harm to the security of the state and the safety of its people. The first chapter of this work argued that these acts occur on what Walzer has described as a spectrum of anticipation and that the acts reflect the state’s knowledge of both the capability and the intent of a hostile state or other actor. Timing remains the discriminating factor between acts of preemption and acts of prevention: the timing of the preemptive act is dictated by the action of the threatening state while the timing of the preventive act is largely a matter of choice for the leaders of the threatened state. Regardless of the preemptive or preventive character of the act, political leaders also have
a choice of means, admittedly limited by the circumstances which confront them, but choices all the same.

The purpose of this chapter is to discuss acts of preemption and prevention as means of statecraft and, historically, not uncommon as strategies employed by states seeking to protect their security and defend their sovereignty. These are acts of diplomacy and negotiation as well as acts that involve the use of compelling measures that include the use of armed force. It will explore the argument that democracies do not engage in preventive war, cite historical examples to the contrary, and demonstrate that preventive acts—to include preventive war—are not anomalous behaviors of democratic states but are among the regular strategies political leaders choose to deal with threats of harm.

This chapter will also explore the political process that leads to the decision to act preemptively or preventively. The argument here is that this process occurs in three distinct phases beginning with recognition of the threat, followed by deliberations that lead to the decision to act. Each of these phases will be explored as part of the larger process. This discussion will explore the primacy of the state in this regard and the complexities and necessity to engage policy makers in what is, at its root, a political decision. This chapter will argue that public policy-making and decision-making for preemptive and preventive actions are rarely accomplished by fiat, and especially so in modern democracies. Instead this process is usually highly collaborative as decision makers engage both the military and the government in an assessment of capabilities and
means, and the risk of action or inaction, and the prospect for success. In addition, the
decisions to adopt preemptive or preventive courses of action now play out on a world
stage and both domestic and international political considerations come into play.
Decision makers and their advisors during this process also address both moral and legal
considerations, as each has implications for domestic and international public opinion.
Those opinions also shape the decision-making process for preemptive and preventive
action.

**Preemptive and Preventive Strategies**

Much of the most recent literature that addresses preemptive and preventive acts
of state discusses these acts, and especially the act of war, as doctrinal concepts, ascribing
to them a definitive role in U.S. foreign policy and national military strategy. The
impetus for the discussion was the publication of President George W. Bush’s National
Security Strategy (NSS) in 2002, drafted in the wake of the terrorist attacks on the United
States on September 11, 2001:

> The United States has long maintained the option of preemptive actions to counter
> a sufficient threat to our national security. The greater the threat, the greater is 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. To forestall or prevent such hostile acts by our adversaries, the
> United States will, if necessary, act preemptively.¹

That strategy made clear that the United States was prepared to act in the face of sufficient threats to the nation’s security, but ambiguously stated that anticipatory actions to forestall or prevent those threats would be taken preemptively. Critics of the NSS and of the U.S.-led 2003 War in Iraq coupled the language of that strategy and the attack on Iraq to identify the so-called “Bush Doctrine” of preventive war. Much of the subsequent discussion has been colored by this assumed connection:

For the most part, the debate over preemption, and especially over preventive war, has become a debate over the legitimacy of the attack on Iraq and its subsequent occupation. Moreover, the very different issues of singular surgical preemptive attacks (such as Israel’s bombing of the Osirak reactor), as contrasted with full-scale preventive war (such as the invasion of Iraq) have become conflated in at least some of the discussion growing out of the invasion of Iraq. Thus, although the invasion of Iraq is indeed a testing case for the doctrine of preventive war, it should not be regarded as the testing case. . . . A far wider array of potential situations must be evaluated.²

Critics of preventive war see this doctrine as a misguided break with American traditions and a dangerous step closer to legitimizing aggression. Some authors have claimed that the war in Iraq was the first preventive war in U.S. history.³ Distinguished Professor of Global Diplomacy at San Diego University, John G. Stoessinger asserts the Bush Doctrine has been widely criticized because Iraq “did not pose a direct threat to the United States,” and because “Bush chose to overturn more than 200 years of American foreign policy.”⁴ Neta Crawford has bemoaned the “necessity for preemption and an

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³ Herring, Colony to Superpower, 948.

⁴ Stoessinger, Why Nations Go to War, 311.
expansive conception of what constitutes a threat . . . coupled with a doctrine of permanent US military superiority,” as a “revolution in US foreign and military policy.”

Other authors, commentators and critics assailed the doctrine and the war. Historian Arthur Schlesinger, for example, lamented that America had never before made the choice to fight a preventive war. He claimed that “for more than 200 years we have not been that kind of country,” and went on to argue that the war in Iraq was immoral.

Rodin brands the Bush Doctrine as a “radical innovation in the grounds for waging war” and argues that all preventive wars are immoral.

These criticisms are so pervasive that they deserve to be carefully dissected and assessed. The first criticism is that the Bush administration has created a ‘Doctrine of Preventive War’ and also implies that this doctrine calls for the unbridled use of force. There is, however, nothing doctrinal in the National Military Strategy of 2002, at least in the U.S. Department of Defense definition of a ‘doctrine’ as “a fundamental principle by which the military forces or elements thereof guide their actions in support of national objectives.”

Preemption and prevention, as discussed in the first chapter, are not doctrines to be applied with a universal consistency as a keystone of foreign policy. Preemptive and preventive acts of state are strategic choices that policy-makers select

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5 Crawford, “False Promise,” 98.
from among a range of options to deal with threats to national security. As Jack S. Levy, Board of Governors’ Professor of Political Science at Rutgers University, puts it “prevention and preemption are each forms of better-now-than-later logic, but they are responses to different threats involving different time lines and calling for different strategic responses.” ²⁹ These responses are part of larger, or overarching grand strategy such as that enunciated in the NSS. Moreover, these actions are not exclusively confined to acts that require the use of force.

Fighting power is but one of the instruments of grand strategy—which should take account of and apply the power of financial pressure, of diplomatic pressure, or commercial pressure, and, not least of which is ethical pressure to weaken the opponent’s will. ³⁰

The National Security Strategy of the United States of 2002 (NSS) also stated, unambiguously, that the “United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression,” but rather U.S. policy would remain open and flexible. The nature of the threats, however, warrants action to address these threats before they are fully formed:

There are three reasons for a more expansive use of preventive force—the changing nature of the actors who threaten the United States (rogue states and terrorist vs. traditional state adversaries); the characteristic of the threat (clandestine weapons programmes) and the inadequacy of relying on collective action through the Security Council (‘While the United States will constantly strive to enlist the support of the international community, we will not hesitate to

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act alone, if necessary, to exercise our right of self-defense by acting preemptively’).  

While it can be argued that the authors of the NSS substituted preemption for prevention in its wording, the strategy itself makes it clear that other means besides the use of force are envisioned to deal with emerging threats. The NSS, for example, goes to some lengths to describe how economic inter-relationships and the spread of democratic institutions form part of the larger, grand strategy. It also describes the means by which to confront the grave nuclear, biological and chemical threats that face the United States:

It lays out four components of American strategy to confront this threat: deterrence and defense, strengthening diplomatic and multilateral efforts, improving abilities to respond to and reduce the effects of the actual use of NBC weapons, and preventive attacks against emerging NBC programs.  

In addition, the NSS states unequivocally that the United States will “always proceed deliberately, weighing the consequences of our actions.” To support these actions the United States will create improved intelligence capabilities “to provide timely, accurate information on threats;” to coordinate with allies and “form a common assessment of the most dangerous threats;” and to develop the military means “to conduct rapid and precise operations to achieve decisive results.” Given this context—and the actual language of the NSS— it is difficult if not impossible to criticize the strategy as ‘revolutionary’ or a ‘radical innovation in waging war.’ Critics of preventive war, with its source in the NSS or in some assumed new American doctrinal approaches to the use of force, have little on

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which to base their arguments. The NSS lays out a plan for action that includes deterrence and defense, diplomacy and multilateral initiatives that have all the hallmarks the U.S. national security strategy for the Cold War. These are not revolutionary concepts. The use of preventive force is posited in the NSS as a last resort and that is not a radical innovation in waging war.

**Prevention and American Precedents**

The second criticism of the use preventive force is rooted in ill-founded arguments that deny an American historical precedent for these actions. Preemptive and preventive strategies, and especially strategies that involve the use of preventive force, have been among the tools of statecraft for centuries and were neither unknown nor unpracticed by American leaders. “Virtually ignored . . . in this debate is the substantial history of European warfare launched to preempt perceived gathering threats and the lengthy post-Cold War discussion among United States policymakers as to the advisability of the United States launching preventive wars against the Soviet Union or other communist states.”\(^{13}\) Yet critics are obdurate in their insistence that the use of preventive force is without precedent in the American tradition. It is instructive, therefore to investigate the American historical record in this regard.

The history of the United States, since the earliest days of the republic, illustrates that its political leaders knew and understood that preventive strategies were essential to the safety of the state. The new nation had gained independence from Britain, but independence had come at the cost of losing the security afforded by, arguably, the world’s most powerful armed forces. The country and its leaders were faced with a host of external and internal security threats. Britain was now an adversary and menaced the United States from Canada, contested American claims in the Ohio Territory and was expanding its trade and presence in the Pacific Northwest. Russia was pressing down through Alaska and claimed much of the North American west coast. The Spanish weakly held a swath of territory from the east coast of Florida, across the future Gulf states to the Mississippi River. France controlled that river all the way to the port of New Orleans and claimed the vast heartland of the continent as its own, Louisiana. Stripped of the protection once afforded its sea-going commerce by the British Navy, American interests on the high seas were now threatened by pirates and a host of small maritime states eager to prey on U.S. merchant ships plying a transoceanic trade—trade vital to the new nation’s struggling economy.\(^{14}\) The new American nation also faced an internal

threat from Native Americans. The United States had vast borders to defend but only limited means with which to defend them. Its leaders would never be able to anticipate all of the possible places, times and ways by which another attack might come; and as the nation grew in territory and population, the problem could only get worse.  

George Washington, in the early days of his presidency, chose to deal with the internal threat posed to the new nation—and to its expansion—with a preventive force aimed at the Native American tribes forming an alliance in the Northwest. After years of Indian raids in the Northwest, Washington authorized military action across the American border and into Indian lands to attack the tribes of the Northwest Confederacy. In addition, Washington began to develop the earliest foreign policy strategy of the new nation with preventive diplomacy intended to forestall the threat of future Indian raids. The Trade and Intercourse Act of 1790 created the basis for treatment of the tribes as sovereign nations and laid the groundwork for the establishment of future Indian Territories. The act was intended to prevent all but the Federal Government from treating with the tribes in an attempt to safeguard their lands, foster good trade relations, and prevent future conflict. 

Thomas Jefferson, a president who both strictly and narrowly interpreted the constitution, nevertheless moved adroitly and quickly—and likely unconstitutionally—to forestall a strategic threat to the long-term interest of the young American nation with preventive action. Apprised in 1802 that Napoleon of France planned to acquire

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Louisiana from Spain, Jefferson was prepared to wage a preventive war to protect American interests. The United States had a favorable arrangement with Spain to move its trade goods down the Mississippi to market through New Orleans. That arrangement would be jeopardized by French control of the port or by a British blockade in the event of war with France. Faced with the potential loss of the vital port, Jefferson threatened an Anglo-American alliance and signaled his willingness to take New Orleans by force. In a private letter of instruction to Robert R. Livingston, American Minister to France, Jefferson asked that the American position be made plain to certain “friends” in France:

The day that France takes possession of New Orleans fixes the sentence which is to restrain her forever within her low water mark. It seals the union of two nations who, in conjunction, can maintain exclusive possession of the ocean. From that moment we must marry ourselves to the British fleet and nation. We must turn all our attentions to a maritime force, for which our resources place us on very high grounds: and having formed and cemented together a power which may render reinforcement of her settlements here impossible to France, make the first cannon which shall be fired in Europe the signal for tearing up any settlement she may have made and for holding the two continents of America in sequestration for the common purposes of the united British and American nations.  

In 1803, Jefferson sent James Monroe to France with instructions to either buy New Orleans or go to London to form the alliance to take New Orleans by force. In the end, Monroe negotiated the sale not just of New Orleans, but of the whole of Louisiana. Jefferson made these moves without informing the Congress of either his intent to enter

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16B.L. Rayner, *The Life of Thomas Jefferson* (EZReads, 2010), 310. Jefferson’s private letter to Livingston him to let these sentiments be known to certain members of the French Court and other influential parties. Anxious that Livingston had not been aggressive enough in this initiative, Jefferson then sent Madison to France.
into a foreign treaty or his intent to wage war. Instead, Jefferson threatened a preventive war and protected American vital interests with admittedly heavy-handed and coercive preventive diplomacy.  

Jefferson’s action was not the only example of coercive American diplomacy and the preventive use of force in the early years of the Republic. President James Monroe, for example, justified General Andrew Jackson’s invasion and occupation of parts of Spanish Florida in 1817 after raids on U.S. territory by Creek and Seminole tribes and escaped slaves. Monroe refused to either censure Jackson or offer an apology as demanded by Spain. Monroe’s position was crafted by Secretary of State John Quincy Adams, who claimed that the United States had a right to act preventively in such situations and especially so when Spain did little or nothing to stop the attacks that originated in its territory. Adams asked the British Minister Plenipotentiary to Spain to intercede with the Spanish crown and in so doing advanced an argument that was an example of coercive diplomacy coupled with the prospect of the preventive use of force. Adams first exculpated Jackson’s invasion of Florida and capture of Spanish forts by insisting that Jackson had acted “in the first law of nature—self-defense,” and was, moreover, necessitated in doing so by Spain’s failure to stop attacks on the United States. Adams then made clear that the Spanish had but two choices in the matter:

The obligation of Spain to restrain, by force, the Indians of Florida from hostilities against the United States and their citizens . . . and that Spain must immediately

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make here election either to place a force in Florida adequate at once to the protection of her territory, and to the fulfillment of her engagements, or cede to the United States a province, of which she retains nothing but the nominal possession.\textsuperscript{18} 

John Lewis Gaddis has argued that Adams’ approach is very like that made in more modern discussions of the means by which nations attempt to deal with the security problems presented by ‘failed states.’\textsuperscript{19} 

The application of Adams’s doctrine to contemporary circumstances would unquestionably warrant the United States using force preventively against a failed or failing state that was unable or unwilling to take the actions necessary to suppress a terrorist group within its boundaries that was engaging in attacks upon the United States.\textsuperscript{20}

Adams also articulated the idea of the state’s moral obligation to defend its people. In the same diplomatic note to the British Minister, Adams argued, “the duty of this government to protect the persons and property of our fellow citizens on the borders of the United States is imperative—it must be discharged.”\textsuperscript{21} That duty, a moral obligation to protect innocent Americans from depredations and harm, would require the United States to act. Should Spain fail to stop the transgressions emanating from its territory, Adams claimed that a preventive use of military force driven by the “necessity


\textsuperscript{19}Ibid., 17.


\textsuperscript{21}American State Papers, Senate, “Century of Lawmaking,” 544-545.
of self-defense” would again “compel the United States to take possession of the Spanish forts and places in Florida.”

Cleary, early American statesmen and leaders understood the necessity of preventing attacks on the nation and of securing U.S. borders against those who would mount future attacks on its territory. They also recognized that action was needed to prevent future sources of conflict in the Americas. Fearing that the great powers of Europe would continue to claim a stake in the Americas and establish a presence that would eventually lead to conflict with American ambitions, Monroe articulated a policy (authored largely by John Quincy Adams) that further European attempts to colonize lands or interfere with newly independent states in the Western Hemisphere would be viewed as acts of aggression and prompt U.S. intervention. The Monroe Doctrine (1823) was an act of preventive diplomacy backed by the threat of force.

The use of preventive acts of state—acts of diplomacy and negotiation, the threat of force, the use of force, and preventive war—were staples of American foreign policy from the earliest days of the Republic through nineteenth century. Various authors and commentators, including Gaddis, Strachan, and Trachtenberg, have argued that these

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22Ibid., 545.

23The Doctrine was largely ignored by European diplomats; the United States had neither a Navy nor an Army sufficiently capable of launching expeditionary operations to enforce it. The Doctrine, however, met with British approval. Britain was anxious to expand its trade in the hemisphere and was loathe of risking Spain to retake its possessions in the New World and impose a closed mercantilist system that barred British trade. It was the British Navy, then, that protected the western hemisphere. See Herring, *Colony to Superpower*, 153-155.
preventive approaches to looming threats to American independence and security also
figured as part of the U.S. national security strategy well into the twentieth century.²⁴

A succession of twentieth-century American Presidents also announced
‘doctrines’ of preventive intervention. These include Theodore Roosevelt,
Franklin Roosevelt (through Secretary of State Henry Stimson), Harry Truman,
Dwight Eisenhower, Lynden Johnson, Richard Nixon, Jimmy Carter and Ronald
Reagan. . . . These Presidential Doctrines ‘do not say when the U.S. will actually
intervene, but rather when it will regard itself as rightfully contemplating
intervention.’²⁵

Theodore Roosevelt, for example, made clear in a message delivered by
Secretary of State Elihu Root that the United States would intervene in the internal affairs
of Caribbean and Latin American states when, and only if, those nations failed to meet
their international obligations or maintain internal order. The immediate issue was the
failure of these states to pay loans and obligations to Europeans, a situation which
threatened direct European involvement in the hemisphere.²⁶  Roosevelt’s was a
remarkable expansion of the basic premise of the Monroe Doctrine and early recognition
of the importance of the stability of nations neighboring the United States.  Root laid out
Roosevelt’s “Corollary to the Monroe Doctrine” by reading Roosevelt’s letter to the
Cuban Society of New York on the second anniversary of Cuban liberation:

²⁴See Gaddis, *Surprise, Security*, 16; Strachan, “Preemption and Prevention,” 23-39; and Marc
Trachtenberg, “Preventive War and US Foreign Policy,” *Preemption: Military Action and Moral


394-397.
If a nation shows that it knows how to act with decency in industrial and political matters, if it keeps order and pays its obligations, then it need fear no interference from the United States. Brutal wrongdoing or an impotence which results in the general loosening of the ties of a civilized society, may finally require intervention by some civilized nations, and in the Western Hemisphere the United States cannot ignore this duty.\(^{27}\)

The cause for Roosevelt’s concern was the state of financial affairs of the Dominican Republic in 1904. Debts owed to commercial interests in Germany, France and Italy were in arrears and those nations threatened to intervene to collect. When an Italian cruiser appeared off the Dominican coast, Washington persuaded the Dominicans to request U.S. assistance in collecting customs receipts. Even though the protocol to collect customs revenue was signed by both parties, it was rejected by the U.S. Senate. Roosevelt pressed ahead and arranged for American oversight over customs revenue collection beginning in 1905. Conditions improved rapidly thereafter. The revenue was collected, corruption was eliminated, creditors were paid and money was made available for infrastructure on the island. The episode is an example of an economic act of prevention and diplomacy coupled with simple pragmatism.

Three decades later, Franklin Roosevelt relied on economic acts of prevention, announced a policy of maintaining the lifeline of supply to Britain to prevent the Nazi conquest of that nation, and then launched an undeclared preventive naval war in the Atlantic.\(^{28}\) The Truman Doctrine of containment in 1947 pledged the United States “to


support free peoples who are resisting attempted subjugation by armed minorities or outside pressures,” with the immediate result of covert American intervention in the civil war in Greece. The Johnson Doctrine, established by President Lyndon Johnson after the U.S. invasion of the Dominican Republic in 1965, declared that domestic revolution in the Western Hemisphere would no longer be a local matter when “the object is the establishment of a Communist dictatorship.” In each case, the President identified conditions which warranted U.S. intervention. The course of action in each instance was chosen from among a range of preventive strategies that included the use of diplomatic and economic means, covert action, and the use of force, to include preventive war.

American policy-making and the formulation of preventive strategies have not been confined to actions in the Western Hemisphere. President Jimmy Carter, for example, made explicit that U.S. interests in the unhindered passage of energy from the Middle East warranted American intervention in any case where shipment was threatened. The so-called Carter Doctrine was a clear diplomatic statement of preventive intent backed by the explicit threat of the use of preventive armed force.

Despite this historical record, some commentators insist that the war in Iraq—as distinct from the regime change it produced—represents an unprecedented use of preventive force by the United States. Political theorist Randall Schweller, for one, argued that no preventive war has ever been initiated by a democratic state, an argument made hollow both by the historical record and by the Iraq war. Schweller, however, also argues that the normative and institutional character of a democratic state drives its
leaders to seek alternatives to war in defensive alliances or accommodation to the
threatening state. Silverstone argues that long-held beliefs about preventive war
“determine whether and to what extent it has been seen as a normatively prohibited
strategic option in the American democratic political system.” Americans, he claims,
see preventive war as a form of aggressive war which violates the country’s normative
standards justifying the use of military force. Moreover, he argues that Americans resist
the notion of war as inevitable, preferring instead to use a variety of other means to avoid
conflict. On the international level, Americans fear that U.S. initiation of a preventive
war sets an unwelcome precedent for aggression by other nations. Finally, Silverstone
captures what many argue is the moral aspect of these actions. “Even if American
leaders did not fear direct reciprocity for engaging in preventive war . . . the potential loss
of a positive reputation or moral authority with other states may be perceived as an
additional cost of this kind of behavior.”

It is difficult, if not impossible, to reconcile these arguments with the historical
record. Even Silverstone’s claim that an anti-preventive war norm existed in the
immediate post-World War II years simply does not stand up to scrutiny. The record
shows that American leaders have consistently considered and adopted preventive
actions, including the use of preventive force, to meet its security objectives:

29 Randall L. Schweller, “Domestic Structure and Preventive War: Are Democracies

30 Silverstone, Preventive War, 18.

31 Silverstone, Preventive War, 22.
The United States had used preventive war regularly since 1945 to forestall revolutionary change. In the 1950s and 1960s, it employed military power once every eighteen months on average to overthrow a government inimical to its interests. But this existing predisposition in favor of preventive war was obscured until the 1990s by the wider context of the Cold War, by America’s endorsement of international law and multilateral institutions, themselves designed to curb preventive war, and by the use of special forces and covert operations which ensured the United States’ actions were largely overlooked.32

Intervention through the use of a range of preventive acts of state is then, historically, not a radically new concept. For more than 200 years, American statesmen have crafted preventive strategies that included various means—including the use of armed force—to ensure the security of the United States. Their notes and diplomatic exchanges, their policies and their actions, confirm that the U.S. government has always believed in the justified use of preventive actions in specific circumstances. In view of the historical record, a single diplomatic note—in this instance that of Webster in the Caroline case—can hardly be regarded as the last word on the legitimate use of preemptive and preventive acts of state, despite its current stature in international law.33 Nor can it be argued that a cultural pre-disposition, or a democratic tradition, stands in opposition to preventive actions, and especially to the first use of force.


33“The Caroline standard is too extreme. It is not clear that an attack on U.S. territory was necessary as a matter of imminent self-defense. It is clear that the actual attack was not justified by the principles Webster and Ashburton promulgated. Moreover, the principles themselves are deeply flawed. They justify reflex defensive actions to imminent threat and nothing more. For instance, they do not leave enough time for states to protect their legitimate interests in self-defense when they still do have some ‘choice of means,’ albeit no peaceful ones, and some ‘time to deliberate’ among the dangerous choices left.” Michael W. Doyle, Striking First: Preemption and Prevention in International Conflict (Princeton, NJ: Princeton University Press, 2008), 14.
Preemptive and Preventive Acts and Political Decision-Making

To say only that the threat of harm leads to the decision to act preemptively or preventively is a gross oversimplification. The decision to act is made in a crucible in which the nature and timing of the threat, the risk of harm, the capabilities of the threatened state, international and domestic politics, public opinion and morality are all at issue. Moreover, the decision to act is the culmination of a process that occurs in phases. The process begins when decision-makers recognize the threat, come to a realization of the nature of the threat and understand the risk to the security of the state and the safety of its people if that threat is made manifest as harm.

In many cases, first recognition of the threat is provided by the threatened nation’s foreign intelligence. Once the threat is recognized and understood, decision-makers then engage the military and the government in making an assessment of the capability to respond to the threat and determine the optimal means to make that response. These decision makers must then weigh the risks of action or inaction to address the threat, mindful that the final decision must be made in the face of both domestic and international opinion. At the culmination of this deliberative phase of the process, decision makers then weigh the choice of means and the timing of the preemptive or preventive acts before choosing to authorize the action.
Recognition

Preemptive and preventive actions are only possible when decision-makers have adequate warning of the threat of harm. No preemption is possible when an adversary launches a sudden, successful surprise attack. In like manner, it is not possible to take preventive action when the threatening state successfully masks its intentions and preparations. Decision-making for preemptive and preventive action is a process that begins with the classic warning problem: “It is . . . impossible to prove in advance that something is going to happen, when that something is dependent on the decision and actions of people rather than the laws of nature.” 34 Intelligence work is not a science.

The decision maker’s full recognition of the threat develops after warning of the threat of harm has been understood but that recognition also includes a well-informed idea of the temporal nature of the threat. The threat can be immediate, near-term, or long-term and the decision maker must begin the process of deliberation as to the response based on these temporal states. As was discussed in Chapter One, an immediate threat—and especially a threat of armed attack—can be met with preemptive action only in exceptional circumstances and only if the threatened state has sufficient capability to meet the threat. Had the United States received adequate warning of the Japanese attack on Pearl Harbor on the morning of December 7, 1941, for example, the U.S. Navy might have been able to launch its own preemptive attack. Even so, this would have required

34 Cynthia M. Grabo, Anticipating Surprise: Analysis for Strategic Warning (Washington, DC: Center for Strategic Intelligence Research, 2002), 12.
the Navy to sortie at night, find the Japanese battle group, close on the Japanese Navy and engage in a pre-dawn action. Threats that occur further along the spectrum of anticipation, threats not immediate but more distant, can be addressed with a range of options. France in the years between World War I and World War II, for example, readily discerned the threat that would come from a resurgent Germany. French leaders chose to deal with this long-term threat by building its massive Maginot Line to defend against and more hopefully, deter a German attack.

The decision maker also weighs the risk of potential harm to the state, to its sovereignty and security. Sovereign threats put at risk the integrity of the state; these are threats of harm to its territory and its institutions. The military occupation of a state by a foreign power is perhaps the best illustration of this sovereign harm, for that occupation denies the state both the rights of its own territory and its own institutions. Occupied France in World War II was thus forced to submit to measures which exploited French resources—natural resources, capital resources and labor—and replaced the French republican government with the puppet Vichy regime.

Threats to the security of the state put at risk its national interests and the lives and safety of its people. President Carter, for example, expressed this recognition of a security threat to U.S. national interests immediately following the Russian invasion of Afghanistan in December, 1979. In his January, 1980 State of the Union Address, Carter was unequivocal:

The Soviet effort to dominate Afghanistan has brought Soviet military forces to within 300 miles of the Indian Ocean and close to the Straits of Hormuz, a
waterway through which most of the world’s oil must flow. The Soviet Union is now attempting to consolidate a strategic position, therefore, that poses a grave threat to the free movement of Middle East oil. . . .

Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.

Carter’s recognition of the threat to U.S. interests drove the decision to engage in preventive diplomacy and in so doing, he followed in the footsteps of other presidents who were prepared to use military force to prevent future threats from being realized as harms to the nation’s vital interests.35

Deliberation

The decision to adopt preemptive or preventive acts in the face of the threat of harm to the state is a political decision normally made by the heads of state. In modern democracies this process of decision-making relies not on the judgments of a single authority—as was the case of European monarchies in the early modern era—but, instead, involves much of the political apparatus of state. The framers of the Constitution of the United States, for example—weary of the European wars of feuding monarchs and wary of placing the power to wage war in the hands of the head of state—reserved to the Congress the right to declare war. Similarly, the U.S. Senate must approve treaties arising out of diplomacy and the full Congress and the State Department have a hand in

creating sanctions. In practice, even though Congress has not declared war since 1942, all of the acts of preemption and prevention from diplomacy, to sanctions, to strikes and war, are conducted as part of a coordinated effort across government. U.S. military actions undertaken after the attacks of September 11, 2001, for example, were authorized by Congress, as was the U.S.-led war in Iraq. Even in the most autocratic contemporary governments, with a single strong man ruler, some effort is made to involve the military leadership in the process that leads to the decision for the use of preemptive and preventive force. Even autocrats need broad support to make war.

This process of deliberation engages the principals in an effort to weigh a number of factors to better inform decision-making that include a capabilities assessment, the prospect for success (of various courses of action), the political cost of acting and of not acting, a moral judgment of the contemplated courses of action, and the legality of the action.

**Capabilities Assessment**

Once the threat has been recognized and fully understood, decision makers and their advisors begin to take stock of their own state’s capability to respond to that threat. This is an effort to gauge their state’s strengths and weaknesses in the context of the threat and includes an assessment of diplomatic, informational, economic and military capabilities. There is, in this part of the larger process, some effort to narrow the courses

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36Congress declared war against Romania when that country joined the Axis powers during WWII.
of action. The more certain the threat, the more imminent the danger of armed attack, the more likely it is that decision makers will choose to use force and strike first.

The more certain a threat is, and the greater the advantage of attacking on relatively favorable terms is over being attacked at the enemy’s convenience, the more attractive anticipatory attack becomes. If striking first appears highly advantageous against a highly certain threat—which usually also means an imminent one—anticipatory attack becomes a relatively easy choice.  

By contrast, the more uncertain the nature and timing of the threat, the more likely it is that decision makers will seek alternatives to the use of force and explore policy options that include defense and more coercive actions. “Coercive diplomacy is an attractive strategy insofar as it offers the possibility of achieving one’s objectives economically, with little if any bloodshed, and with fewer political and psychological costs than warfare exacts and less risk of conflict escalation.”

This was the situation in Iraq after the first Gulf War when the United States and the international community sought to enforce sanctions and trade restrictions and maintain the No-Fly zone.

This capabilities assessment phase includes the effort to identify alternate courses of action involving various means and also takes account of the temporal dimension of the threat. Many of the courses of action open to the decision maker are constrained by the time available to act. The large scale movement of troops, for example, requires days and even weeks and so might preclude the choice of any course of action that involves the use of force against an immediate threat. Other actions may only become effective

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after considerable time has elapsed. Economic and trade sanctions aimed at threatening states will likely take months, and even years to have an impact on those states’ behavior.

**Prospect for Success**

Arguably the most difficult aspect of the deliberations is the effort to identify the action, or actions, which are most likely to succeed in the face of the threat. Use of the wrong means could aggravate the threat or magnify its consequences. Then, too, there is the possibility that any action could actually precipitate the incipient threat and thereby cause the harm that action was intended to forestall. “Sometimes a state is so fearful of provoking its opponent into preemption that it avoids taking preparatory military measures important for the national defense.”39 The Lincoln administration, for example, determined not to reinforce Federal forces in Charleston, South Carolina, for fear of sparking open conflict between the Union and the seceded state. A key factor in the decision to use force and to strike first is the likelihood the action will be successful in eliminating the threat and this is true whether the threat be near or distant:

How much better off the state expects to be if it carries out the anticipatory attack than if the adversary attacks at the time and in the way of its choice is in large part a military question. If attacking promises great success while defense is unpromising, the first-strike advantage will be large. When considering preempting an imminent threat, it is the benefits and costs of literally striking first, and of being struck, that matter. For preventive attacks, the consequences of expected changes in the combatants’ strengths and vulnerabilities between the

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time when a first strike would be launched and the time when the enemy would choose to attack are what count.\textsuperscript{40}

The likelihood of success plays a pivotal role in the deliberations as to the choice of means to respond to the threat and ultimately drives the decision-making process. Advisors to the decision makers typically focus their efforts on identifying pragmatic alternatives that offer a high chance for success. Despite this pragmatic approach, there is no scientific certainty in this process. Nassim Nicholas Taleb has suggested that attempts at predicting future outcomes are handicapped by the illusion that decision makers think they understand what is happening and that inordinate emphasis is placed on factual information in this process. In addition, decision makers who attempt to be guided by the past can be easily seduced by a retrospective distortion, a phenomenon that Taleb describes as a tendency to examine past events without considering the impact of the passage of time.\textsuperscript{41} Despite these handicaps, politicians are often still required to determine a future course of action. A successful or unsuccessful outcome for any preemptive or preventive action also plays out before both a domestic and international audience and so affects the political capital the decision maker has put at risk. The assessment of the prospect for success, then, also considers the amount of political capital needed to act.

\textsuperscript{40}Mueller, \textit{Striking First}, xiii.

\textsuperscript{41}Nassim Nicholas Taleb, \textit{The Black Swan: The Impact of the Highly Improbable} (New York: Random House, 2010).
Political Cost

Political factors also weigh heavily in the deliberation phase of the decision making process for preemptive and preventive action. “States that are genuinely threatened are, of course, more likely to receive the political benefits of being a victim than are those that fabricate a threat.”42 The long record of wrangling among states at the United Nations debating the use of sanctions to check a rising threat to peace and security—from Iran, or Iraq, or North Korea, to name a few instances— is an illustration of actions that require the political support, tacitly or explicitly, of other states. This is more often the case as preventive actions move from those which are coercive to those which are compelling, and especially so to those which involve the use of force.

Anticipatory attacks usually entail significant political costs in the international arena, especially in cases where the threat that prompts them does not appear dire and imminent to outside observers, and these can outweigh even considerable military advantages to striking first . . . There are usually also important domestic political costs and benefits to take into account . . . These considerations may argue in favor of or against striking first, depending on the circumstances and the state in question.43

There are often important domestic political considerations to take into account when decision makers weigh the costs of preemptive or preventive actions. Domestic public perception of the country’s leaders and their ability to deal with a threat to the state can work profound changes in government. Churchill’s selection as Prime Minister in 1940, for example, came amid a crisis of confidence in Britain’s leadership. Prime


43 Mueller, Striking First, 35.
Minister Neville Chamberlain lost his majority in the British House of Commons in the wake of Britain’s failed Norwegian Campaign, a preventive action, and as German troops advanced into Belgium and Holland.

In similar fashion, public opinion can impact decisions made to take preemptive or preventive actions. Israeli Prime Minister Begin, for example, made the decision to launch the preventive attack on the Iraqi nuclear reactor at Osirak in June, 1981, with nagging doubts that his Likud Party could win the next general election. For Begin, the choice was between attacking the threat posed by Iraq, or surrendering the initiative to the Labor Party and its preference for renewed diplomacy. Begin acted, in part, because he was certain diplomacy would fail again, as it had in the past. Begin told a close political advisor, “I know there is an election coming. If they (Labor) win, I will lose my chance to save the Jewish people.” Begin knew the Israeli Labor Party was committed to a negotiated settlement in a process that would buy time for Iraq, a move wholly disadvantageous to Israel. Begin, then, had an impetus to action based on his perception that public support that was swinging towards Labor.

Decision makers often try to get a sense of both domestic and international opinion before acting either preemptively or preventively. This effort is an attempt to gauge not only the temper of both domestic and international audiences, but of the leadership of those audiences, so as to better calculate the political cost of action. In the

days before the decision to launch the preemptive air strike in the Six Day War, Israeli leaders delayed the decision to act in the face of increasingly alarming signs of Egypt’s preparation for war until Cairo closed the Strait of Tiran to Israeli shipping.

This last action helped steel the resolve of the Israeli leadership that war must be considered as a possible course of action. Israeli Foreign Minister Abba Eban argued that Israel could not passively accept these Egyptian moves, lest Israel's deterrent power and international credibility be destroyed. However, he noted the importance of taking international repercussions into account, especially U.S. desires to defuse the crisis and avoid war. Going to war against the diplomatic tide might mean winning the war militarily but losing the victory politically.\(^\text{45}\)

The Israeli decision to attack Egypt came after all hope of a diplomatic solution had evaporated and U.S. pressure on Israel to forgo military action had waned. Only after Israeli leadership understood the new stance in Washington, which some called a ‘yellow light’ for the Israelis, “did preemptive war become a politically feasible option . . . . The delay in the decision to preempt demonstrates that Israel decided to attack only after the leadership concluded that such an attack would not jeopardize relations with the United States.”\(^\text{46}\) Here the Israeli leadership carefully weighed the political cost of the loss of U.S. support vice the inherent military advantages of striking first. States faced with the prospect of preemptive and preventive action consider a range of political costs. They also consider the rightness of their actions.

\(^{45}\) Reiter, “Exploding,” 17.

\(^{46}\) Reiter, “Exploding,” 19.
Moral judgments in the deliberation phase of decision making for preemptive and preventive actions are calculated as both part of the political cost and as part of the prospect for success. Public perceptions of what constitutes the just action of states shape international opinion—and the political capital attached to that opinion. “There are also domestic political costs and benefits to take into account, and considerations of law and morality are often intertwined with these political concerns.”

These factors then—political cost, benefit, morality, legality—can hardly be untangled and yet each plays a part in the decision-making process. Significant weight, however, is sometimes given the moral quotient of action, that is to say, the rightness of the action vice the lawfulness of the action. The considerations of morality “often play a major role in decisions regarding the use of force, but are especially prone to do so in cases of anticipatory attack, since the act of striking first may itself appear to be morally problematic.”

There is a sense here that public perceptions are shaped by what is justifiable in the face of the threat, in other words, what would constitute a legitimate action to eliminate the threat of harm.

Because the existing legal standards regarding the use of force are very restrictive, such actions that are perceived to be legal will generally be considered legitimate as well, but attacks that are not legal by these criteria may also appear legitimate. In particular, an action may well be considered legitimate if it is perceived to be undertaken for a moral purpose even if the action does not strictly accord with the law.

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47 Mueller, Striking First, xiii.

48 Mueller, Striking First, 35.

49 Mueller, Striking First, 88.
The Israeli attack on the reactor at Osirak, for example, was widely perceived as unlawful at the time and UN Resolution 487 passed unanimously with language that “strongly condemns the military attack by Israel in violation of the Charter of the United Nations and the norms of international conduct.” The strike was condemned as unlawful and therefore, illegitimate. But legitimacy also implies that actions taken should be wholly proportional to the threat. So although Israel’s attack on the Iraqi nuclear reactor at Osirak was condemned at the time as aggression, even the most severe critics of that preventive action realized it was a surgical strike that targeted only the reactor and was timed to cause as few casualties as possible. In years to come, recognition that Iraq had been actively pursuing a nuclear arms capability tempered those earlier judgments and the attack is now viewed, as has been noted in previously, as a textbook example of a morally justifiable preventive strike. This would hardly be the case if the Israeli attack had resulted in widespread destruction and civilian casualties.

**Legal Considerations**

Legal considerations also impact this decision-making process, but less so as the preemptive and preventive acts move from those which are coercive to those acts which are wholly compelling, that is, acts involving the use of force and waging war. Richard

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K. Betts, the Saltzman Professor of War and Peace Studies at Columbia University, went to the heart of this issue when he pragmatically observed that: “The international legal status of rationales for war may matter for discussions of how governments should decide for or against initiating war. It does not have much to do with how governments do decide.” Instead Betts argues that moral considerations, extruded from perceptions of the strategic necessity to act, result in interpretations of law to conform to the moral instincts. The moral judgment, the sense of what is right conduct, weighs heavily in the decision to use force and is a filter through which decision-makers then view international law. Once morally justified, actions that conform to that moral judgment take on a legitimacy generated by the sense that what is right is also legal—or should be, at the very least, condoned in international practice.

In addition, as Betts has noted, the efficacy of these actions—whether the actions chosen prove to have been wise or unwise strategies—figure into the decision-making process as well. This is not to say that law does not matter but, rather, that law is often interpreted by decision-makers once they have determined an acceptable course of action. During the run-up to the Iraq war, for example, Britain’s Attorney General Lord Goldsmith secretly cautioned Prime Minister Tony Blair that some might consider the war to be an act of aggression, and therefore illegal, and that the safest course would be obtaining a second Security Council resolution authorizing the war. Blair chose to side

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with the U.S. and subsequently won Goldsmith’s public support for Britain’s role in the war based on existing UN resolutions.

Decision

This is the culminating phase of the process in which the decision makers choose a course of action. The actions proposed have likely been examined in nearly every facet from the state’s capability to execute the actions, and their prospect for success, to their impact on domestic and international opinion and the political cost to the state. The decision makers are faced with a choice of actions or even of inaction: the choices in this phase will always include the option to do nothing and, thereby, accept whatever risks to the safety and security of the state the threat may pose. This is the case where preemptive and preventive actions are considered, including the use of force and waging war.

Whereas the preemtitor has only two choices, to strike first or to ride out the enemy’s first strike and then strike back, the potential agent of preventive war has many choices, at least in theory. A state considering preventive war has a choice of timing, “Should we wait?” Also, if the state is functioning with a national security policy and strategy worthy of being so called, the military option will be only one of the ways in which anticipated evils might be prevented. 52 This is a choice not only of means, but of timing as well. In the case of an action in the face of an imminent threat, the timing—as addressed earlier in this work—is dictated by the threatening actor. Both the timing and the nature of a preventive act, by contrast, is left to the decision maker of the threatened state. Even so, it would be a

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52Gray, Implications, 17.
mistake to think that the impetus to action is not affected by the activities of the threatening actor. In fact, the courses of preventive action are, in many ways, constrained by these activities.

**Recognition, Deliberation and Decision in the Cuban Missile Crisis**

The historical record of the Cuban Missile Crisis[^53] is unique, and arguably, the only case of its kind that lays bare the decision making process for anticipatory actions. The record includes contemporaneous sound recordings of the deliberations of the group formed to advise President John F. Kennedy during the crisis, as well as recently declassified materials from Cuban, Russian and U.S. accounts. Together with the first hand account by Robert F. Kennedy—the Attorney General and one of the participants in the Executive Committee meetings called to deliberate during the crisis—these materials offer in an inside look at the entire process of a state moving through the stages of recognition and deliberation to make a decision to undertake preventive action. With these resources, this particular case is hugely insightful and bears extended treatment here because it is wholly illustrative of the stages of the process of recognition, deliberation and decision described above.

[^53]: Americans refer to the incident as the Cuban Missile Crisis. The Soviets refer to it as the Caribbean Crisis and the Cubans call it the October Crisis.
Background

On October 14, 1962, an American U-2 reconnaissance aircraft flying over western Cuba returned to base with photographs of military construction on the island. Within 24 hours, imagery analysts poring over the film confirmed the construction of sites for Soviet Medium Range Ballistic Missiles (MRBMs). The images confirmed the worst fears of the Central Intelligence Agency that Russia would base missiles in Cuba. Three days later, a U-2 flight returned with images of Intermediate Range Ballistic Missiles in Cuba (IRBMs). With a range of more than 2,000 miles, these missiles could target most of the continental United States and put all of the nation’s major cities in range. The United States was now faced with the threat of Soviet nuclear attack from Cuba, an attack that could be launched with little warning and against which there was no defense.

Given the rising tensions of the Cold War, the Soviet alliance with Cuba was viewed with genuine alarm by the Kennedy administration. The Soviet Union and the United States were locked in an ideological struggle around the globe and a military face-off in Europe. The nuclear arms race, American military basing in Europe and the Near East, Soviet support of revolutionaries in South America and the continued Western Allied presence in Berlin, all served to exacerbate the frictions between the two superpowers. The United States had adopted a policy of containing and rolling back Soviet power and influence around the world and Kennedy was determined to check the spread of Communism in Latin America. Soviet Premier Nikita Khrushchev was equally
determined to bolster Castro’s communist regime and establish Russian bases but “was
driven in part, if not predominantly, by the desire to prevent an expected U.S. attack on
Cuba.”54

Soviet support for Cuba first began in 1959 when the United States refused to
recognize Fidel Castro’s Communist government and later suspended the trade that
underpinned much of the Cuban economy.55 By 1962, the United States had put in place
a virtual economic embargo. After the failed U.S.-sponsored invasion at the Bay of Pigs
in 1961, the United States undertook a planned campaign of covert actions to destabilize
the Cuban government. Fearful of a full-scale U.S. invasion, which he thought was
inevitable, Castro sought both Soviet military aid and advisors as a means to protect his
regime. Castro had been pressing Moscow for arms and had been the beneficiary of
Soviet military aid that equipped his forces with hundreds of tanks and artillery pieces,
small arms and ammunition and future deliveries of reconnaissance aircraft, jet fighters,
more tanks, heavy artillery and anti-aircraft guns.56


55 “Sugar was Cuba’s principal crop, and the country sold between 2.5 and 3 million metric tons of it (50-60 percent of total production) to the United States every year at a subsidized price. North American subsidiaries employed 10 percent of all Cuban workers, and U.S. interests owned the island’s utilities and most of its oil refineries, besides its main sugar plantations. Primarily as a result of direct U.S. investment, Cubans had the second highest standard of living in Latin America and among the highest literacy rates of any state it the region.” Aleksandr Fursenko and Timothy J. Naftali, One Hell of a Gamble (New York: W.W. Norton & Company, 1998), 8.

56 Fursenko and Naftali, One Hell of a Gamble, 99.
Khrushchev was more than willing to accommodate Castro. Moreover, Khrushchev, for his part, recognized that Cuba afforded the Soviet Union an opportunity to establish a base in the Western Hemisphere. Operation Anadyr was developed in May, 1962, as part of a secret Soviet plan to base ballistic missiles, medium-range bombers and mechanized regiments in Cuba, a force Khrushchev believed sufficient to forestall an invasion of the island by U.S. forces. Most of the equipment for Anadyr was shipped to Cuba in merchant vessels and the operation was shrouded in secrecy. Shipments to the island also included 45 nuclear weapons: aerial bombs, warheads for both the MRBMs and IRBMs. Despite the fact that American analysts knew both the Soviet bombers and missiles were nuclear capable, the United States remained in the dark as to the presence of the nuclear bombs and warheads before, during, and even after the Crisis.

The presence of missiles with an offensive strike capability created a crisis that would pre-occupy Kennedy and his closest advisors for thirteen days. To deal with the crisis, Kennedy created an Executive Committee (ExComm) composed of the regular members of the National Security Council and selected principal advisors. The

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57Ibid., 188.

58The members of the National Security Council included President John F. Kennedy; Vice President, Lyndon B. Johnson; Secretary of States, Dean Rusk; Secretary of the Treasury, C. Douglas Dillon; Secretary of Defense, Robert McNamara; Attorney General, Robert F. Kennedy; National Security Advisor, McGeorge Bundy; Director of Central Intelligence, John McCone; and Chairman of the Joint Chiefs of Staff, General Maxwell D. Taylor, U.S. Army. Other members of the ExComm included: Under Secretary of State for Economic, Business, and Agricultural Affairs, George Ball; Ambassador to the Soviet Union Llewellyn Thompson; Deputy Secretary of Defense, Roswell Gilpatric; Special Counsel to the President, Ted Sorenson; and Dean Acheson, Former United States Secretary of State. Acheson was later sent by President Kennedy to France to garner support from Charles de Gaulle for the U.S. during the Cuban Missile Crisis.
ExComm met for the first time on October 16, but by October 17, they had sufficient intelligence to realize the larger dimensions of the threat posed by the newly discovered Soviet IRBMs. To deal with the threat, this group could choose from a range of options that included acquiescing to a Soviet fait accompli, pursuing a diplomatic settlement in negotiation. The ExComm also considered the use of preventive force with actions ranging from imposing a maritime blockade, to launching air strikes against the missile sites, to mounting an invasion of Cuba.

The crisis brought together American advisors to address the security of the United States in the face of the threat of a nuclear war between the world’s superpowers. In this crucible, the advisors and the President moved from recognition of the threat, through more than a week of deliberations, to the President’s final decision.

Recognition

Even though the first U-2 imagery of a Soviet missile unit being deployed in the San Cristobal area of Cuba was collected on October 14, President Kennedy was not briefed until the morning of October 16. In the intervening hours CIA imagery analysts poured over the photographs from the U-2 mission and puzzled out the details on the images. Missile batteries and missiles appeared on the images, but the missiles themselves were much longer than Soviet surface-to-air missiles (SAM). Analysts finally

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pieced together the puzzle and realized the longer missiles at the sites were actually mobile Soviet MRBMs, first seen by the West in photos from the Moscow May Day parades and later revealed, in detail, by a Soviet informant.

That the missiles were discovered at all is surprising. Given the tensions of the Cold War, and recent attempts to achieve some rapprochement, the United States had decided to limit reconnaissance overflights of Cuba. Secretary of State Dean Rusk worried that Soviet SAMs recently emplaced on the island—the same SA-2 antiaircraft missiles which brought down Gary Powers’ U-2 over Russia and embarrassed the Eisenhower administration in 1960—made the U-2 and the Kennedy administration vulnerable. The loss of a Taiwanese U-2 on a mission over China on September 8, only added to Rusk’s worries. CIA Director McCone, however, had repeatedly pressed for the reconnaissance missions over the island, and with the help of Attorney General Robert Kennedy, finally won a compromise with Rusk that resulted in the October 14 flight.60 Discovery was also delayed by deliberate attempts by the Soviets to conceal the operation. “From its inception, the Soviet missile operation entailed elaborate denial and deception (D&D) efforts. The craft of denying the United States information on the deployment of the missiles and deceiving US policy makers about the Soviet Union’s intent” was the foundation for Khrushchev’s plan to bolster his Cuban ally.61

60May Zelikow, The Kennedy Tapes, 45. This volume is the only complete transcript of the secret recordings of the ExComm discussions made during the Crisis. As such, it is unique primary source for uncovering the decision-making process.

The Soviet D&D effort, or *maskirovka*, coupled with the sporadic reconnaissance of the island initially permitted by Washington, allowed Moscow and Havana to make substantial progress in building the missile launch sites. By the time the Americans recognized the threat, the missiles had been in Cuba for more than a month.\(^62\) When briefed on the missile sites on October 16, President Kennedy quickly pressed his presenters for information which would give him full recognition of the threat. Kennedy first asked a question in an attempt to make certain of the nature of the threat: “How do you know these are medium range ballistic missiles?”\(^63\) In reply the CIA analysts explained the length of the missile trailers in the photos matched that of trailers carrying MRBM\(_s\) in the Moscow parades. This prompted the next questions from President Kennedy, his attempt to frame the temporal nature of the threat. “Is this ready to be fired,” he asked? Told that it was not, Kennedy then asked “How long have we got? We can’t tell, can we, how long before it can be fired?”\(^64\) The less than reassuring answer was that analysts had no way of knowing when the missiles would be ready to fire, that is, fully operational. Analysts did acknowledge however, that no evidence had been found of nuclear warheads. President Kennedy and his immediate circle of advisors now knew there were MRBM\(_s\) sited in Cuba and that the best American intelligence could not


\(^{63}\) May and Zelikow, *Kennedy Tapes*, 48-49.

\(^{64}\) Ibid., 49.
predict when those missiles would be operational or when they might be mated with nuclear warheads.

President Kennedy and his top advisors initially disagreed about the nature of the threat. Secretary of Defense Robert McNamara, for example, was coolly analytical and judged that the missiles in Cuba hardly changed the nuclear balance between the two superpowers. There were not enough missiles on the island to challenge America’s nuclear superiority. President Kennedy saw threat in a wholly different light.

Less concerned with their effect on the nuclear balance, Kennedy believed the missiles posed a strategic threat because of the amount of diplomatic leverage they gave Khrushchev. Gnawing at the president was the sense that if the United States did not act quickly, Khrushchev would have locked in enough nuclear power in Cuba to acquire this leverage and to make an attack on the sites nearly suicidal.65

There were even nagging doubts in this early stage of the recognition phase of the decision-making process, as to the threat itself. By the evening of October 16, at another special meeting of the President and his advisors, the discussion turned to establishing—with certitude—the existence of the threat. President Kennedy pressed Acting Director of the CIA, Marshall Carter, whether there was any question in his mind about the missiles. “There’s no question in our mind, sir,” Carter said in response.66 McGeorge Bundy, the President’s National Security Advisor, then quizzed Carter:

I don’t mean to go behind your judgment here, except that there’s one thing that would be really catastrophic, would be to make a judgment here on a bad guess as to whether these things are . . . We mustn’t do that.

65Fursenko and Naftali, One Hell of a Gamble, 226.
66May and Zelikow, Kennedy Tapes, 81.
How do we really know what these missiles are, and what their range is?⁶⁷

Bundy’s questions prompted additional discussion among Carter, Rusk and McNamara that eventually left Bundy in agreement with the assessment. It’s important to note, however, that this deep probing of the nature of the threat was undertaken as President Kennedy was listening—without comment—to the conversation. The conversation very likely settled the issue with certainty in the president’s mind, too. As the meeting was drawing to a close, President Kennedy told the group there would be further discussion that evening, but that preparation for an attack on Cuba ought to begin. Kennedy was certain: “We’re going to take out those missiles,” he said.⁶⁸

Whatever lingering doubts remained as to the nature of the threat vanished on October 18, when new imagery from U-2 overflights that covered much of the island of Cuba revealed the presence of Soviet IRBMs at fixed sites, missiles with range enough to strike nearly all of the continental United States. The more extensive reconnaissance provided coverage that also revealed a total of five ballistic missile sites, 23 SAM sites, and evidence of the presence of Russian IL-28 jet bombers with a nuclear payload capability. At the conclusion of the morning meeting the president and his closest advisors fully recognized the Soviet nuclear threat in Cuba and, furthermore, understood they could have no certain knowledge of the point in time at which these nuclear capabilities would be fully operational. The uncertainty that had laced the discussions of

⁶⁷Ibid.

⁶⁸Ibid., 71.
previous meetings was replaced with the certainty of an issue in black and white: more than 28,000 linear feet of U-2 photography that provided clear evidence of the full extent of the Soviet threat.

Deliberation

Political Cost

Once the members of the ExComm recognized the full scope of the threat, discussion of alternative courses of actions began almost immediately. President Kennedy’s advisors quickly rejected the option of doing nothing and accepting a Soviet fait accompli in Cuba. With the Administration tarnished by the failure at the Bay of Pigs, Kennedy’s advisors were increasingly concerned with both the domestic and international political considerations surrounding Cuba. In early September, pressed by Republican charges that his Administration was ignoring events in Cuba and putting U.S. security at risk, Kennedy released a press statement that acknowledged the growing Soviet military aid to Cuba and identified the kinds of military aid that would be unacceptable to the United States. The statement warned that “the gravest issues would arise,” Kennedy said, if the United States found evidence of Soviet ground combat troops in Cuba; Soviet bases on the island; a violation of the treaty giving the United States
control of Guantánamo; ground-to-ground missiles; or any other “significant offensive capability.”

At the morning meeting with the President on October 18, Rusk reminded Kennedy of that statement and how, at the time, it was intended to be a clear warning to the Soviet Union. Rusk then made plain to the President the political cost—both at home and abroad—of taking no action after having issued such a direct warning:

I think we also have to think of the effect on the Soviets if we were to do nothing. Now suppose that they were to consider this a major backdown, then this would free their hands for almost any kind of intervention that they might want to try in other parts of the world. If we are unable to face up to the situation in Cuba against this kind of threat, I think that they would be critically encouraged to go ahead and eventually feel like they’re got it made as far as intimidating the United States is concerned.

I also think that we have an almost unmanageable problem in this country getting any support for a foreign policy that would assume we were going to sustain the cause of independence of states here and in all parts of the world. . . . And it seems to me that inaction in this situation would undermine and undercut the long support we need for the kind of foreign policy that will eventually ensure our survival.

Rusk was here warning of the loss of enormous political capital if the President chose not to act. What was at risk was the entire policy of containment and Rusk drew that risk in starkly existential terms. Rusk also noted the political cost in the domestic arena. These domestic political considerations also played a hand in the ExComm members’ refusal to consider any course of action that would make concessions to the Cuban and Soviet

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69Fursenko and Naftali, One Hell of a Gamble, 206.

70May and Zelikow, Kennedy Tapes, 127.
governments. It was not possible, politically, to accept the risk of Soviet offensive capabilities in Cuba.

In his memoir of the Crisis, Robert Kennedy recalled the climate of the domestic political scene. “It was election time,” Kennedy wrote. “The autumn days of September and October were filled with charges and counter charges. Republicans ‘viewing with alarm’ were claiming the U.S. was not taking the necessary steps to protect our security.”71 The same day that President Kennedy was briefed on the first missile sightings, the press broke stories that President Eisenhower was openly critical of President Kennedy’s foreign policy and denounced it as a “dreary record.”72 Weeks before, New York Republican Senator Kenneth B. Keating had charged the Soviets would be able to launch rockets from Cuba, a claim that President Kennedy sent Bundy to refute on national television.73 With the mid-term elections just weeks away, and concerned that news of the Soviet nuclear missiles in Cuba would leak to the press, members of the committee were wary of the political backlash at the polls that would result from the failure to act. Both of the Kennedy brothers were convinced that failure to act would have resulted in the President’s impeachment.74


72 Michael Dobbs, One Minute to Midnight: Kennedy, Khrushchev and Castro on the Brink of Nuclear War (New York: Knopf, 2008), 5.

73 Dobbs, One Minute, 6.

74 May and Zelikow, Kennedy Tapes, 342. See also Kennedy and Schlesinger, Thirteen Days, 67.
Courses of Action

The political considerations in the early days of the discussion forced the ExComm advisors to look for options that would not diminish the standing of the Administration at home or abroad. Kennedy’s advisors believed the United States risked loss of its international standing and credibility at home if it were to allow this Soviet threat in the Western Hemisphere to go unchecked and to fail to find a political course of action. McNamara tackled this issue squarely when he told the President:

It is not a military problem we’re facing. It is a political problem. It’s a problem of holding the alliance (NATO) together. It’s a problem of properly conditioning Khrushchev for our future moves. And the problem of holding the alliance together, and the problem of conditioning Khrushchev for our future moves, the problem of dealing with our domestic public, all requires action, that in my opinion, the shift in military balance does not require.75

Here McNamara staked out a position that the presence of a Soviet offensive capability in Cuba did not alter the balance of the power between the Soviet Union and the United States and implied, therefore, that no action need be taken. But McNamara, the President’s top military advisor, was also keenly attuned to the unique political problems presented by the Soviet arms in Cuba. Identifying the choice of means available that would satisfy all the political problems McNamara identified would consume the President’s advisors for the next 10 days. As early as mid-day October 16, at the time of the first missile brief to the President, several of the President’s advisors had in mind various courses of action.

75May and Zelivow, Kennedy Tapes, 133.
Rusk outlined two such courses of action: a quick preventive strike on the missiles or a combination of defensive and diplomatic initiatives. Rusk argued that the quick strike need not involve an invasion of the island and that the strike itself—to echo the Caroline case—was driven by an “overwhelming, overriding necessity,” to take action.\textsuperscript{76} Rusk then argued the missiles in Cuba presented a threat to the Western Hemisphere and, as such, the Organization of American States (OAS) should be called upon to intervene under the terms of the Inter-American Treaty of Reciprocal Assistance (Rio Pact). He called for intermediaries to approach the Castro government and negotiate. Rusk also laid out defensive measures that included both partial and mass mobilization, reinforcement of the American base at Guantanamo, and the build-up of forces in the southeastern part of the United States with a capability of striking Cuban installations and of defending against an air attack launched from Cuba.\textsuperscript{77}

McNamara then argued that any military course of action be predicated on two major propositions. The first was that any strike would take place before the Cuban installations were fully operational. His second proposition was that strikes should target not just the MRBMs, but also airfields, aircraft and all the potential nuclear storage sites. General Maxwell Taylor, Chairman of the Joint Chiefs of Staff, agreed with the target criterion outlined by the Secretary of Defense and suggested that, in addition, a naval blockade would be needed to prevent further shipments of weapons to the island.

\textsuperscript{76}Ibid., 54.
\textsuperscript{77}Ibid., 54-57.
President Kennedy listened intently to the discussions and summarized the options as including a strike on the three MRBM bases; air attacks on all installations, as McNamara had suggested; all the air attacks and a naval blockade; and consultation with America’s allies. It was Robert Kennedy who then added the fifth course of action: an invasion of Cuba. As a result, during the mid-day meeting of the President’s top advisors, those government officials laid out courses of action ranging from diplomatic initiatives, to air defense of the continental United States, to preventive strikes, to an invasion and a preventive war. Acceptance of the situation was never an option. President Kennedy was also informed at the meeting that the United States had the military capability to launch hundreds of sorties and sustain an air campaign over Cuba for several days; to launch an invasion of 90,000 men in seven days (based on long-standing contingency plans) and to mount a blockade of Cuba. With several courses of action available, President Kennedy’s advisors now had the far more difficult task of advising him which of those actions was most likely to succeed.

Prospects for Success

With five distinct courses of action on the table, the members of the ExComm now had the unenviable job of assessing the likelihood of success of each of these actions, or any combination of them. They were debating just courses of action, including the use of force and war, in view of the principle of the likelihood of success. That task was made even more difficult because the members could only speculate as to
Khrushchev’s intentions and could not be certain of the extent of Soviet control of the weapons in Cuba. Dozens of questions, not the least of which was the location of the nuclear warheads and bombs—if any—remained unanswered by U.S. intelligence; no intelligence could divine the plans of Khrushchev or of Castro. All the gaps in the less than perfect intelligence of the situation in Cuba were left to be filled by the judgments of President Kennedy’s senior-most civilian and military advisors, by his cabinet members, and by the analysis developed by Soviet specialists at the CIA and Defense Intelligence Agency. Moscow’s likely reaction to any move by Washington was especially in the forefront of President Kennedy’s mind.

Taylor and his staff members were unanimous in their recommendation on October 19 to launch a surprise attack on all known weapons sites in Cuba, but were doubtful of the eventual success of that action on two counts. As Taylor explained, “The first is that we’re never sure of getting all the missiles and all the offensive weapons if we fire a strike. Secondly, we see—all of us, all of your advisors—a very damaging effect of this on our alliances.” 78

President Kennedy, for his part, agreed with that assessment and made his own calculation of the impact on America’s European allies: “We would be regarded as the trigger happy Americans who lost Berlin. We would have no support among our allies.” 79 Kennedy then went on to express his own dour assessment of the prospects for success.

78 Ibid., 175.

79 Ibid.
While a strike on the missiles could neutralize the chance of danger to the United States, it would inevitably encourage a reprisal from the Soviet Union and most likely the loss of Berlin to Soviet arms. A blockade of Cuba would encourage a blockade in Berlin. Kennedy saw little prospect for success for any course of action that risked the loss of Berlin, and the support and confidence of the European allies ringing the Soviet Union. On other hand, he expressed the belief that doing nothing would result in the loss of Berlin just the same and even then, the IRBMs in Cuba would likely be fully operational by December. For Kennedy, that prospect was “like a knife stuck in our guts.”

President Kennedy’s assessment pushed members of the ExComm to regard success as an action which would, at once, ensure support of the European allies in NATO, discourage Soviet retaliation and demonstrate American resolve. On October, 19, the ExComm divided into two groups, each to build a case for the preferred course of action. The group of advocates of a blockading action wanted to give the Soviets a window of opportunity in which to defuse the situation before any military strike. The group of advocates of a military strike wanted to ensure that something was done about the missiles already in Cuba and argued for a large surprise air attack (with a few hours notice for the British and German allies) and a complete naval blockade. During the next three days, Robert Kennedy would play a unique role in trying to bridge the two groups. Initially, he had argued for an immediate strike, but as the deliberations continued, Robert Kennedy began to have doubts about the prospects for success of the strike. “The reason

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80 Ibid., 176.
was not that he agreed with . . . the others who believed a blockade and an ultimatum would compel Khrushchev to back down. It was his growing appreciation of the likely cost of an attack.”

By October 20, members of the both groups understood that a strike could still be launched after a blockade. “Robert Kennedy ‘took particular note of this shift’ and, towards the end of the day, began portraying a blockade as only a first step that would not preclude other action.” Kennedy here was, in reality, steering the group towards the just use of force as a last resort. What was missing at this point in the discussion was any further consideration of an invasion. Although it was not discussed specifically, the tone of the deliberations indicates that it was thought to be least likely to meet the criteria for success.

What was left then was an argument for what Deputy Secretary of Defense Roswell Gilpatric termed a choice of “limited force” or “unlimited force,” and he “defined a blockade as being the application of the limited use of force and doubted that such limited use could be combined with an air strike.” Advocates of the unlimited use of force, including Taylor and the Joint Chiefs, argued that the blockade could be penetrated, that it would not end the missile threat and that military action would be inevitable and far more costly if strikes were delayed. Taylor was clearly pressing for

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81 Fursenko and Naftali, One Hell of a Gamble, 233.
82 Ibid., 190.
83 Ibid., 197.
preventive action along the classic lines of the argument to wring every possible advantage out of a first strike. McNamara noted that the planned air action called for 800 sorties, would result in great loss of life in Cuba and further believed the Soviets would retaliate with a major response. U.S. Ambassador to the United Nations Adlai Stevenson argued that an air strike on the missile sites would ultimately lead to a U.S. invasion of Cuba.

In his first meeting with selected members of Congress, President Kennedy put the prospects for success of the invasion squarely before the Senators and Congressmen who had been brought in, out of recess, for the private discussion. The meeting was tense and several members of Congress echoed earlier arguments for an attack on the missile sites in Cuba to be followed by an invasion of the island. After hearing them out, and after acknowledging that preparations were under way should it be necessary to invade, President Kennedy told his listeners:

If we go into Cuba, we all have to realize that we are taking a chance that these missiles, which are ready to fire, won’t be fired. So that’s a gamble we should take. In any case we are prepared to take it. The fact is that this is one hell of a gamble…

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Moral Considerations

The members of the ExComm were drawn by their deliberations of the prospect for success into two factions: those favoring an air strike and those favoring a blockade.

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84Ibid., 264.
While much of the discussion was framed by the likely outcomes of each course of action, and the risk which each imposed, the ExComm members also considered the moral implications of these courses of action. Taylor and the Joint Chiefs argued for military necessity and further that the blockade would only give the Soviets more time to make the missiles in Cuba operationally ready. Taylor also argued that missile sites, airfields and aircraft must also be attacked. Robert Kennedy observed later that:

> Whatever military reasons he and others could marshal, they were nevertheless, in the last analysis, advocating a surprise attack by a very large country against a very small one. This, I said, could not be undertaken by the U.S. if we were to maintain our moral position at home and around the globe. Our struggle against Communism around the world was far more than physical survival—it has as its essence our heritage and ideals, and these we must not destroy.

> We spent more time on this moral question during the first five days than on any other single matter.  

Robert Kennedy was not alone in these sentiments. Rusk was also opposed to an air strike, and especially a strike without warning which he regarded as immoral.  

> President Kennedy finally agreed on October 21 that if an air strike were ordered, this first strike would have to include attacks on airfields and aircraft in Cuba.  

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85 Kennedy and Schlesinger, *Thirteen Days*, 30. While the recordings of the ExComm meetings and the notes of other meetings do bear out that the moral implications of a surprise attack and the loss of innocent life did enter into the discussions, Robert Kennedy’s assertion that more time was spent on the moral issues than on any others is an exaggeration. Most of the time was spent on discussing courses of action. It is also revealing to note that at the time of the Crisis, Robert Kennedy headed up a secret planning team bent on toppling Castro and the Kennedy administration was deeply committed to a campaign of covert operations. *Operation Mongoose*, a $50 million plan, included acts of sabotage against the Cuban economy, plots to overthrow or assassinate Castro, and contingency plans to blockade, bomb and invade Cuba. See Sheldon M. Stern, *The Week the World Stood Still: Inside the Secret Cuban Missile Crisis* (Stanford, CA: Stanford University Press, 2005) 2.

his opinion on the issue, Robert Kennedy was flatly opposed because “it would be a Pearl
Harbor type of attack.”87 It was not the first time a member of the ExComm had made
reference to the surprise attack that drew America into the Pacific War. Yet so much
opprobrium was attached to the attack on Pearl Harbor that future discussions of a
surprise attack of any kind were always colored by nagging doubts of the morality of that
action. President Kennedy continued to allude to the connection. In his afternoon
meeting on October 22, President Kennedy, in his meeting with selected members of
Congress, discussed it in connection with an eventual air strike. “Now, Bobby (Robert
Kennedy) mentioned Pearl Harbor,” the President said in reference to previous comments
about the air strike, “Is this action justified, what we’re now doing? This is one of the
problems which are going to be most troublesome in our discussions with our allies.”88
Here President Kennedy was making it plain that he had considered the morality of the
air strike in the context of what was justified in international norms of behavior. He was
not asking if the action was justified as matter of self-defense, but if it could be justified
before the international community. “International morality mattered to him, but not as a
source of absolute injunctions. Each transgression of the code had its costs, which would
have to be factored into the larger calculations before any decision.”89

87Ibid., 207.
88Ibid., 234.
89Fursenko and Naftali, One Hell of a Gamble, 238.
In making his assessments of those costs, President Kennedy had calculated that a surprise air attack on Soviet forces in Cuba would strain the NATO alliance to the breaking point. He had also calculated that a first strike would not eliminate the whole of the nuclear threat from Cuba. The strike, then, was not to be the immediate course of action because it would fail the moral test, the political test and the military test. These factors, considered during the deliberation phase, would influence not only the decision for action, but also the way in which the Administration would make its case to the international community. Later in that same day’s discussion with the Congressmen, for example, Robert Kennedy reaffirmed that if the press or the European allies were to question why air strikes were not considered as part of the immediate response to the threat from Cuba it was because “we couldn’t have the Pearl Harbor kind of operation.”

While President Kennedy and members of the ExComm did, in fact, concern themselves with the morality of a conventional first strike in Cuba, there is little in the record of the ExComm to indicate they discussed the moral implications of a nuclear exchange should their actions fail. There is ample evidence, however, to suggest that all of the participants in the decision-making process were keenly aware of the risk of a nuclear strike, and several high-level Washington staff members had even made plans for their families to leave town. President Kennedy, as did many other staffers, thought that, eventually, a nuclear exchange between the two superpowers was likely and at one

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90 Ibid., 238.
91 Dobbs, 310.
time Kennedy calculated the odds of nuclear war with the Soviets at ‘one in five.’ Once
the decision was made to quarantine Cuba President Kennedy, however, believed the
crisis in Cuban would not lead to an all-out nuclear exchange and that only an American
ground invasion of the island would invite nuclear retaliation. Fatalistically, the
President mused that a ground invasion would be met with “5 or 10 or 15” missiles
launched from Cuba against the United States and wondered what civil defense actions
could be undertaken so that something could be done for the “population in the affected
areas.”

Legality

The recordings and other notes indicate that the legality of the preventive actions
the Kennedy administration considered during the crisis—including air strikes without a
declaration of war and the blockade—was not a significant factor during deliberations as
to courses of actions. Legal issues simply did not matter: raison d’état prevailed in this
regard. In fact, an exchange between Senator Leverett Saltonstall and President Kennedy
captured the essence of the matter. Saltonstall reminded President Kennedy: “Mr.
President you’ve twice said that a blockade would be illegal unless the OAS gave us 14

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92 Dobbs, 14-15.

93 May and Zelikow, Kennedy Tapes, 338-339.

94 Ibid., 339.
votes. Why is it? My only thought is, why emphasize at all any question of illegality?”

President Kennedy responded:

We’re not. We can always make it legal, as I say, by a declaration of war and, in addition, we will do it anyway. But it would give a particular sanction if we have the OAS endorsement in the morning. If we don’t get it, we’ll continue it anyway.96

President Kennedy was here making it more than plain that legal factors would in no way constrain action the United States might undertake in its own security interests. The law, in this case, was neither a constraining nor enabling factor.

**Decision**

Despite the split among the members of the ExComm, and in the face of the strong recommendations for a surprise air strike from his military advisors, President Kennedy decided to blockade Cuba and allow for time to negotiate a resolution to the crisis with the Soviet Union. The blockade, or quarantine97 as it was styled, was subsequently unanimously authorized by the OAS under the provisions of the security agreement in the Rio Pact. President Kennedy, however, was not prepared to rely solely on the quarantine and so ordered planning to continue for an armed attack on Cuba, first with broad air strikes on all Soviet capabilities and then, as needed, an invasion of the

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95Ibid., 269.

96Ibid.

97The State Department’s acting legal advisor, Leonard Meeker, had suggested that the term “defensive quarantine” be used instead of “blockade.” May and Zelikow, *Kennedy Tapes*, 171.
island. He had also ordered an additional 7,000 Marines into the U.S. base at Guantánamo, Cuba and put dozens of Strategic Air Command (SAC) long-range bombers on airborne alert, keeping this nuclear capable force in the air 24-hours a day.

The president in this decision phase also determined the timing of the preventive action. Kennedy had waited for the vote of the OAS before initiating the quarantine. While U.S. Navy ships had been moving for some days into position to establish a cordon around Cuba, McNamara advised the president the Navy would not have all the ships in place to form an effective blockade until the morning of October 24. It was not a simple matter. As McNamara explained:

Mr. President, the third action we need to take is a determination of when the proclamation will be effective, the proclamation of the quarantine, the time it will be issued, the time it will become effective, and time for the first intercept of a ship under the terms of that proclamation. 98

But the president had also decided the blockade should be coupled with a diplomatic initiative: Kennedy was prepared to make a concession to Khrushchev and remove American nuclear Jupiter IRBMs from Turkey. McNamara had proposed such a move early in the deliberation phase, but that course of action was not given additional consideration at the time. On October 21, President Kennedy began to discuss with confidants the possibility of making the missile exchange. 99 The tape recordings of the ExComm meeting on the morning of October 22, indicate President Kennedy and Rusk


discussed proposals for the negotiated removal of Soviet missiles from Cuba and American missiles from other countries. President Kennedy was considering a plan to negotiate for bilateral initiatives to remove the missiles even with the quarantine in place. He was loathe, however, to tie the two actions together and thought the quarantine should not be ended even if there were a deal to remove the missiles. “I think we’ve got to always keep on this pressure for the removal, because I don’t think we’re going to be a hell of a lot better off if they’re just sitting there…”  

After a few more exchanges which are not clear in the recording, President Kennedy suggested “I think we ought to be looking forward to the day when they (missiles) are removed from Cuba, Italy and Turkey.”

Robert Kennedy, for his part, was also interested in a negotiated removal of the missiles from Cuba. The Attorney General met with his brain trust at the Justice Department and that group came to the consensus that removing missiles from Turkey would likely be the price of a settlement. “The attorney general was opposed to a public offer through the UN, considering it ‘rather weak and defensive’ opening gambit to make to the Kremlin. But he said nothing about a secret offer.” The Kennedy brothers, and a select group of advisors, were shaping a new course of action, even as President Kennedy had decided to initiate the quarantine. This preventive diplomatic action would,

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100 May and Zelikow, Kennedy Tapes, 216.  
101 Ibid.  
102 Fursenko and Naftali, One Hell of a Gamble, 237.
indeed, become part of the resolution of the crisis, but it was played out behind the scenes in a delicate series of steps worked through intermediaries.  

President Kennedy in his decision-making had come a long way from his earliest resolve to launch an air strike on the missiles in Cuba, to a more thoughtful approach as a result of the deliberations. His approach, and that of his advisors also—unknowingly it would seem—reflected the Just War Traditions’ tenets of just cause, right intention, proportionality, likelihood of success and of last resort. Political, moral, and military considerations—weighed by his advisors—helped to fashion a preventive action that included both the use of preventive force and the use of preventive diplomacy.  

( President) Kennedy appropriately chose the minimum proportional measure that forced the withdrawal of the missiles. He removed a political strategic threat to the Soviet Union in Turkey in return. He sought multi-lateral legal authorization at the Security Council and presented the U.S. case in full. When the Soviet veto made UN action impossible, he brought the issue to the Organization of American States. Regional organizations cannot legally authorize enforcement measures (Article 53 limits enforcement to the Security Council) but they do offer deliberation and the legitimate authorization that comes from consultation with other states deeply involved in the threatened escalation to war. He also consulted with Macmillan and DeGaulle, key allies in Europe before announcing the quarantine.  

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103 A Russian military intelligence officer, Georgi Bolshakov and Robert Kennedy had developed an unusual personal rapport starting in 1961. The two had met more than a dozen times and both the White House and the Kremlin wanted to preserve this back-channel. At the height of the crisis and a day after President Kennedy’s speech to the nation, Bolshakov was approached by New York Daily News reporter Frank Holeman. “Someone in the attorney general’s office, possible Robert Kennedy himself, wanted to use Bolshakov to sound out the Kremlin on a possible diplomatic solution to the crisis. Robert Kennedy and his people believed, Holeman explained, that the missiles in Cuba were the Soviet Union’s way of responding to U.S. Jupiter missiles in Turkey. ‘In connection with this (the assumption about Soviet motives),’ Bolshakov noted for his superiors, ‘Robert Kennedy and his circle consider it possible to discuss the following trade: The U.S. would liquidate its missile bases in Turkey and Italy, and the USSR would do the same in Cuba.’” Fursenko and Naftali, One Hell of a Gamble, 184, 249.  

104 Doyle, Striking First, 77-78.
The public face of these preventive acts was one of American resolve in the face of Soviet aggression: quarantine backed by heightened defenses in the continental United States. Behind the scenes, however, preventive diplomacy—a secret action shaped by the president and his advisors—was also at work.

The Kennedy administration’s handling of the Cuban Missile Crisis involved decision makers weighing the merits of preventive action through a three phase process of recognition, deliberation and decision. Once there was a full recognition of the threat posed by Soviet bombers and missiles with a nuclear capability, President Kennedy engaged his top advisors—both civilian and military—to deliberate the merits of various courses of preventive action. Despite the recognition the bombers and missiles in Cuban did not essentially change the balance of power between the Soviet Union and the United States, Kennedy was determined to act. Political, military and moral considerations all played a part in crafting the course of the ultimate preventive action.

Preemptive and Preventive Actions and the State

Preemption and prevention are acts of state intended to achieve political goals through a variety of means that include negotiation, diplomacy, economic measures, covert action and the use of force. These actions, taken in the face of identifiable threats to the nation’s security have been a staple feature of American security planning since the founding of the Republic. Neither policy nor doctrine, acts of preemption and prevention have been among the tools of statecraft used by decision-makers to eliminate risk of the
threat of harm and so protect the sovereignty and security of the state. There is nothing new or radical in these actions—and especially in the use of preventive force—for these actions are strategic responses to threats in the security environment of the state.

Contrary to claims made by various authors, U.S. history is replete with instances in which decision makers chose to use preventive force in the face of threats to American security. Virtually every president in the twentieth century has chosen to use these instruments of statecraft and various means to achieve political ends to ensure the sovereignty of the United States and the safety of its people. The means chosen, however, were often dictated by circumstances. So, it is important to note that no single strategy can be identified, nor is there a doctrine that always applies in the face of emerging threats.

Decision making for both preemptive and preventive acts of state is a complex process but certain features of that process are discernable from a variety of historical instances. This chapter argued that those features include phases that move from recognition of the threat of harm, to deliberations that identify courses of action that mitigate or eliminate the threat, and then, finally, to a phase in which a decision is made to act. While each phase of this process is shaped by the unique circumstances that confront the decision maker and his advisors, the argument here is that the phases likely remain the same in nearly all cases. The Cuban Missile Crisis provides a telling case for the argument. This chapter demonstrated that during the Crisis, the American president and his advisors actually made their way through the phases of the decision-making
model developed here. This model has constructive utility for understanding the ways in which preemptive and preventive acts of state are chosen by decision makers. As an initial contribution to this area of study, it is also made here to invite additional inquiry that is beyond the scope of this effort.
CHAPTER FIVE

PREEMPTIVE AND PREVENTIVE ACTS OF STATE
IN THE TWENTY-FIRST CENTURY

Whereof what’s past is prologue; what to come,
Is yours and my discharge.

—William Shakespeare
The Tempest, Act 2

The assaults on the peace and security of nations in the last decade—sorrowful, savage, tragic, and terrible events like 9/11—are likely to prove, not the past, but the prologue to this century. Although perhaps not precisely as predicted, Samuel Huntington’s forecast of a clash of civilizations has come to pass.1 Culture, religion, ideology and ethnicity divide nations and fuel their fears of one another. Fear is father to hatred and hatred in its turn sires the wrath that leads remorselessly to conflict, violence and war. Within the framework of equitable relations among nations, these grim realities will challenge states that seek their own security and prosperity to build an enduring peace in this century. The conventional tools of statecraft that include diplomacy and deterrence will continue to be strained beyond their capacity to deal with new forms of aggression, with terrorism, with the proliferation of fearsome weapons of mass destruction, and with the unpredictable actions of rogue states and non-state actors. This

work has, heretofore, argued that states facing this new and increasingly formidable battery of threats to their peace, prosperity and security have responded in the decade past with both preemptive and preventive actions and will continue to do so in the decades to come.

The actions have not been without controversy. The U.S. National Security Strategy of 2002, written in the aftermath of the tragic events of September 11, embraced preventive means to include the use of force to protect Americans. That strategy and its unambiguous statement of the U.S. determination to take preventive actions proved controversial and ignited a public, even global debate.2 What is most remarkable about that debate, however, is that it was not re-ignited with the publication of the U.S. National Security Strategy of 2010. Preventive actions are incorporated as part of this strategy, too. Prevention as a strategy is not unique to the Bush administration, then. The 2010 strategy specifically states that the United States will deny Al-Qa’ida and allied terrorists the “ability to conduct operational plotting from any locale, or to recruit, train, and position operatives, including those from Europe and North America,” and “prevent future attacks on the United States, our allies, and partners.”3 The 2010 strategy also positions the uses of armed force as a last resort, as does the 2002 strategy. The Obama administration, as did the Bush, also plans to use military force, if necessary, and reserves


“the right to act unilaterally if necessary to defend our nation and our interest.”

Despite the fact that American intervention in Iraq and American unilateralism remains flash points for the continued debate on the legitimacy, the morality and the efficacy of preventive actions, the United States was not alone in taking preventive or preemptive action in this past decade. In 2007, for example, Israeli aircraft bombed a suspected nuclear production facility in northern Syria. For Israel, the action was a reprise of its planning and execution of the successful attack on the nuclear reactor site at Osirak near Bagdad, Iraq in 1981. The attack on the Iraqi site, widely condemned at the time by the United States, a host of European nations and by the UN, is now regarded by many scholars and international observers as a textbook example of a justified preventive strike. More to the point, the Israeli strike in Syria has been subjected to little and muted criticism.

Not so with the Israeli attack on Gaza that began in December 2008. Israel’s armed efforts to prevent the terrorist group Hamas from launching rockets from Gaza into Israel was met with widespread condemnation. Israel justified its actions as self defense, as the means to preempt further rocket and mortar attacks and as means to prevent Hamas from continuing to build its stockpile of weapons. Despite the fact that Israel perceived Hamas as maintaining the Tahdiya ceasefire agreement, there was also recognition that

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4 Ibid., 22.

the ceasefire allowed Hamas to consolidate and gather strength. In May, 2010, Israeli commandoes seized five ships in an aid flotilla sailing past the Israeli-Egyptian blockade of Gaza and fought with crew and passengers on a sixth vessel. Nine people died and dozens were injured in Israel’s preemptive seizure of the ships. The action met with widespread international condemnation of Israel’s use of force and with renewed questions about the legality—and efficacy—of Israel’s preventive blockade.

Individual preemptive and preventive actions by states around the globe—China, Israel, Russia, the United States—and preventive sanctions and other efforts by the UN are staple, even enduring, features of the international environment. Depending on the circumstances, however, there are limits to the efficacy of these actions. There are also limits to the effectiveness of sanctions. This chapter argues that these very real limitations will continue to drive states to consider courses of action in response to these threats that include the preventive use of force. Moreover, the argument here is that the threatened use of force of arms likely increases the efficacy of other preventive actions. This chapter will further claim there is evidence of an evolving international norm now emerging that reflects broader recognition of legitimate acts of prevention, to include a justifiable first use of force and, moreover, that this use of force is a just and reasonable expansion of the right to action in self defense and the defense of others.

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Finally, some authors have argued that creating conditions that legitimize the first use of force will, in turn, create a more permissive environment that actually encourages the use of force over other mechanisms. This argument has been so widely repeated and so often taken at face value, that it merits further discussion in this chapter. These arguments have a direct bearing on the use of preemptive and preventive actions and the context in which they are undertaken.

**The Limits of Defense, Deterrence and Preventive Diplomacy**

Preemptive and preventive acts of state will remain viable options for decision makers seeking to ensure the security of their states and the safety of their people in the decades to come. Preventive and preemptive actions by states in the twenty-first century are not new means of statecraft. As demonstrated in the previous chapters, these means of statecraft occur so commonly and with sufficient regularity so as to constitute a specific class of actions in the intercourse of nations. Today, the threats posed by non-state actors, rogue nations and aggressors drive states at risk to seek means to avert those harms or mitigate their consequences. Decision makers will likely attempt to control these threats with negotiations or with more coercive actions to include sanctions. In extreme cases, and in those instances where neither diplomacy nor sanctions will mitigate the threat of harm, states at risk will consider the use of military force. As a consequence, the use of both preemptive actions and preventive actions will been seen as wholly justified and legitimate responses to these threats. Decision makers will seek out
those courses of action most likely to succeed at the lowest political risk and these actions will include the use of force.

Mueller has suggested that preemptive and preventive uses of force have become more attractive options in the face of new threats because traditional forms of deterrence and defense “appear to offer less adequate protection against some types of security threats than they once did—or, more accurately, the sorts of threats against which they provide the least reliable protection now loom larger than they did in past decades.”

Terrorist suicide bombers, indeed all terrorist actors bent on harm, seem wholly immune to the policies and practices of deterrence. Policies of that sort rely upon the threatening actors to make cold calculations in their own self-interest and weigh the consequences of their actions in the face of the prospect of a terrible retaliation. Terrorist actors are so bent on destruction, and have so little at stake, that they cannot be deterred from attack. Traditional forms of defense, including the use of military defenses, are demonstrably inadequate in the face of adversaries who avoid direct confrontations with military forces and, instead, seek out ‘soft targets’ in commercial passenger jets, trains, buses and public buildings. As a result, the choice of preemptive and preventive action and use of force become more attractive to policy makers as traditional forms of defense and deterrence appear to be less viable in the face of new threats.

Preventive diplomacy is also an option for decision makers who attempt to check the threats posed by rogue nations. Both preventive diplomacy and, increasingly,

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7Mueller, *Striking First*, 94.
economic and other sanctions are the political choices likely to be made when threatening states cannot be deterred and pose significant risks even in the face of defensive actions. North Korea, for example, faces an array of defenses put in place by South Korea and the United States but has persisted in developing its nuclear weapons program and in maintaining large and well-equipped conventional forces. North Korea has also been subject to decades of nonproliferation diplomacy and yet shows no signs of willingness to engage in meaningful discussions to either disarm or to normalize relations with South Korea. More alarmingly, North Korea continues to provoke confrontations and to escalate tensions. In March, 2010, for example, the corvette *ROKS Cheonan* was torpedoed and sunk by a North Korean submarine, and in November, North Korea shelled Yeongpyeong Island, killing two South Korean marines.8

Reliance on defensive measures, deterrence and even non-proliferation diplomacy (the Treaty on the Non-Proliferation of Nuclear Weapons, or NPT) have achieved a mixed record in checking the spread of weapons of mass destruction and of bridling the ambitions of aggressor states and non-state actors. Still, some have argued that the current non-proliferation regime and other diplomacy have reduced the numbers of weapons available to states.9 The NPT and other initiatives have reduced the total number of states with a nuclear weapons capability with the willing participation of

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countries that abandoned nuclear research programs, voluntarily engaged in nuclear disarmament, or surrendered their nuclear weapons.\textsuperscript{10} The states of the Former Soviet Union (to include Belarus, Kazakhstan and Ukraine), for example, voluntarily participated in a U.S.-sponsored program to purchase and destroy Soviet-era nuclear weapons systems. South Africa, by contrast, ignored sanctions and international pressures for years and only undertook nuclear disarmament before the end of the apartheid regime and the first open election.\textsuperscript{11} On-again, off-again diplomatic initiatives aimed at Iran’s nuclear ambitions, however, have only slowed the course of that nation’s acquisition of a nuclear weapon capability. Most recently, Iranian President Mahmoud Ahmadinejad claimed that Iran’s right to nuclear capabilities was “non-negotiable,” a remark intended to stake out Tehran’s position well in advance of another series of talks with Western nations alarmed by Iran’s atomic program.\textsuperscript{12}

\textsuperscript{10}After the disintegration of the Soviet Union, the Ukraine had in its possession some 5,000 strategic and tactical nuclear weapons. Per agreements signed as part of the creation of the CIS, Ukraine voluntarily removed all tactical weapons. In 1994, Ukraine signed an agreement with the United States and Russia to exchange 200 strategic nuclear warheads for non-weapons grade nuclear fuel for Ukrainian power plants and U.S. $60 million in payments to Russia for scrapping the warheads. In 1997, Ukraine agreed to destroy its remaining nuclear missiles, silos and launch sites in return for U.S. $47 million for the Nunn-Lugar Cooperative Threat Reduction program. The United States contributed a further U.S. $400 million for this effort. Federation of American Scientists. “Ukraine Special Weapons,” The Nuclear Information Project. http://www.fas.org/nuke/guide/ukraine/ (accessed February 18, 2011).

\textsuperscript{11}Neither international sanctions nor non-proliferation diplomacy induced South Africa to disarm. Instead, when the apartheid government collapsed, and it was evident the black South Africans would assume power, the ruling National Party destroyed the nuclear arsenal and the country’s nuclear production capability. Linston W. Terry, “Nuclear Disarmament: The South African Case,” The Current 9, no. 1 (Fall 2005) http://www.cipa.cornell.edu cip_publ.taf?_function=detail&pt_id=&ar_id= 10&_UserReference= 6832 (accessed February 12, 2011).

Even signatories to the (NPT)—North Korea and Syria, for example—have pursued clandestine nuclear weapons programs and North Korea eventually withdrew from the treaty. India and Pakistan pursued their nuclear programs and refused to sign the NPT. The NPT’s investigatory arm, the International Atomic Energy Agency (IAEA), has limited reach without the cooperation of host governments and so no practical enforcement of the NPT is possible in a non-permissive setting. Syria is a case in point in this regard as that nation provided IAEA inspectors limited access to a suspected nuclear reactor site even after the 2007 Israeli air attack destroyed the facility.

**Evolving International Norms**

In the face of the obvious limitations of defense, deterrence and diplomacy, decision-makers have few other options to address the future harm posed by threatening and difficult-to-deter actors. A stark choice is drawn between outright acquiescence and the use of force. Preemptive and preventative use of force, however, may be the only ways in which any reasonable self-defense can be achieved in the face of some threats of harm. The only way to defend against a terrorist attack, for example, is to prevent it. The attacks of 9/11 and the U.S.-led invasion of Iraq called into question prevailing international norms of behavior and raised questions about the appropriate use of force.

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13Future Pakistani President, Zulfikar Ali Bhutto, once promised, “If India builds the bomb, we will eat grass or leaves, even go hungry, but we will get one of our own.” Douglas Frantz and Catherine Collins, *The Nuclear Jihadist: The True Story of the Man Who Sold the World’s Most Dangerous Secrets... And How We Could Have Stopped Him*, 1st ed. (New York: Twelve, 2007), 54. Bhutto made good on his promise. Pakistan got the bomb and today hunger is a daily fact of life in much of Pakistan; millions are malnourished.
Those events prompted a reappraisal of international norms and have spawned a larger debate. These norms are now evolving to recognize broader acceptance for preemptive and preventive actions—to include those that rely on military force. One sign of a changing international norm is evidenced in action taken by the UN, the organization chartered with the intent of providing collective security. In the wake of the 2003 War in Iraq, UN Secretary General Kofi A. Annan convened the *High-level Panel on Threats, Challenges and Change*,\(^{14}\) to assess both the current threats to international peace and the use of force in confronting those threats. The 2005 report is remarkable for its frank appraisal of the nature of threats to world peace and security and also for its recognition of the legitimacy of preventive action.

The primary challenge for the United Nations and its members is to ensure that, of all the threats in the categories listed, those that are distant do not become imminent and those that are imminent do not actually become destructive. This requires a framework for preventive action which addresses all these threats in all the ways they resonate most in different parts of the world. Most of all, it will require leadership at the domestic and international levels to act early, decisively and collectively against all these threats — from HIV/AIDS to nuclear terrorism — before they have their most devastating effect.\(^{15}\)

The language of the High-level Panel report is unmistakable: threats “that are distant,” meaning those can only be addressed with preventive action, must not be allowed to mature; imminent threats must not be allowed to “become destructive.” This is language that makes a distinction between preemptive and preventive action and


clearly acknowledges that the real threats of harm seen at a distance are justifiable cause for action. The report also acknowledges that the international community requires a framework in which preventive action can be undertaken, ‘early, decisively and collectively.’ This language reaffirms that such action should be undertaken by the UN and as a multilateral initiative authorized by the Security Council under its Chapter VII powers. Still, this is a distinct shift away from the international norms created by the *Caroline Case* with its emphasis on a justified self-defense rooted in an instant need to act out of overwhelming necessity, with no choice of means. The report also identifies a variety of preventive means—from fighting poverty and social inequities, to enforcing and expanding arms control regimes—and embraces the concept of “preventive diplomacy and mediation.”

The authors of the report also recognize a role for more compelling measures of prevention and the use of preventive military force. The report advocates “preventive deployment” of troops in cases of mounting tension where “the early deployment of peacekeepers can reassure parties seeking peaceful resolution to a conflict and deter would-be aggressors.” The authors also acknowledge military force as integral to a workable system of collective security in cases in which the preventive use of force is legitimate:

> In the world of the twenty-first century, the international community does have to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible States, and much more besides, which may

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16. Ibid., 37.
17. Ibid., 38.
conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent.\footnote{\textit{Ibid.}, 55.}

The report then argues the use of this preventive force is reserved to the Security Council to authorize such action “if it chooses to do so,” and further states that the impetus to preventive action allows for the use of other preventive means—persuasion, negotiation, deterrence and containment—and time to revisit the military option. This seemingly even-handed approach assumes that the other preventive means have not been attempted and moreover, that the Security Council will act. Even the authors of the UN report acknowledge the Council’s “decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs” in the past.

This then leaves as an open question whether a state, acting in conformance with the tenets of the UN report, could legitimately act in the face of a nightmare scenario on the verge of becoming a terrible reality. If the UN were to fail to agree to act and respond to imminent danger—stymied perhaps by a lone dissenting vote on the Security Council—the threatened state might well be able to justify the legitimacy of a first strike citing that a majority of the members of the Security Council endorsed such action. It is also possible that a state might act unilaterally in advance of approved, but not yet fully assembled, collective action.

The High Level Panel report is not the only signal that the international norm for prevention is evolving. The Security Council post 9/11 adopted a number of preventive
measures to deal with the global terrorist threat and this, too, is reflective of an emerging international norm for the use of preventive acts of state. UN Resolution 1373, for example, requires states suppress the funding of terrorism, criminalize the willful collection or provision of terrorist funding and to freeze terrorist assets. The Resolution also calls on states to toughen anti-terrorist laws and restrict and more closely regulate immigration. The UN also created a Counter Terrorism Center (CTC) to monitor and report on the efficacy of these measures and of member state compliance.

**Legitimate Use of Preventive Force**

Beyond preventive measures rooted in law and international exchange, and perhaps as a guide to states that are duty bound to protect both their sovereignty and their people, the UN has cited several criteria—a framework—by which to universally assess the legitimacy of the preventive use of force. The High-level Panel report identifies five distinct criteria for the legitimate use of preventive force that are rooted in Just War Theory and, as such, underscore the evolutionary nature of the moral theories of just war that are shaped by the context of the times. These criteria justify the use of force in prevention of harm and so create a legitimate basis for the use of force in the face of a threat seen at a distance. The criteria include: Seriousness of the Threat, Proper Purpose, Last Resort, Proportional Means, and Balance of Consequences.
Seriousness of the Threat

This seriousness is gauged as threatening harm to the State or human security that is “of a kind, and sufficiently clear and serious, to justify prima facie the use of military force.”\(^1\) If the threat is internal to a state it is actionable if it involves “genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law,” that is actually being undertaken or is imminently apprehended. These are conditions which, essentially, constitute just cause for action. In citing this criterion the authors of the Report cast in a new light the canonical principle of just cause for war and in so doing, expand the concept of just cause to include a justified intervention in the internal affairs of a state when that state has violated the human rights of its own people.

Proper Purpose

This criterion requires that the purpose of the use of military force is to “halt or avert the threat in question, whatever other purposes or motives may be involved.”\(^2\) This is a simple restatement of the canonical principle of right intent. It also acknowledges that the concept of right intent encompasses the idea that the use of force for the proper purpose may be the primary, but not the sole reason, for the use of that force. This expansion presents another set of issues. With this criterion in mind, for example, it

\(^1\)Ibid., 58.
\(^2\)Ibid.
would be possible to justify the invasion of Iraq for the primary purpose of preventing Kurdish genocide even if the means to achieve that end included regime change.

**Last Resort**

One of the principle tenets of Just War Theory, the criterion of last resort, implies that all other means of redressing the threat of harm have been explored before the resort to the use of armed force. The High-level Panel report couples this requirement to explore other means with an additional requirement that there be reasonable grounds to believe those means will not succeed. This concept was explored earlier in Chapter Four as an essential part of the decision-making process for preemptive and preventive action. Decision makers and their staffs develop alternative courses of action and strive to identify the risks of failure associated with each action proposed. The authors of the High-level Panel report are here codifying a routine part of any decision-making process that involves the use of a state’s military forces and incorporating a higher standard in the standing canonical tenet for the use of force as a last resort.

**Proportional Means**

The Panel members here identify the scale, duration and intensity of the use of force and state the requirement that only the minimum force needed to redress the threat of harm is justified. This too is a long-standing principle in the Just War Tradition and could be seen as the means by which the UN might seek to separate a justifiable use of force from aggression. This however, raises the question of the role the Security Council
would play in authorizing future uses of preventive military action. Would the Council only authorize the use of force by member states, or would the Council also specify the scale, duration and intensity of that use of force? In the later case, this would cast the Council in the role of a strike planner or war planner. Moreover, it would also provide the targeted state or actor with forewarning of the limits and scope of the intended military action and, in so-doing, yield an operational advantage to that state or actor.

**Balance of Consequences**

The authors of the report state that this criterion include not only the measure of the potential success of the proposed preventive military action, but also a measure of the consequences of action vice inaction. The intent of this criterion is to ensure that the harms caused by preventive action are not greater than the harms that action seeks to prevent. Here again is a restatement of the Just War principle of proportionality, and a measure, too, of continued weight of the canonical injunctions to make war only to restore the peace that was lost and to refrain from inflicting further injury.

**Just Tenets of Preventive War**

What emerges from the Panel’s report is the application of major tenets of Just War Theory to the use of preventive military force. This approach signals a conditional acceptance of preventive military action, and an emerging international norm, in three instances. The first is the use of preventive force in self-defense. The Report cites two specific conditions for the use of preventive force for self-defense in the face of a
looming, but distant threat: that there are good arguments for preventive military action and there is good evidence to support them. These arguments and that evidence, however, should be put to the Security Council which can then authorize military action. This is an argument for collective security, authorized by the UN per its charter to ‘maintain internal peace and security.’

The second instance in which the use of preventive military force is legitimate is the case of a State posing a threat to other States, to people outside its borders, or to international order more generally. The authors of the Report contend that Chapter VII of the UN Charter\(^\text{21}\) is broad enough to permit the Security Council to take any coercive action, including the use of military force, to maintain or restore international peace and security:

That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State’s own actions or those of non-State actors it harbours or supports; or whether it takes the form of an act or omission, an actual or potential act of violence or simply a challenge to the Council’s authority.\(^\text{22}\)

This language affords the Council broad latitude in taking action deemed necessary to counter both near and distant threats. The use of preventive force hinges, however, on the Security Council’s unanimity and the willingness and capacity of member states to provide the military forces needed to maintain or restore peace in the face of a threatened

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\(^\text{21}\) Chapter VII of the UN Charter implies the Council already has the power to call for the use of preventive force. Article 39 specifies “that the Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.”

\(^\text{22}\) UN General Assembly, More Secure World, 55.
harm. The UN, on March 17, 2011, for the first time in its history, authorized the use of preventive force to protect civilians in Libya. The UN Security Council Resolution 1973 established a ‘no-fly’ zone over Libya and authorized member states to use “all necessary means to enforce the ban on flights” in the Libyan Arab Jamahiriya.\(^{23}\) Previously, the only instances in which compelling force was authorized by the UN, and to which members states responded with military forces, were in the aftermath of invasion, when the harm was already manifest. The UN authorized the use of force in Korea after North Korea’s invasion of South Korea and in Kuwait after the Iraqi invasion.

The authors of the report also argue that the use of preventive action is legitimized in cases where lives are at risk in countries where situations threaten mass atrocities:

The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council. . . .

There is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of every State when it comes to people suffering from avoidable catastrophe — mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.\(^{24}\)

The long-standing prohibitions of international interference in the internal affairs of states are yielding, as the authors of the Report claim, to a new international norm which justifies the use of preventive actions to avoid catastrophe. This shift towards greater


\(^{24}\)UN General Assembly, A More Secure World, 56.
acceptance of the role of states in protecting the citizens of other states recalls the earliest arguments for jus ad bellum, namely the protection of the innocent. The language of the Report is significant in that directs states towards an overarching ‘responsibility to protect’ people from avoidable harms, that is, to act preventively to avoid the harm rather than mitigate the harm after it becomes a crime against humanity. This is, in fact, the case for the Resolution establishing the Libyan no-fly zone in that “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.”

This is not the first instance of the UN enlarging the idea of an international preventive norm. UN Security Council Resolution 1674, passed in 2006, reaffirmed various paragraphs of the 2005 World Summit Outcome document “regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Paragraph 138, referenced specifically in the Resolution, makes explicit a preventive norm of international behavior:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate,

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encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.\textsuperscript{27}

This paragraph goes on to recognize the legitimacy of intervention \textit{and} the use of force in preventing crimes against humanity:

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.\textsuperscript{28}

Despite the language of the World Summit Outcome report and the reaffirming language of Security Council Resolution 1674, the High-level Panel report remains critical of the unilateral use of preventive military force by individual member states, regardless of its primary purpose. Unilateral action, the authors of the report argue, can only lead to further instability in the world order.

In a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.\textsuperscript{29}

It is for this reason that the argument for preventive military force, and the evidence of its necessity must be brought before the Security Council. With the authorization of the Council in hand, the state or the states that brought forth the argument and the evidence


\textsuperscript{28}Ibid.

\textsuperscript{29}UN General Assembly, ‘\textit{More Secure World}, 63.
would then be empowered to act with the legitimacy that flows from the authority of the UN to maintain peace and security.

**Prevention in a Permissive Environment**

While a number of authors have in the past decade denied the justice of preventive war, the UN in the High-level Panel Report spelled out criteria that would permit the Security Council to authorize the use of preventive military action. That same report identified these criteria as necessary to ensure both the legitimacy and prudence of preventive uses of force. So, even as the UN report may be evidence of an emerging international norm, critics of the report continue to question both the legitimacy and the prudence of a preventive war. “Contrary to the expectation and hope of some scholars and policy makers, clarifying procedures for UN authorization of preventive war does not vitiate the problems of preventive war.”

Crawford, for example, argues the case against the collective use of preventive force on two points. The first is that the UN report’s rationale for legitimizing preventive uses of military force is no different from those advanced by individual states. In effect, the UN report is not creating new criteria, but only specifying why and how this preventive military action should be undertaken. Crawford’s second point is to argue that even if the procedural rules outlined by the UN created greater accountability and transparency, any preventive war—including one authorized by the Security Council as a

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30Crawford, *False Promise,* 92.
collective action—is destabilizing and destructive of the international order based on the rule of law. The crux of her argument is simply that none of the objections to the use of preventive war are resolved with the authorization of a collective security organization.

Preventive use of force undertaken with the Security Council authorization would still violate the just war prohibitions of proportionality and discrimination between combatants and non-combatants and create resentment. Preventive use of force undertaken with Security Council authorization would still abbreviate the use of diplomacy and other truly preventive tools. A preventive-war doctrine held and enacted by the UN Security Council would still create insecurity as it erodes the prohibition against preventive war and creates incentives to arm and act before being acted upon.\(^\text{31}\)

The argument advanced here fails on several points. There is admittedly, truth in the claim that the UN rationale in the High-level Panel report is no different from the rationale advanced by individual states to justify preventive use of force. That an individual member state and the UN would agree on a rationale for the use of preventive force, however, is not a reason to dismiss the rationale out of hand. To the contrary, it is evidence that the rationale resonates with the broader body of the international community and is not merely the view of one misguided state.

Crawford also ignores the reality that some threats cannot be effectively addressed by sanctions, diplomacy and other preventive tools. She admits as much when she argues the preventive uses of force should be limited “to prevention of planned genocide and large-scale aggression.”\(^\text{32}\) The fact remains that some threats exist that can

\(^{31}\text{Ibid., 123-124.}\)

\(^{32}\text{Ibid., 124.}\)
only be acted upon preventively; waiting to suffer the first blow may be a price to great to bear.

The anti-preventive war argument also supposes that an environment which both acknowledges and specifies conditions for a legitimate use of preventive force will lead to more conflict, creating incentives to ‘arm and act before being acted upon.’ This argument ignores the reality that states considering the use of force are constrained by several factors, not the least of which are cost, capability and risk. As discussed in Chapter Four, the decision-making process for both preemptive and preventive acts of state is heavily weighted by the prospect for success of any action. Given all the uncertainties of the use of force and its cost, few deliberate decision makers would assume the heavy burden of war-making when other less costly and less uncertain means have a higher prospect for success.

In addition, it can be argued that the threat of force—especially when widely perceived as possible but not inevitable—may make arbitration, negotiation, diplomacy and containment more effective. Libya, for example, proved far more tractable to U.S. demands to renounce terrorism and support for terrorist activities and abandon its weapons of mass destruction program in 2003, after the U.S.-led invasion of Iraq.33 That

33“The Libyans were keenly aware of overwhelming U.S. power, both in terms of intelligence capacity and military might. The U.S. interception of a German ship carrying Malaysian-made nuclear centrifuges from Dubai to Libya in October 2003 was a clear indicator to the Libyans that they could not be sure of what Washington knew about their proliferation networks. In such an event, trying to ‘game’ the United States would likely fail. U.S. military success in Iraq was a further demonstration of capabilities, and while much of the negotiation process began long before even a potential military action against Iraq, U.S. military capacity could not have been in doubt.” Jon B. Alterman, “Libya and the U.S.: The Unique Libyan Case,” *Middle East Quarterly*, 13, no. 1 (Winter 2006), http://www.meforum.org/886/libya-and-the-us-the-unique-libyan-case (accessed 30 October 2010).
action came 27 years after Washington placed Libya on the list of state sponsors of terrorism and severed ties with Tripoli. Libya had resisted U.S. demands for decades even though its assets in the United States were frozen and in the face of tough financial and economic sanctions including a total ban on direct import and export trade, commercial contracts, and travel-related activities.

Fears that a changing international norm would create an environment that leads to more conflict, and especially one in which aggression is masked as a legitimate preventive use of force, are frequently overstated. The High-level Panel report makes it clear that although preventive “force can legally be used,” it “does not always mean that, as a matter of good conscience and good sense, it should be used.”34 This is more than just an important distinction because it points back to both the circumstances which warrant the use of preventive force and the conditions of how that force is applied. Arguably, the authors of the report have limited the circumstances in which preventive military force may be used legitimately to three narrow cases. The cause in each case must be just and the action must be undertaken with the primary purpose of redressing the threat of harm. In each case the defense of self, and the defense of others, can only be accomplished with the use of force after all other means have been exhausted. Should force be required as a last resort, the authors of the report proscribe that the force be proportional to the threat and should only be considered if the use of that force is likely to achieve its end. Rather than creating a permissive environment for the use of preventive

34UN General Assembly, More Secure World, 66. (Emphasis in the original.)
force, the UN Report actually creates a more restrictive environment in the international arena with a suitably high bar to illegitimate and imprudent action, bars to naked aggression.

The Future of Preemptive and Preventive Actions

It can be argued that a broad consensus exists in the international community that supports preemptive action in the face of imminent harm and, moreover, that some consensus exists for the use of more compelling forms of preventive action. The international community, as evidenced by actions of the UN, has largely endorsed the use of sanctions as means of prevention and has attempted with these actions to reverse aggression, restore deposed governments, combat terrorism, counter the proliferation of weapons of mass destruction and protect human rights. In the first forty years of its existence, the UN agreed only twice to impose sanctions on offending states; since 1989 it has imposed sanctions 14 times.\textsuperscript{35} Arguably, there is growing consensus on the use of some coercive forms of prevention, especially those typified by sanctions. A similar consensus does not now exist for the use of preventive force, to include preventive strikes and preventive war.

There is, however, sufficient evidence to suggest that changing international norms recognize the legitimacy of the use of preventive force in specific circumstances and under certain conditions. The UN High-level Panel Report might well be regarded as

\textsuperscript{35}UN General Assembly, \textit{More Secure World}, 32.
the bow wave of changing attitudes that mirror concerns voiced by contemporary legal and moral scholars. Walzer, for example, argues that the first use of force by threatened states is a moral and legitimate act of self-defense, when a failure to act “would seriously risk their territorial integrity or political independence.”\(^{36}\) But, the duty to defend the state and its people will continue to be the overriding concern of decision makers faced with the need to act in the face of the threat of harm. For this reason, Walzer’s criteria for the permissible use of force in self-defense are drawn far too narrowly. Certainly Al-Qa’ida has no ambition or capability to conquer the United States, nor is any number of mad suicidal attacks a threat to the nation’s political independence. Al-Qa’ida has the American people—both at home and abroad—in its crosshairs and that targeting defies approaches rooted in diplomacy, deterrence and defense.

Michael W. Doyle has argued that traditional tools of statecraft—to include dissuasion, defense and deterrence—still have utility, but that some threats cannot be addressed by such traditional counter-strategies.\(^{37}\) Terrorist actors, of which Al-Qa’ida is but one example, are not to be either dissuaded or deterred by traditional military threats to states. Rogue nations present similar problems and challenges for the use of traditional statecraft. Saddam Hussein may well have been deterred from attacking U.S. assets in the Middle East, but nothing deterred him from an invasion of Kuwait. In like manner, Kim Jong Il may have been deterred from an all-out attack on South Korean by the presence of robust South Korean and American defenses, but no amount of dissuasion

\(^{36}\)Walzer, *Just and Unjust Wars*, 85.

stopped him from developing nuclear weapons and long-range missiles or from making sudden, sharp but sporadic attacks. Faced with the limits of measures designed to dissuade, deny with defenses, or deter threatening actors, threatened states are left with few options for their security except the extraordinary instances in which preemptive actions are possible and the use of preventive force.

States are still very likely to undertake preventive action in the face of looming dangers to their territorial integrity and political independence. These threatened states, however, will likely exhaust the utility of traditional preventive measures before even considering the preventive use of military force. The years of sanctions imposed on North Korea are an example of how far the community of nations is willing to go to avoid the uncertain outcomes of the use of preventive military action against the Pyongyang regime and the risk inherent in antagonizing the regime’s Chinese sponsors. So, while there may be a justification for the employment of force to counter emerging threats, the first resort of threatened states will be to employ traditional preventive measures short of the use of force. Evolving international norms will probably result in more deliberate attempts by states, and by coalitions of states, to take preventive action but not, necessarily, to undertake the preventive use of military force.

This is not to say that states will seek to avoid all uses of force when threatened with tangible harm. Preemptive use of force is warranted and justified in self-defense in the face of an imminent attack; a state has the inherent right of self-defense in the face of an attack on its territorial integrity or political independence:
If fully reliable intelligence is ever obtained that an adversary is preparing to attack, and if striking first can reduce the damage that will otherwise be absorbed as a result of waiting to defend against the blow, preemption is the moral decision for any responsible guardian of national security.\(^{38}\)

The difficulty, as explained previously, is the narrow temporal window in which a preemptive strike can be accomplished. The ability to act within that narrow window is wholly constrained by the state’s capacity to employ force and by the completeness and accuracy of its intelligence. As a result, there are very few opportunities in which a state might use preemptive force.

The use of preemptive and preventive acts of state hinges on the threatened state’s ability to discern the threat of harm and its ability to respond. Discerning the threat of harm requires a state to assess both the capacity of the threatening actor to harm and the intent to do so. Yet aggressor states and those who would do harm often take great pains to conceal their designs, leaving little room for the threatened state to maneuver. A state that readily discerns the intent of a threatening actor, and recognizes its capability to harm, may be powerless to act or find its unilateral attempts to dissuade or deter are failing. In these circumstances multi-lateral action may be one recourse from among a coalition of concerned states, a regional security organization, or the UN. Even then, there is no certainty that these collective approaches intended to dissuade or deter will mitigate the threat or prevent that threat from becoming manifest as harm. This precisely the circumstance that confronts the community of nations in the twenty-first century as

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states seek to come to grips with new norms of international behavior in the face of emerging threats all but immune to dissuasion, deterrence and defense. These changes in international norms will, as a result, evolve over time and are likely to embrace and accept the conditions laid out in the High-Level Panel Report to the UN. Those conditions create the framework for the legitimate use of preventive force in exceptional circumstances.

Broader acceptance of the limited use of preventive action, to include the use of military force, will result from the growing recognition of truly perilous threats of harm for which there may be no real self-defense except that of striking first. The threat of harm from terrorists is a threat to the community of nations. Successful attacks in London, Madrid and New York, in India, Pakistan, Indonesia, and on the African Continent are sobering warnings of the ability of terrorists to reach behind the last lines of defense at the very doors of buildings, buses, trains and planes. Self-defense against terrorism can only be preventive. Even preemptive action in the face of imminent terrorist attack runs the all too great risk of only blunting the full force of a devastating blow. Rogue states with no regard for international treaties or conventions and armed with nuclear, chemical and biological weapons can attack without warning by launching intercontinental ballistic missiles. The threats posed by WMD are catastrophic, even existential, and too terrible to imagine that any state so threatened need wait for an attack to act in its own, just defense against them. The community of nations will also recognize that threats to the innocent must be prevented from being made manifest as
harm and long before the ghastly images of genocide from another Bosnia, Darfur or Rwanda provide proof that the world waited, and acted, too late.
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