PREEMPTION AND THE WAR ON TERROR: MORALITY, LAW, AND THE USE OF FORCE

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Abstract

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Mark Totten
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The threat of global terrorism realized on September 11th requires a careful and limited expansion of the right to use preemptive force. The standard governing preemption since at least the end of the Second World War, with its principal requirement of an *imminent* armed attack, can no longer provide states with the security they require. Efforts to revise the standard, however, have failed on two points. First, revisionists have failed to show how an expansion of the right is consistent with underlying moral norms that shaped the standard in the past. Second, the United States government has rejected the settled standard without offering any concrete alternative in its place. An important resource for revising the standard of preemption, and the focus of this work, is the moral tradition on the just war. Augustine, followed by Aquinas, established criteria for deciding when armed force is morally justifiable. In the sixteenth century, Vitoria and other neo-Scholastics applied this moral framework directly to the issue of preemption. A standard evolved in the writings of Grotius, Pufendorf, Vattel and other theorists. At the same time, Machiavelli

and Hobbes articulated a rival and permissive tradition on the use of force. Although the nineteenth century witnessed the triumph of the Hobbesian tradition, the just war standard was not altogether eclipsed. Rather, its norms reappeared with the adoption of the U.N. Charter in the middle of the twentieth century. The customary law governing the use of preemption, most often identified with the standard articulated by Webster in the *Caroline Affair,* draws directly on this moral tradition. A careful understanding of just war thought as it developed from Augustine onwards is valuable on at least two counts. First, it suggests a rationale, consistent with underlying moral commitments shaping the tradition in the past, for moving away from a standard primarily centered upon *imminence.* Moreover, it also suggests several criteria that might govern the decision to use preemptive force, if *imminence* can no longer hold the singular importance it did in the past.

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Introduction

Since the horrific events of September 11th, Americans have pressed one question perhaps more than any other: "How can we prevent this from ever happening again?" Answering this question has meant everything from removing shoes at airport security and learning a color-coded warning system, to the largest restructuring of the federal government since the 1940s, an altering of the balance between national security and civil liberties, and large-scale military operations in Afghanistan and Iraq. Each are disputed but all come in the name of prevention. One means of prevention given considerable visibility by the United States government and the subject of intense debate is the use of preemptive force. This strategy seeks to prevent another terrorist attack through the starkest of means: using force first to incapacitate or kill the enemy. Although preemption represents only one strategy in the larger war on terror, John Lewis Gaddis has gone as far as to suggest that it lies at the center of American grand strategy, post-9/11.[1] Beginning with a series of speeches in the early months after 9/11, and most importantly in the 2002 *National Security Strategy,* the United States government has claimed a right to the use of preemptive force that extends well beyond the international law norms governing the use of such force since at least the end of the Second World War.

Response to this new doctrine of preemption is divided. Some critics view change as a dangerous roll back that will lead to more violence and less order. Other voices in the debate conclude that the new threat of global terrorism requires this shift. I refer to these two sides in the debate as *preservationists* and *revisionists*. My aim is not

[1] Gaddis, "A Grand Strategy," 50-57.

to argue for one side or another. I start by accepting the general conclusion of the revisionists: on September 11th America awoke to a world threatened by terrorism, and addressing this threat requires a careful expansion of the right of states to use preemptive force. Rather than arguing for the revisionist position, however, my aim in these pages is to consider how we might revise the standard governing the use of preemptive force, taking into account the changed circumstances since 9/11.

Although sympathetic to the need for a revised, carefully expanded right to the use of preemptive force, I remain critical of current government policy and of many scholarly supporters who have sought to defend it. My primary criticisms are two. While there is no shortage of nuanced commentary, what has been noticeably absent from the arguments of revisionists—policymakers, scholars, and others—is a robust moral argument in behalf of revision. More specifically, revisionists have failed to show how a revised standard for the use of preemptive force might preserve moral norms that have profoundly shaped the use of force in the past. Reaching the revisionists' goals, however, will in part depend on securing moral legitimacy. In addition, having rejected the pre-9/11 standard for the use of preemptive force, the government has failed to provide a concrete alternative. Policymakers have assured the world that America's use of such force would be "just," but have developed little in the way of an alternative standard. Employing the particular lens of moral theory, I hope to fill this void by undertaking two tasks. First, I will argue that a longstanding moral tradition has significantly shaped the law of force in general and preemptive force in particular. Second, I will draw upon this moral tradition to begin to sketch a new, concrete standard that preserves these important

moral commitments that have shaped the use of preemptive force in the past, but provides states with the security they require today.

The tradition I appeal to is the longstanding moral tradition on the just war. This moral theory has an extensive history, shaped by both secular and religious sources. Certain formalistic practices appear in Roman sources as prerequisites to a "just war." Beginning most importantly with Augustine, theologians and canonists developed the tradition within Christian thought, first raising the question of whether it was ever just for a Christian to bear arms. From Augustine through Aquinas and into modernity, the tradition evolved as a framework limiting the use of force. It is roughly divided into two parts, the *jus ad bellum* and the *jus in bello*, with the former considering the occasion for war and the latter its conduct. In each area, the tradition provides concrete criteria for decisionmaking. My focus is on the *jus ad bellum,* particularly as it concerns the decision to use preemptive force. Just war thinking is best understood as part of a tradition: a shared commitment through time to an evolving moral framework for thinking about the ethics of war, often adapted to changing circumstances and at times reflecting divergent judgments. At key moments in its history, the just war tradition has undergone important developments as theorists employed its concepts to consider the pressing political and military issues of their day. Chapter 4 explores one key moment: the sustained application of just war norms to the issue of preemption, beginning in the sixteenth-century. As I will suggest in Chapter 7, the just war today is widely diffused in American society and represents perhaps the predominant moral framework for thinking about the ethics of war. Attention to this tradition is important for the end of achieving moral legitimacy, because of its role in shaping the norms governing the use of

preemptive force and because the tradition so widely maps on to Americans' moral intuitions about the use of force.

Although turning to moral theory, and the just war tradition in particular, as a source for thinking about the use of preemptive force might seem uncontroversial—after all, the use of armed force involves killing another person—in fact, many scholars aside from theologians and ethicists have marginalized or simply ignored the tradition as an important historical force and as a source for normative thought today. It is often mentioned as only a footnote in the historical development of international norms governing the use of force—a failed theory of mere historic interest, gradually eclipsed and forgotten. Separate, but often joined to this interpretation is the claim that the just war tradition expressed only religious-moral ideas, with little connection to contemporary international law. Both of these conclusions, however, miss the significant ways in which the moral tradition has shaped the international laws governing the use of force today. A significant portion of this work will focus on select moments in the history of the tradition to suggest otherwise. In drawing upon the tradition, I remember Oliver Wendell Holmes' warning about the two errors in using history for contemporary legal thought: the error of overlooking the fact that cherished ideas rest on a history of change, and the opposite error of "asking too much of history,"[2] assuming that it readily yields simple answers for today's challenges. Acknowledging these limits, however, the historical tradition on the just war has much to say about the contemporary challenge of preemption.

Before briefly reviewing the structure of this project, I offer a few comments regarding my choice of terms and the scope of my argument. Although participants in

[2] Holmes, *The Common Law*, 5-6.

this contemporary debate have stipulated various terms and distinctions regarding the preemptive use of force, no settled terminology has emerged. *Preemption, prevention,* and *anticipatory self-defense* are all terms that circulate, often with different meanings from one writer to the next. Some commentators have distinguished *preemption* from *prevention,* based on the temporal proximity of the threat. The use of force first against an *imminent* threat is preemptive, but against a threat that is less than imminent is *preventive. Anticipatory self-defense* is taken to describe the legal right, under international norms (whatever the scope of that right might be). Following the lead of government policymakers, the American public more often uses these terms interchangeably, speaking of *preemption* to signify a broad range of action where force is used first. Although the distinctions lend a certain conceptual clarity, I have found it important to use the terms in the sense they most often appear in public discussion.

My focus in this work is on the decision to use preemptive force. The new threat of global terrorism and the American response raises a multitude of moral and legal issues—issues of state responsibility, the strategy of democracy promotion, the scope of executive power, and many other issues. Except as they connect directly to the decision to use preemptive force, however, I largely set these issues aside. Moreover, the issue of preemption is not simply an American issue; it is an issue that states around the world confront in dealing with terrorism. Nonetheless, I write as an American, focus on United States policy, and am especially concerned with America's exercise of this power. Finally, my focus on preemption should not communicate that preemption is the most important strategy in fighting the war on terror. It is just one strategy among many and, as I will often suggest in this work, is a strategy only of last resort. Lawrence

Freedman's warning bears much truth: "The enthusiasm for pre-emption reflects a yearning for a world in which problems can be eliminated by some bold, timely and decisive strokes. The cases where this can happen are likely to be few and far between."[3] Moreover, the revisionist who accepts the need for a carefully expanded right of preemption is not thereby committed to a strongly unilateralist foreign policy. The belief that the United States might, under some scenarios, need to go on its own in using preemptive force is compatible with a range of positions regarding the importance of international support.

I divide this work into three parts. Part I, "The Contemporary Challenge of Preemption," examines the standard governing the use of preemptive force that held sway from at least the end of the Second World War to 9/11 (Chapter 1), and the United States' rejection of this standard after the attacks (Chapter 2). In concluding Part I, I offer several criticisms of the government's response, while accepting the fundamental need for change. In Part II, "Preemption and Moral Tradition," I trace several key moments in the development of the just war idea. Augustine and Aquinas are the most important early figures in the tradition and identify its basic commitments (Chapter 3). In the early modern period, proponents of the just war tradition began to apply the moral framework on the use of force expressly to the issue of preemption. This tradition developed alongside a rival and permissive tradition on the use of preemptive force—what might be called the "just fear" tradition (Chapter 4). The most important figures in the modern period, representing each respective tradition but interacting in important ways, were Hugo Grotius and Thomas Hobbes (Chapter 5). In the eighteenth and nineteenth centuries, the standard governing the use of preemptive force continued to evolve,

[3] Freedman, *Deterrence,* 107.

although it was pushed out of the increasingly distinct conception of international law that matured in the nineteenth century (Chapter 6). Together, these four chapters in Part II identify the primary criteria governing the use of preemptive force in the moral tradition and signal the contribution that this tradition made to international law in its earlier stages, as well as its significance for contemporary international norms. Finally, in Part III, "Revising the Law of Preemption," I draw on the historical work in Part II, summarizing the primary commitments in the moral tradition on the use of preemptive force and its importance today (Chapter 7), and then applying the tradition to begin thinking about a new standard (Chapter 8).

PART I

THE CONTEMPORARY CHALLENGE OF PREEMPTION

Chapter 1

Preemption on the Eve of Terror

The United States' claim to a broad right of preemption stumbled into the forum of public discussion in the summer of 2002. Its proponents defend the claim as a necessary weapon in the war on terror; its detractors chasten the move as reckless and unprecedented. The Bush Administration recognized that it was departing from existing norms. The 2002 *National Security Strategy* argues plainly that the new threat of global terrorism realized after 9/11 requires a change in the law of force.[1] In this chapter I examine the right of preemption as it existed in international law prior to 9/11. After making the case for this right under the Charter system, I turn to its limits. Three norms in particular govern the decision to use preemptive force today: the norm I call "*due cause,*" and the long-recognized norms of *necessity* and *proportionality.*

I. The Charter System and the Case for Preemption

The transition from a largely unlimited right to use force that existed during the nineteenth century to the present legal regime under the United Nations Charter took place over a span of at least fifty years. This transition included important developments after the First World War, such as the Covenant of the League of Nations (1919) and the later Kellogg-Briand Pact (1928, also known as the General Treaty for the Renunciation of War).[2] The horrors of two world wars finally provided the impetus for the ratification of the United Nations Charter in 1945. In examining the right of preemption under the

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[1] National Security Council, *National Security Strategy* (September 2002).
[2] For commentary on this transition *see* Brownlie, *International Law,* 51-111; Alexandrov, *Self-Defense,* 29-76; and Waldock, "The Regulation of the Use of Force," 469-486.

Charter system, I will begin by making the case for such a right, noting first the more general restrictions on the use of force. While a vast body of literature examines this topic, my aim is only to identify the basic contours of the law and note some relevant points of disagreement.

A. *General Limits on the Use of Force*[3]

Article 2(4) of the Charter of the United Nations states a general prohibition on the use of force. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The scope of this prohibition is sweeping. It bars the use of *force* in general, as opposed to the more narrow term used elsewhere in the Charter, *armed attack.* Members agree not only to refrain from using force against other states, but also not to threaten its use. The object against which force is prohibited is also broad, including not only the "territorial integrity or political independence of any state," but also any use of force which is "inconsistent with the Purposes of the United Nations."

The Charter identifies two important exceptions to this general prohibition. The first exception pertains to the Security Council. Where the Council finds an "act of aggression" or even "the existence of any threat to the peace" or "breach of peace,"[4] the Council can take measures up to and including the use of armed force "to restore

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[3] General introductions to the use of force under the Charter include: Clark and Beck, *International Law;* Brownlie, *International Law;* Brownlie, *Principles;* Dinstein, *War, Aggression, and Self-Defence;* Feliciano and McDougal, *Minimum World Public Order;* Franck, *Recourse to Force;* Gray, *International Law;* Schachter, "International Law"; Waldock, "The Regulation of the Use of Force"; Weightman, "Self-Defense in International Law."

[4] United Nations, *Charter of the United Nations,* Art. 39.

international peace and security."[5] The Security Council has broad discretion to determine what counts as a "threat to the peace," and most scholars agree that the Council can authorize preemptive uses of force, even where the threat is not imminent.[6] The record of uses of force authorized by the Security Council is slim, though the end of the Cold War has led to more collective action than in the past.[7]

The Charter grants a second exception to individual states for the limited purpose of self-defense. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

States and commentators invoked the concept of self-defense in the nineteenth century as a justification for the use of force, though they took it to mean something quite broad in scope. Under the Charter, however, self-defense has a much narrower meaning. While a full account of this term and the points of disagreement among scholars is outside the scope of this chapter, a distinction between *self-defense* and *defensive armed reprisals* is suggestive of the change. A defensive armed reprisal is a use of force, short of war, by one state against another in retaliation for some earlier violation of international law. As

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[5] Ibid., Art. 42.

[6] *See* Gardam on collective security, *Necessity,* 188-212. Dinstein notes: "The notion of maintaining international peace and security has a preemptive thrust. The purpose is to ensure, before it is too late, that no breach of the peace will in fact occur. Measures taken by the Council to forestall a breach of international peace and security can have deterrence and prevention as their goals." *War, Aggression and Self-Defence*, 248.

[7] In 1993 the Security Council determined that internal conflict in Haiti, where a military junta had overthrown the legitimate government, "threatens international peace and security in the region." S.C. Res. 841 (1993). In a later resolution, the Council allowed Member States to use "all necessary means" to restore the legitimate government in Haiti. S.C. Res. 940 (1994). In 1997, the Council determined that a conflict in Angola was "a threat to international peace and security in the region," and imposed sanctions on a non-state entity involved in the conflict. S.C. Res. 1127 (1997).

such, armed reprisals are punitive in nature. Most commentators conclude, and the International Court of Justice has confirmed, that defensive armed reprisals in a time of peace are unlawful under the Charter. Self-defense, strictly construed, does not extend to punishing another state.[8] I will discuss additional limits on the scope of self-defense later in the chapter.

I also note that some disagreement has arisen over what counts as an "armed attack." While certain cases clearly fit this term—the 1990 Iraqi invasion of Kuwait, for example—other cases are not so clear, such as the case where one state gives aid to a revolutionary group.[9] This issue of state responsibility for the acts of irregular forces was at issue in the *Nicaragua Case,* before the International Court of Justice (ICJ). The ICJ went some distance in clarifying the scope of an "armed attack" in deciding this case, but use of the term remains unsettled.[10]

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[8] *See* Dinstein, *War, Aggression and Self-Defence,* 194-195; Bowett, *Self-Defence,* 13-14; Shaw, *International Law,* 786-787; International Court of Justice, *Nuclear Weapons,* 246.

[9] This was an important issue in the *Nicaragua Case.* International Court of Justice, *Nicaragua Case.* Other scholars have asked whether uses of force other than through traditional military means would allow for the use of force in self-defense. Dinstein, for example, raises the question of whether an attack on a computer network could count as an "armed attack," where the disruption causes fatalities. Dinstein, *War, Aggression and Self-Defense,* 166-167.

[10] "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law." International Court of Justice, *Nicaragua Case,* 103.

B. *The Customary Right of Preemption*

Some disagreement exists, however, as to whether Article 51 and the Charter System more generally allow states to use force as an act of anticipatory self-defense.[11] Critics of such a right usually make at least two arguments. The primary argument states that the Article 51 exception for individual states to use force "if an armed attack occurs" exhausts the possible cases that a state might act in self-defense. Since preemption comes prior to an armed attack, it is ruled out. Noting that the use of the term "armed attack" is more restricted in scope than "aggression," used elsewhere in the text, Dinstein concludes: "The choice of words in Article 51 is deliberately restrictive. The exercise of the right of self-defence, in compliance with the article, is confined to a response to an armed attack."[12] Under this interpretation, if a state is threatened by an armed attack the only avenue of recourse prior to the actual attack is to bring the issue before the Security Council.[13] A second argument concludes that customary law, even if it could support such a right, does not. Brownlie takes this position and argues that the relevant time frame for discerning a customary right is the years since the ratification of the Charter, not state practice prior to its ratification. Reviewing state practice, he concludes that "since 1945 the practice of States generally has been opposed to anticipatory self-defence."[14]

While a minority of scholars hold this view, the majority of commentators and arguably most states recognize a limited right to use preemptive force as a matter of

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[11] For a general overview of this debate, *see:* Franck, *Recourse to Force,* 97-108; Gray, *International Law and the Use of Force,* 111-115; Schachter, "International Law," 1633-1635; and Dinstein, *War, Aggression and Self-Defence,* 165-169.
[12] Dinstein, *War, Aggression and Self-Defence,* 166.
[13] Ibid., 167. *See also* Brownlie, *International Law,* 275-280.
[14] Brownlie, *Principles,* 701; *International Law,* 251-280.

customary law.[15] This claim rests on two arguments. The first argument seeks to explain the incorporation of customary law into the Charter system, and the second argument shows that the customary law includes a limited right of preemption. The argument for incorporation has two grounds. The first ground is the text, itself, which refers to the "inherent" right of self-defense. This language suggests some right that pre-dates the Charter. While not ruling on the question of whether customary law includes a right of anticipatory self-defense,[16] the International Court of Justice concluded in the *Nicaragua Case* (1986) that customary law is an independent source of law within the Charter system.

> [T]he United Nations Charter . . . by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' . . . of individual or collective self-defence . . . . The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature.

The Court goes on to say that the Charter does not directly regulate all aspects of this customary law. Moreover, while the two sources may overlap, customary law retains a valid role independent of the Charter even where they do not overlap.[17]

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[15] *See, e.g.*, Feliciano and McDougal, *Minimum World Public Order,* 229-241; Schachter, "International Law," 1634-1635; Franck, *Recourse to Force,* 97-99; and Gray, *International Law,* 84-119.

[16] "[R]eliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue." ICJ, *Nicaragua Case,* 103. In its Advisory Opinion on *Nuclear Weapons,* 266, a majority of the judges could not conclude that the first use of nuclear weapons would always be unlawful, if the very existence of the state was in jeopardy.

[17] ICJ, *Nicaragua Case,* 94. As Dinstein points out, taking this approach leaves open the possibility that developing customary law might contradict the Charter, even if it does not at the present. "It can be taken for granted that pre-Charter customary international law was swayed by the Charter and that, in large measure, customary and Charter *jus ad bellum* have converged. But did the process of change in customary international law come to a stop in the post-Charter era? . . . . It seems logical to believe that an eventual dissonance between Article 2(4) and customary international law can be anticipated." *War, Aggression and Self-Defence,* 91.

A second ground for incorporation is simply the weight that is due state practice in discerning the law. The idea is one of an interpretive dialectic that moves back and forth between the text of the Charter and state practice to interpret the relevant law.[18] Of course, it might be that state practice simply contradicts the Charter under any reasonable interpretation, but more often it is the case that the Charter is open to multiple interpretations. Examples we will examine shortly suggest that in fact states do not see themselves as having given up a limited right of preemptive force, where an armed attack is *imminent.*

Following the argument for incorporation is a second argument, which finds that a limited right of preemption does in fact exist in customary law. Certainly prior to the First World War, states could act preemptively, since few if any norms restricted the decision to go to war. The usefulness of state practice during this time as a guide to the scope of this right today is limited. As Brownlie rightly concludes, "to regard any form of action formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with 'self-preservation' and 'necessity' as within a surviving 'customary right', is a very arbitrary process."[19] Nonetheless, it seems clear that a limited form of anticipatory self-defense did survive attempts to limit the recourse to force between the two world wars.

Another possible ground for incorporation is the legislative history of Article 51. Several scholars have argued that the Framers did not intend to provide an exhaustive definition of self-defense in Article 51, relying instead on shared customary norms. The specific qualification in the text was rather included as a means to clarify the position of the Charter in relation to collective arguments for mutual defense. Waldock, "The Regulation of the Use of Force," 451-455, 498; McDougal and Feliciano, *Minimum World Public Order,* 235. In dicta in his dissenting opinion to the *Nicaragua Case,* Judge Schwebel cited both of these reasons offered by Waldock in support of the claim that the Charter preserves the customary right of anticipatory self-defense. ICJ, *Nicaragua Case,* 347-348 (dissenting opinion of Judge Schwebel).

[18] Feliciano and McDougal suggest such an approach in the context of arguing for a right of anticipatory self-defense. *Minimum World Public Order,* 234-241. Elsewhere, McDougal argues that the subsequent practice of states gives no indication that states intended to give up this right in ratifying the Charter. McDougal, "The Soviet-Cuban Quarantine," 600-601.

[19] Brownlie, *International Law,* 274.

Although a more thorough account would need to examine the history closely, case by case, one of the most important events interpreting the law shortly after the Second World War was a decision handed down by the International Military Tribunal at Nuremberg, less than a year after the United Nations Charter entered into force. This judgment concerned the legality of Germany's invasion of Denmark and Norway, an event, of course, which occurred prior to the signing of the Charter. The Tribunal rejected Germany's argument that it acted in anticipatory self-defense, concluding that "preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.'"[20] Citing the important *Caroline Case,* the Tribunal suggested that preemptive uses of force are lawful where the anticipated attack is imminent.

Several events since the signing of the Charter, moreover, confirm that states understand themselves to have this limited right under the imminence standard. Although never acting on it, the United States clearly believed itself to have a limited right to use preemptive force during the Cuban Missile Crisis. In late September and into October of 1962, the Kennedy Administration faced the perilous decision of how to respond to the Soviet Union's covert and rapid efforts to establish several medium and intermediate-range nuclear missile sites in Cuba, capable of reaching all the primary population centers in the United States and Central and South America.[21] Foreseeing a coming crisis, the Justice Department prepared a memorandum on the salient legal issues that would shape the Administration's response if the Soviets attempted to establish an

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[20] International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946).
[21] For an account of this crisis, *see* Kennedy, *Thirteen Days.* The Administration's public statements are compiled in U.S. Department of State, *The Department of State Bulletin* 47, 714-741. A helpful inside account of the legal issues involved is Chayes, *The Cuban Missile Crisis.*

offensive capability.[22] Citing the previously mentioned *Caroline Case,* the document concluded: "It is thus clear that preventive action would not ordinarily be lawful to prevent the maintenance of missile bases or other armaments in the absence of evidence that their actual use for an aggressive attack was imminent."[23] Although the President eventually chose not to employ military strikes, as many of his advisers urged, it is clear that even his most cautious advisers recognized that under certain circumstances international law would sanction the use of preemptive strikes.[24]

More recent events also confirm that the United States recognizes a customary law right of preemption. Although widely criticized under existing norms, the first President Bush invoked this right in justification of the 1989 U.S. invasion of Panama, again invoking the criterion of *imminence.* "The deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger."[25] In late summer of 1998, President Clinton ordered the bombing of a pharmaceutical plant in Sudan, allegedly used to produce materials for chemical weapons in association with Osama bin Laden. Critics have charged that the action had more the character of a reprisal, as a response to the bombing of the U.S. embassies in Kenya and Tanzania two

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[22] Memorandum for the Attorney General, Re: Legality Under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union (August 1962), in *The Cuban Missile Crisis,* Abram Chayes, 106-116.
[23] Ibid., 110.
[24] In his October 22, 1962 Address to the American people about the U.S. response to the crisis, President Kennedy justified the blockade not by invoking a doctrine of anticipatory self-defense, but on the basis of regional security arrangements authorized under the Charter. John F. Kennedy, *State Department Bulletin* 47, 718. The decision to justify the blockade—arguably a use of armed force—on this ground was in part based on fear that recourse to a doctrine of preemption would open a Pandora's box, allowing the U.S.S.R. to act against American missiles positioned at that time in Turkey. McDougal found the regional security argument flawed, and defended the blockade as a use of preemptive force justified under the *Caroline* standard. *See* McDougal, "The Soviet-Cuban Quarantine."
[25] Bush, Letter to the Speaker of the House of Representatives on Panama, *Public Papers of George Bush* 1989:2, 1734.

weeks earlier. Nonetheless, President Clinton justified the attacks on the ground of anticipatory self-defense, invoking the classic tests. "The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat."[26] In late 2002, Clinton revealed that his Administration had drawn up plans for a preemptive strike against several North Korean nuclear reactors.[27]

Two other events not directly involving the United States register an international recognition of a right to use preemptive force. The first event was the 1967 Israeli-Arab War. On May 18, 1967, Egypt requested that the United Nations remove the United Nations Emergency Force (UNEF) that had served as a buffer between Egypt and Israel since the 1956 war. The withdrawal took place and Egyptian forces and Israeli forces were soon opposite each other on the Sinai border. At the same time, Egypt closed off the Gulf of Aquaba and the Strait of Tiran to Israeli ships. Although events were not clear at the time, it is now widely held that Israel initiated the war that resulted in the quick destruction of the entire Egyptian air force and later Jordan's air force as well. Israel achieved a decisive victory, occupying Gaza, the West Bank, Sinai, and the Golan Heights. The Security Council demanded a cease-fire, but never required Israel to return

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[26] Clinton, Letter to Congressional Leaders on Afghanistan and Sudan, *Public Papers of William J. Clinton* 1998:2, 1464. *See also* the *National Security Strategy* released by the Administration about a year later. Referring to the strike in the Sudan, the document concludes: "The strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities." *A National Security Strategy for a New Century* (December 1999), 13-15.

[27] Elaine Monaghan, "Clinton Planned Attack on Korean Nuclear Reactors," *The Times* (London), December 16, 2002.

the new land it now occupied or otherwise condemned the Israeli action.[28] Attempts to pass such a resolution failed easily. While some commentators argue that a state of war already existed between Israel and the other Arab states, most recognized the Israeli action as a legitimate use of preemptive force.[29]

A second event registering state recognition of a limited right to use preemptive force was the international response to the Israeli bombing of an Iraqi nuclear reactor at Osirak on June 7, 1981. Israel argued, in part, that the action was a necessary act of self-defense to prevent Iraq from developing a nuclear capacity and acting on its hostile intentions toward Israel. Since the reactor was to become operational later that summer, Israel argued that the action was necessary at that point in time to avoid the later risk of nuclear fallout.[30] As a matter of international law, Israel justified the action as a necessary act of self-defense. The international community, however, resoundly rejected this claim. The Security Council unanimously adopted a resolution condemning the action as a violation of international law.[31] As the resolution noted, Iraq, unlike Israel, was party to the 1968 Treaty on Non-Proliferation of Nuclear Weapons. The reactor at Osirak was subject to regular inspections by the International Atomic Energy Agency (IAEA), which had never found any violations.

In condemning the action, several members of the Security Council made clear that the facts in this situation did not give rise to the customary law right of anticipatory self-defense. A representative of the United States implied recognition of this right, but

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[28] S.C. Res. 233 (1967); S.C. Res. 234 (1967); S.C. Res. 236 (1967); S.C. Res. 242 (1967).
[29] *See, e.g.*, Franck, *Recourse to Force,* 101-105.
[30] Foreign Minister Shamir's Statement in the General Debate of the United Nations General Assembly, October 1, 1981. This statement, and Israel's defense of the strike, is contained in a document issued by the Israeli Government subsequent to the attack. Government of Israel, *The Iraqi Nuclear Threat.* In addition to the argument from anticipatory self-defense, Israel also argued that the relationship between Israel and Iraq was in fact a state of war.
[31] S.C. Res. 487 (1981).

concluded that Israel did not satisfy its requirement of last resort. "Our judgment that Israeli actions violated the United Nations Charter is based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute."[32] Ambassador Otunnu of Uganda cited the *Caroline Case* and its rule of necessity as the relevant standard, which Israel clearly did not satisfy.[33] Sierra Leone's Ambassador Koroma reached a similar conclusion.[34] Likewise, the British representative concluded that "there was no instant or overwhelming necessity of self-defense."[35] In each case, states recognized a right of anticipatory self-defense, but concluded that Israel's actions failed to satisfy the requirements for this right to ripen.[36] Together these cases represent a widespread recognition by states of a limited right to the preemptive use of force.

II. *Norms Governing the Right of Preemption*

As suggested, the right of anticipatory self-defense is largely a product of customary law. The norms governing its use, moreover, are not clearly spelled out. While commentators have disagreed about both the relevant norms and their substantive content, I would suggest that three legal norms govern the decision to use force: the norms of *due cause, necessity,* and *proportionality.* Before examining each of these norms in some detail, I turn to a brief account of the aforementioned *Caroline* affair,

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[32] U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/PV.2288 (1981).
[33] U.N. SCOR, 36th Sess., 2282th mtg., U.N. Doc. S/PV.2282 (1981).
[34] U.N. SCOR, 36th Sess., 2283th mtg., U.N. Doc. S/PV.2283 (1981).
[35] U.N. SCOR, 36th Sess., 2282th mtg., U.N. Doc. S/PV.2282 (1981).
[36] While there was widespread concurrence on this question, not all states agreed. The representative of Guyana stated: "While Article 51 of the Charter of the United Nations does confer upon Member States the right of individual self-defense if an armed attack occurs against them, nowhere does it provide for the use of the pre-emptive strike, which is contrary to the spirit of the Charter and to the purposes and principles of the Organization." U.N. SCOR, 36th Sess., 2286th mtg., U.N. Doc. S/PV.2286 (1981). For an overview of the legal issues, *see* Mallison and Mallison, "The Israeli Aerial Attack." D'Amato questions whether the action was in violation of international law. *See* Anthony D'Amato, "Israel's Air Strike."

widely recognized as the *locus classicus* of these norms governing the decision to use preemptive force.

A. *The* Caroline *Affair*

The *Caroline* affair lasted from 1837 to 1842.[37] During the Canadian Rebellion of 1837, several rebel leaders came to Buffalo, New York in December and rallied a large group of American sympathizers to support them in their cause against the British government. Although the United States had signed a neutrality agreement with Britain, Buffalo was far away from the arm of federal control. An American militia seized Navy Island, a British possession in the Niagara River and separating the United States from Canada, sometime on or shortly after December 13, 1837. Over the next several days, a privately owned steamboat, the *Caroline*, made repeated trips from the American side of the river to Navy Island, bringing more men and supplies. These supplies almost certainly included military equipment and ammunition. On the evening of December 29, a British force raided the *Caroline* where it was docked along the American shore. Setting it on fire, they towed it into the current and it was swept over the Falls.

In a series of diplomatic exchanges from January 1838 to August 1842, the United States government sought redress for a claimed violation of state sovereignty, while the British defended their actions as a necessary means of self-defense.[38] Of this correspondence, most important was an April 24, 1841 letter sent by then-Secretary of State Daniel Webster to the British Minister at Washington, Henry Fox. In this letter,

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[37] A summary of the history and legal issues involved is Jennings, "The *Caroline* and *McLeod* Cases," 82-99. *See also* Collins and Rogoff, "The *Caroline* Incident," 493-527.

[38] These letters, as far as I am aware, are not available in one source. Collectively, almost all of this correspondence is in three sources: *British and Foreign State Papers, 1840-1841,* Vol. XXIX, 1126-1142 (1857); *British and Foreign State Papers, 1841-1842,* Vol. XXX, 193-202 (1858); and H. Ex. Doc. 302, 25th cong., 2d Sess.

Webster famously outlined a standard for using preemptive force. "It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and "the act, justified, by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[39]

The *Caroline* case became important for international law and the norms governing the use of preemptive force not because states recognized these norms as binding law in the mid-nineteenth century, but as they were appropriated in the twentieth century under the Charter. It is clear from the comments legal scholars made over the next several decades that the case did not have the standing in the nineteenth and early twentieth centuries that it has today. Lawrence (1895) mentions the *Caroline* episode in the context of the law of neutrality. Hall (1895) and Oppenheim (1905) treat the case as an example of the limits on a nonetheless broadly construed right of self-preservation, the exercise of which states are the final judge.[40]

The standard that Webster articulated achieved the status of customary law as it was appropriated in the twentieth century, particularly under the Charter system.[41] In this sense, contemporary use of this case involves a creative application of the norms in the context of the Charter system. A more narrow concept of self-defense, the presence of contemporary formal and informal processes whereby states and even other non-governmental actors pass judgment on the lawfulness of a state's use of force, and other factors create the context for its meaning today. Moreover, it is also important to note that while commentators today largely read the *Caroline* case as an instance of the

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[39] Webster to Fox (April 24, 1841), 195.
[40] Lawrence, *Principles,* 610; Hall, *Treatise on International Law,* 283-284; Oppenheim, *International Law,* Vol. I, 180-181.
[41] For examples of states recognizing the authority of the *Caroline* standard, *see* notes 33-35 in this chapter.

preemptive use of force, the norms it stands for are taken to govern the use of force by individual states in self-defense generally. I set aside the debates in this wider context, however, and focus on these three norms in the context of anticipatory self-defense.

B. *Due Cause*

Interpreted under the Charter system, the *Caroline* affair stands for three norms that govern the decision to use preemptive force. The first I call the norm of *due cause.* Webster's mention of self-defense invokes this norm, though again only as a contemporary appropriation of the term. Although this norm has a long history, the primary source for this norm today is the Charter, and in particular the Article 51 exception.[42] Since we noted the relevant features of this norm earlier, I offer only a few additional comments.

This norm has two aspects, one concerning the *precipitating event,* and the other concerning the *legitimate end* in using force. The occasioning event for a legitimate use of force under the Charter is an "armed attack." In the context of anticipatory self-defense, and taking account of the relevant customary law, a state must reasonably conclude that its actions against the target state are an act of self-defense against the threat of an armed attack that would otherwise occur absent the preemptive action. The timing of preemptive action is important, but we will discuss this issue further under the norm of *necessity.*

The second aspect of *due cause* concerns the legitimate end in using force. This end the Charter identifies as *self-defense.* Of course the Charter leaves much unsaid

[42] As the International Court of Justice notes in the *Nicaragua Case,* however, the mention of an "inherent" right of self-defense is a reference to a customary law right of self-defense, although one since shaped by treaty law, namely the Charter. International Court of Justice, *Nicaragua Case,* 194.

about the scope of self-defense. State practice, rulings of the International Court of Justice, legal scholarship and other sources attempt to refine it further. As mentioned earlier, the Charter rules out defensive armed reprisals in a time of peace on account of their punitive nature. At its core, the use of force toward the end of self-defense aims to repel an attack and to achieve security where such a violation has occurred. A preemptive use of force as a means of self-defense anticipates an attack that is about to occur.

C. *The Twin Norms of Necessity and Proportionality*

Unlike the norm of *due cause, necessity* and *proportionality* are entirely products of customary law and work to define the scope of legitimate self-defense. Recall that the International Military Tribunal at Nuremberg cited Webster's language in the *Caroline* case regarding necessity as the relevant standard.[43] Nonetheless, the question remained whether these twin norms of customary law survived passage of the Charter. As the several cases briefly examined earlier indicate, many of which cite the *Caroline* case or employ its language, states have continued to regard these norms as valid.[44] Since these norms work to limit the use of force, it is not surprising that they would complement Article 51 of the Charter, which marked a profound limitation on the use of force.

Two judgments of the International Court of Justice, moreover, confirm the role of these norms under the Charter system. In the *Nicaragua Case* (1986), the Court states the aforementioned general principle that the Charter does not exhaust international law

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[43] International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), 205.
[44] Commentators have confirmed this conclusion, as well. *See, e.g.,* Gray, *International Law,* 105-108; Feliciano and McDougal, *Minimum World Public Order,* 218-244; Schachter, "International Law," 1635-1638; Ago, *Addendum to the Eighth Report on State Responsibility,* 68-70; and Dinstein, *War, Aggression and Self-Defence,* 207-213.

regulating the use of force. The Court continues: "For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."[45] While acknowledging these rules as established in customary law, the Court did not state clearly their relationship to Art. 51. This step was taken a decade later in its advisory opinion, *Legality of the Threat or Use of Nuclear Weapons* (1996). "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. . . . This dual condition applies equally to Article 51 of the Charter, whatever means of force employed."[46] The more important and much less discussed questions, however, concern the substantive content of these norms.[47]

1. *Necessity*

The concept of *necessity* has different usages in international law. In the nineteenth and early twentieth centuries, the notion of *necessity* was often evoked as a broad justification for the use of force. For our concerns, however, the norm of necessity is a customary law restraint on the decision to use force. Again, the classic statement is Webster's: "It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[48] The conceptual structure of this norm is far from clear. Although these distinctions are seldom addressed, I suggest, and will develop more thoroughly in Part III, that the norm

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[45] International Court of Justice, *Nicaragua Case,* 94.
[46] Ibid., *Nuclear Weapons,* 245. The court again confirmed this position in its 2003 *Oil Platforms Case,* para. 76.
[47] Scholars have devoted surprisingly little attention to this important subject. Perhaps the most important and comprehensive treatment of these norms is Gardam, *Necessity, Proportionality and the Use of Force by States* (2004).
[48] Webster to Fox (April 24, 1841), 195.

of *necessity* as it appears in contemporary law prior to 9/11 measures two things: (1) the existence of reasonable alternatives to the use of force, and (2) the temporal proximity of the threat. The first measure is traditionally captured in the requirement that a state can only use force as a *last resort,* while the second measure is captured in the traditional requirement that the use of force be against an *imminent threat.* I begin with a few brief comments on necessity as a requirement of last resort, before separately considering imminence and the relationship between these two measures of necessity.

Roberto Ago provides a clear statement of necessity understood as "last resort" in his *Addendum to the Eighth Report on State Responsibility.* "The reason for stressing that action taken in self-defense must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force."[49] Ago rightly understands last resort in terms of the legitimate end for using force ("halting the attack"), rather than as a requirement of exhausting even improbable alternatives. Although states acting in self-defense must often make these judgments in the first instance, the international community will judge the lawfulness of the action in part by determining whether the particular recourse to force exhausted all reasonable alternatives for achieving the same goal as would otherwise be sought in using force.[50]

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[49] Ago, *Addendum to the Eighth Report on State Responsibility,* 69.

[50] Although our focus is on the relevance of this norm to the preemptive use of force, which by definition always takes place prior to an "armed attack," scholars dispute the relevance of this norm where an armed attack has already occurred or is occurring. Perhaps the majority position is that in deciding how to fit this rule of customary law within the Charter system, any actual armed attack will automatically fulfill the necessity requirement. *See, e.g.,* Schachter, "International Law," 1635. Under this understanding, the norm of necessity under the Charter system is most important in the context of the preemptive use of force. Other scholars, however, argue that even in the case of an armed attack, a state must still seek other reasonable alternatives short of responding with force. *See, e.g.,* Jennings and Watts, *Oppenheim's*

The contemporary doctrine also understands necessity in terms of *imminence,* as a measure of the temporal proximity of the attack. Although he does not use the word, Webster's statement in the context of preemptive force is taken to require that the anticipated armed attack be *imminent.* Scholars debate what counts as an imminent threat—and certainly Webster's strong language points to one extreme—yet this debate goes on within certain limits.[51] Commentators are in wide agreement that the requirement of *imminence,* at least prior to 9/11, rules out the use of force against an attack that is not underway or close to the point of execution.

Lawrence Freedman's definition is helpful: a preemptive attack against an imminent threat takes place "at some point between the moment when an enemy decides to attack—or, more precisely, is perceived to be about to attack—and when the attack is actually launched."[52] This requirement rules out the first use of force against threats that are merely emerging, outside the heat of a crisis. Traditionally, it meant a visual mobilization of armed forces preparing for an attack. This was likely the case in the 1967 Israeli-Arab War. The Bush Doctrine, which we will examine shortly, is an open

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International Law, 422. The recent *Oil Platforms* decision can be interpreted as supporting this position, as well. International Court of Justice, *Oil Platforms,* para. 76. For criticism of the case on this ground, *see* Taft, "Self-Defense and the Oil Platforms Decision," 304-305.

[51] Oscar Schachter represents the more limited version of this right. Drawing on the near-universal condemnation by states of Israel's bombing of the Osirak reactor in 1981, he concludes: "We may infer from these official statements recognition of the continued validity of an 'inherent' right to use armed force in self-defense prior to an actual attack but only where such an attack is imminent 'leaving no moment for deliberation.'" Schachter, "International Law," 1635. McDougal holds that the Webster standard is too stringent, disallowing self-defense where it may otherwise be necessary. "The understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists." McDougal, "The Soviet-Cuban Quarantine," 598. Elsewhere, he notes: "The standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case." Feliciano and McDougal, *Minimum World Public Order,* 217.

[52] Freedman, "Prevention, not Preemption," 106. Note that Freedman works with a distinction between the *preemptive* and the *preventive* uses of force that I have not adopted.

challenge to this long-standing requirement that the use of preemptive force always be in response to an imminent armed attack.

State practice has widely confirmed the requirement of an imminent threat. The International Military Tribunal at Nuremberg rejected Germany's self-defense argument as justification for the invasion of Denmark and Norway, concluding: "From all this it is clear that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date."[53] Sources cited earlier confirm that the international community's near universal condemnation of Israel's attack against Iraq's nuclear reactor at Osirak was in part on the ground that Israel did not face an imminent threat.

The relationship between *necessity* and *imminence* is not clearly understood. Scholars have wrongly suggested that *imminence* is a separate requirement from *necessity,* altogether.[54] Admittedly there is very little consensus on this issue—if only because few scholars have addressed it. Although we will examine this relationship more closely in Parts II and III, for now I will only state that this way of conceiving the relationship between these two requirements is conceptually confusing. Rather, we do best to conceive the requirement of *imminence* in the way described earlier, as one measure of necessity, a measure of the temporal proximity of the threat.

The relationship between necessity as a measure of the exhaustion of alternatives and necessity as a measure of the temporal proximity of the threat is rarely

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[53] International Military Tribunal (Nuremberg), Judgment and Sentences, (Oct. 1, 1946), 206.
[54] For example, Michael Schmitt concludes: "International law requires that any use of armed force in self-defense, preemptive or otherwise, comply with three basic criteria—necessity, proportionality, and imminency. These requirements derive historically from the *Caroline* case." Schmitt, "Preemptive Strategies," 529. *See also* Yoo, "Using Force," 776.

conceptualized, but the priority assigned to *imminence* today allows for an easy inference. In the contemporary doctrine and especially in the context of preemptive uses of force, these two aspects of necessity are held tightly together. In fact, the customary law of preemption requires the presence of an imminent threat, and such is taken as necessary to satisfy the requirement of last resort. In other words, the contemporary doctrine holds that a state has exhausted all reasonable alternatives against a coming threat of an armed attack only when that threat is imminent. Imminence and last resort are not simply two independent measures of necessity; rather, the former is a necessary and usually sufficient requirement of the latter. As we will see in Parts II and III, however, this understanding of imminence and its relationship to necessity understood as last resort is a notable departure from the moral tradition that gave rise to the contemporary doctrine. In deciding whether this account of preemption, widely recognized since the end of World War Two, can provide states with the security they require against the new threat of global terrorism, we will want to ask whether the moral tradition gives us good reasons for thinking differently.

2. *Proportionality.*

Like *necessity,* the norm of *proportionality* has different usages in international law. The primary distinction concerns proportionality as part of the *jus ad bellum* and proportionality as a judgment under the *jus in bello.*[55] Although the two norms have conceptual similarities, only the former is of concern to us. Again, the classic statement

[55] For an account of the former, both its historical development and normative content, *see* Gardam, *Necessity, Proportionality and the Use of Force by States.* Proportionality in the *jus in bello* and the *jus ad bellum* is sometimes distinguished as a proportionality of "means" and "ends," respectively. The former measures proportionality between a particular use of force and the cost in terms of human casualties and damage. Proportionality of ends, however, considers the decision to use force overall and weighs the proposed action in general against the legitimate ends in using force, as discussed more fully below.

is Webster's: "the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[56]

A judgment of proportionality concerns a judgment about the relationship between two entities. One entity in this case is not disputed: the amount and type of force used by the target state acting in self-defense. Disagreement arises, however, concerning the other entity against which the defensive use of force is measured. Some commentators have suggested that the use of force in self-defense must be proportional to the particular use of armed force that initiates the defensive response. Dinstein seems to adopt this view. He writes that proportionality requires an "evaluation of the magnitude of force used by the state invoking self-defense as compared to that of the original armed attack."[57] In its 2003 *Oil Platforms* decision, the International Court of Justice suggested something similar. Assessing the proportionality of the use of force by the United States against Iran, the Court seemed to measure these actions against the initial armed attack, the mining of the U.S.S. Samuel B. Roberts.[58]

Although we will examine the conceptual structure of this norm more closely in later chapters, this understanding of proportionality is problematic for the primary reason that it may threaten the underlying goal of self-defense. Requiring that a state use force similar in type and level to the initial armed attack may not adequately allow a state to defend itself, since the presence of an imminent or actual attack may only be a slim fraction of the amount of force the aggressor is able and willing to use. An alternative

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[56] Webster to Fox (April 24, 1841), 195.
[57] Dinstein, "Implementing Limitations," 57. *See also* Dinstein, *War, Aggression and Self-Defence,* 208.
[58] International Court of Justice, *Oil Platforms*, para. 77. "As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence."

and more acceptable definition of proportionality measures the responsive use of force by the targeted state against the aim that justifies that use of force in the first place: self-defense. Again, Ago offers perhaps the best definition: "The requirement of *proportionality* of the action taken in self-defence . . . concerns the relationship between that actions and its purpose, namely . . . that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring."[59] In the case of anticipatory self-defense, of course, the application of proportionality is especially difficult, insofar as the comparison is between the proposed use of force and the aim of self-defense against an armed attack that has not yet occurred. Nonetheless, proportionality in this context is a measure of the amount of force necessary to prevent the attack from occurring, and not a comparison with the perceived initial attack.

An example that perhaps illuminates this understanding of proportionality as a norm in the *jus ad bellum* is the 2003 invasion of Iraq with its goal of "regime change." The Bush administration offered multiple justifications for the war, giving different weight to each depending on the circumstances. One justification was the preemptive use of force, based on the claim that Saddam Hussein had or was eagerly seeking to acquire weapons of mass destruction, which he used in the past and would not hesitate to use in the future or supply to terrorists who would. In response to this threat, the American military successfully achieved the stated goal of "regime change." Of course, the lawfulness of this action under international law as it stood prior to 9/11 and insofar as it

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[59] Ago, *Addendum to the Eighth Report on State Responsibility,* 69. Ago goes on to say: "It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself." 69. Judge Schwebel adopts this view in his dissenting opinion in the *Nicaragua Case*, 367-368; and so does Judge Higgins in her dissenting opinion in *Nuclear Weapons*, 583-584.

is justified as an act of anticipatory self-defense poses a significant challenge to the norm of *necessity*, and its traditional requirement of *imminence*. Setting this issue aside, however, does this action satisfy the norm of proportionality? In particular, was the use of military force to achieve "regime change" a proportional response to the goal of thwarting a potential attack by Iraq or one of its agents? Anticipating this test, the Administration has repeatedly tried to make the case that it is: Saddam Hussein has continually defied the international measures taken to contain him, and nothing short of regime change will achieve the goal of preventing an attack. If the Administration could make this case successfully, it would likely satisfy the norm of proportionality, even though "regime change" might be disproportional to any perceived initial armed attack.

In summary, on the eve of 9/11 the majority of commentators and nearly all states recognized a limited right to use preemptive force under the United Nations Charter and customary law, governed by the norms of *due cause, necessity,* and *proportionality.* Although all three norms are important, as we will see it is the norm of necessity and its requirement of an imminent threat that raises the most pressing issues today. The Bush Doctrine, it is fair to say, is an explicit rejection of this imminence standard. In so many ways, the cloudless skies on the morning of September 11th marked a new day, and the decision of when to use force first was no exception. The norms that had governed the use of preemptive force since the Second World War were quickly put into question. In the next chapter I turn to this new security environment and the contested claim put forth by the White House for an expanded right to use preemptive force.

Chapter Two

The Preemptive Option after 9/11

What is now commonly referred to as the "Bush Doctrine" emerged as a response to the terrorist attacks of September 11. This Doctrine represents a monumental shift in American grand strategy—how the United States positions itself and relates to others in the world.[1] The Bush Doctrine has several closely related elements, of which one of the most visible and important is the claim to an expanded right to use preemptive force. In this final section I describe and critically appraise this claim as it has developed since 9/11.

I. Challenge and Response

This broad claim to the use of preemptive force is prefaced on the new threat of global terrorism. Of course, terrorism is not something new and the developments that made a 9/11 possible did not materialize over night. The United Stated confronted terrorism in the early nineteenth century in the form of the Barbary pirates, and the government did not first discover the threat posed by al Qaeda in September 2001. Less than two years before the attack, the U.S. Commission on National Security/21st Century concluded that over the next quarter century "terrorists will acquire weapons of mass destruction and mass disruption, and some will use them. Americans will likely die on

[1] Several important essays and books have described the Bush Doctrine and traced its departure from American foreign policy in the past. *See* Daalder and Lindsay, *America Unbound;* Gaddis, *Surprise;* Ikenberry, "America's Imperial Ambition," 44-60; Mead, *Power, Terror, Peace, and War;* Talbott, "War in Iraq," 1037-1045.

American soil, possibly in large number."[2] Nonetheless, the threat realized on September 11 was a new kind of threat—the threat of global terrorism and its presence on U.S. soil—and few were left doubting its existence after the ashes settled in lower Manhattan. At least four characteristics mark this new security environment.

The first characteristic is the *non-amenability of potential aggressors to traditional strategies of deterrence and containment.* These terrorists have no territory to preserve, no citizens to protect, and are often quite willing to sacrifice their lives to achieve certain ends. At the same time, "rogue state" leaders are willing to disregard callously the consequences of their actions upon their population, and to some extent, themselves. Even when they are not, the fear is that such state leaders are willing secretly to provide sanctuary for terrorists and supply them with weapons of mass destruction (WMD), training, and other resources, even while responding to strategies of deterrence as regards actions for which the state is traceably responsible.

A second characteristic concerns the magnitude *of harm.* Whether by using WMD or other more conventional means such as highjacking civilian aircraft, today's terrorists are capable of wreaking wide scale destruction. In a draft document called the "National Planning Scenarios," inadvertently released in early 2005, the Department of Homeland Security identified several possible terrorist strikes that it viewed as most plausible or devastating.[3] Included on the list is the blowing up of a chlorine tank, killing 17,500 people and injuring more than 100,000; an anthrax attack exposing 350,000 people and killing 13,200; and the release of a dirty bomb, killing 180, injuring 270, and contaminating 20,000 persons.

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[2] The U.S. Commission on National Security/21st Century, *New World Coming.*
[3] *See* "U.S. Lists Possible Terror Attacks and Likely Toll," *New York Times* (March 16, 2005).

A third mark of the new threat is the *capacity to evade detection.* Terrorists can easily conceal WMD and use them with little or no warning, effected by only a single or small group of individuals. Even lacking traditional WMD, terrorists have shown they can cause enormous destruction. Terrorists often move undetected between states who either provide them with sanctuary, or who are unaware of their presence. Finally, the contemporary threat of global terrorism is marked by the *desire to effect maximum devastation.* Traditional state adversaries have as their minimal goal the preservation of their respective states. Unlike the great power rivalries of the Cold War, where nuclear weapons and other WMD were weapons of last resort, terrorists are eager and willing to use the most destructive weapon they can acquire and effectively deploy.

Recognizing this new security environment, the Bush Administration publicly declared that the United States will employ multiple means—including the use of preemptive force—to prevent terrorists and rogue states from attacking first.[4] President Bush hinted at this shift in his State of the Union Address in late January, 2002,[5] but not until June 2002 did the President clearly signal that the United States would claim a broader right to use preemptive force. In a commencement address at West Point, the

[4] The primary statements by the Administration include: G.W. Bush, State of the Union Address (January 29, 2002); G.W. Bush, Commencement Address at the United States Military Academy in West Point (June 7, 2002); Cheney, Address at the VFW 103rd National Convention (August 26, 2002); *National Security Strategy of the United States of America* (September 2002); G.W. Bush, Remarks at the United Nations General Assembly (September 12, 2002); Rumsfeld, *Prepared Testimony by U.S. Secretary of Defense Donald H. Rumsfeld* (September 19, 2002); Rice, Remarks on the President's National Security Strategy (October 1, 2002); G.W. Bush, Remarks by the President on Iraq (October 7, 2002); Taft, "Old Rules, New Threats"; Wolfowitz, Remarks before the International Institute for Strategic Studies (December 2, 2002); *National Strategy to Combat Weapons of Mass Destruction* (December 2002); *National Strategy for Combating Terrorism* (February 2003); Taft, "Preemption, Iraq, and International Law," 557-563; Taft, "Preemptive Action in Self-Defense," 331-333.

In his recent book, *Surprise, Security, and the American Experience,* John Gaddis claims that the Bush Doctrine in important ways signals a return to the strategies of preemption and unilateralism that marked American grand strategy from John Quincy Adams to the beginning of the Second World War.

[5] "We'll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons." G.W. Bush, State of the Union Address (January 29, 2002).

President described at length the changing threats which face the United States and which September 11 brought to the nation's attention. America, he said, must "be ready for preemptive action when necessary to defend our liberty and to defend our lives."[6]

Insofar as the imminence requirement is a measure of necessity, as described earlier, the main challenge posed by the Bush Doctrine to existing norms prior to 9/11 concerns the norm of necessity.[7] The primary statement of this doctrine and the claim to an expanded right of preemption is found in the September 2002 *National Security Strategy*. The *Strategy* explicitly proposes to uphold but adapt the longstanding, customary right to anticipatory self-defense. "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."[8] The focus is upon the traditional requirement of *imminence*. It continues: "Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack."[9] The *Strategy* concludes, however, that this understanding of *imminence* does not provide the United States opportunity to address some of the most perilous threats it faces. Therefore, it asserts: "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[10] The document does not claim to

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[6] G.W. Bush, Commencement Address at West Point (June 7, 2002).
[7] Although not the focus of this work, the new security environment also poses a challenge to the norms of *due cause* and *proportionality*. Issues of state responsibility, raised in the context of terrorism, concern the norm of *due cause*, and more specifically the aspect of its occasioning event. When does a state become responsible for the acts of terror committed by agents located within or identified with the state? As we will see, Aquinas's account of "just cause" focuses on a notion of *fault*. Furthermore, the possibility of "regime change" as a legitimate end of preemptive force (or the use of force more generally) is an issue of *proportionality*.
[8] *National Security Strategy* (September 2002), 15.
[9] Ibid.
[10] Ibid.

dismiss the importance of *imminence* as a requirement, but rather proposes an adaptation of the concept to today's threats.[11]

Concerning the scope of this right, the document is much less clear.

> 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. . . . The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. . . . We will always proceed deliberately, weighing the consequences of our actions. . . . The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.[12]

Subsequent policy statements by the Administration have gone some distance in clarifying the new strategy, yet by and large it remains ill-defined. Speaking before the Manhattan Institute, then National Security Adviser Condoleezza Rice explained: "The *National Security Strategy* does not overturn five decades of doctrine and jettison either containment or deterrence. These strategic concepts can and will continue to be employed where appropriate. . . . The number of cases in which [preemption] might be justified will always be small. It does not give a green light . . . to act first without exhausting other means, including diplomacy."[13] As a matter of law, it is clear that the Administration envisions a much broader right of preemption than any states or scholars admitted prior to 9/11. The possible targets of the United States military include "emerging threats," not just enemies executing an actual attack.[14] Despite the unsettled

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[11] In a Memorandum to the ASIL-CFR Roundtable (November 18, 2002), William H. Taft, Legal Adviser to the State Department, defended and explained this adaptation of the concept of *imminence*. Deputy Secretary of Defense, Paul Wolfowitz, however, stated that the concept no longer had a role in the new security situation. "We must be prepared to act. We cannot wait to act until the threat is imminent. The notion that we can wait to prepare assumes that we will know when the threat is imminent." Remarks before the International Institute for Strategic Studies (December 2, 2002).

[12] *National Security Strategy* (September 2002), 15-16.

[13] Rice, Remarks on the President's National Security Strategy (October 1, 2002).

[14] *National Security Strategy* (September 2002), 15.

nature of the customary right to anticipatory self-defense, the Bush Doctrine enters new territory.

II. Assessing the Bush Doctrine on Preemption

Response to the general claim that the law of anticipatory self-defense must adapt to the new threat of global terrorism is divided. Preservationists view change as a dangerous roll back that will lead to more violence and less order, while Revisionists conclude that the new threat requires an expanded right of preemptive force.[15] On account of the changed security environment described earlier, I accept the general conclusion of the revisionists: on September 11th America woke up to a world threatened by terrorism, and addressing this threat requires a careful expansion of the right of states to use preemptive force. On this fundamental issue the Bush Doctrine is correct.

More specifically, the pre-9/11 standard governing the use of preemptive force fails because of its central requirement of an *imminent* threat. Recall that in the contemporary doctrine, the norm of necessity is measured in two ways: by the exhaustion of reasonable alternatives and by the presence of an *imminent* threat, as an assessment of temporal proximity. These two measures are not independent, however. Rather, under the contemporary doctrine the presence of an *imminent* threat is taken to be the necessary and sufficient condition for establishing that the use of force is a last resort,

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[15] "Revisionists" is not an entirely satisfactory label, since it sometimes connotes leaving behind the old and crafting something entirely new, a shade of meaning I do not intend. For examples of those who defend the preservationist position, *see*: Bothe, "Terrorism and the Legality of Pre-emptive Force," 227-240; Brownlie, *Principles,* 701-702; Falk, "What Future for the UN Charter System of War Prevention?" 590-598; O'Connell, "The Myth of Preemptive Self-Defense"; Sapiro, "War to Prevent War," 42. On the revisionist side, *see*: Freedman, "Prevention, Not Preemption," 105-114; Glennon, "Preempting Terrorism: The Case for Anticipatory Self-Defense," 24; Schmitt, "Preemptive Strategies in International Law," 513-548; Sofaer, "On the Necessity of Pre-Emption," 209-226; Wedgwood, "The Fall of Saddam Hussein," 576-585; Yoo, "International Law and the War in Iraq," 563-576; Yoo, "Using Force," 729-796.

and hence *necessary.* The problem with this standard so described is that it is now possible to imagine a situation where a state has exhausted all reasonable alternatives outside the use of force to secure the legitimate end of self-defense, but the threat is not *imminent,* as traditionally conceived. Imminence, we now worry, might fail as an adequate proxy for necessity. If self-defense is in fact a legitimate end, then we may have good reasons for revising the contemporary doctrine.

Effecting this shift in the governing norms is not as simple as merely declaring a broader right, even where the state so declaring is as powerful as the United States. Nor is it a matter of garnering enough signatures for a treaty. A careful expansion of the right of preemption will come about through the processes that shape customary law. As is often the case, these changes occur after momentous events that challenge the legal status quo. States may decide that some part of this assembly of expectations no longer serves the end it was meant to secure. Powerful states often initiate the process, as the United States did with release of the *National Security Strategy.* Other powerful states or coalitions of smaller states may object to the change. A dynamic of back and forth exchange, shaped by public statements, formal discussion, actual practice, and various other means will often push toward a more settled expectation.[16] As the leading proponent of this shift in international law, the United States carries an enormous responsibility.

While the Bush Administration rightly concluded that the new threat of global terrorism requires an expansion of the right to use preemptive force, the proposed doctrine fails in three critical ways: it is not clearly defined; it was too closely connected

[16] For a helpful examination of this process, see Reisman, "Assessing Claims to Revise the Laws of War," 82-90.

to the second Iraq war; and it fails to make the case for moral legitimacy. First, the doctrine is ill-defined and underdeveloped, leaving confusion at important points where clarity is crucial. Absent from the public pronouncements regarding the doctrine is a developed account of when the right should ripen, and when it should not. What factors determine that a state is justified in using force against some less-than-imminent threat? The fear is that some states might employ this ambiguity to bolster otherwise unlawful actions. As many commentators point out, expanding the right of preemption must consider the effects of such a right on points of interstate tension, such as exists between India and Pakistan who both have nuclear weapons. Both an ambiguous doctrine and a doctrine that is too broad might encourage conflict and fail to contribute to interstate security. At present, it appears that the White House has hastily adopted a new policy and let the chips of international law fall where they may.

A clearly defined policy, however, is crucial for facilitating shared expectations regarding the use of force. This, after all, is a primary purpose of law. Law in general, and especially the law governing the use of force, performs the crucial function of providing shared expectations, either by creating them or registering those that already exist. The practical benefits of these shared expectations are two. First, they enhance security. Where the law is relatively settled, widely accepted, and generally upheld, states typically enjoy a greater sense of security. Certainly any law is open to different interpretations (and manipulation, as well), but this debate falls within a limited spectrum of reasonable alternatives. Where the law is settled, states can usually anticipate how other states will react to certain actions. Related is a second practical benefit: shared expectations can create a deterrent effect. Deterrence strategy has changed since 9/11,

but it has not vanished as an important security strategy.[17] A settled expectation about when states can use preemptive force will have some effect in deterring rogue states from sheltering and aiding terrorists. The 2002 *National Security Strategy,* as it pertains to preemption, however, does not advance these important ends.

A second failure, and one difficult to mend at this point in time, is the close connection between the new policy on preemptive uses of force and the Second Iraq War. The Administration released the 2002 *National Security Strategy* in the midst of building its case for the use of force against Iraq.[18] The context of the document is Iraq and it makes direct reference to Iraq's alleged nuclear weapons.[19] The temptation, then, is to assess this newly-declared right by the outcome in Iraq. The justifications for the war in Iraq were several, but insofar as Iraq is the natural case-in-point for the new preemption doctrine, the war has certainly not become the poster child for expanding the right. Supporters of the war have been hesitant to justify it on the grounds of preemption, choosing rather to make the legal case on the continuing validity of past Security Council resolutions.[20]

A third and final criticism is that both policymakers and revisionist commentators have failed to make the necessary moral arguments for expanding the already uneasy right of preemption. Namely, both have failed to make the case that this shift in the law

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[17] *See* Freedman, *Deterrence.*

[18] Less than a week before the White House released the document, President Bush warned Members of the United Nations to act decisively or risk becoming irrelevant. Remarks at the United Nations General Assembly (Sep. 12, 2002).

[19] Section V of the *Strategy,* "Prevent Our Enemies from Threatening Us," discusses the new doctrine and notes: "At the time of the Gulf War, we acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents." *National Security Strategy* (September 2002), 14.

[20] For example, *see* Wedgwood, "The Fall of Saddam Hussein." Although the United States government has not issued an official legal justification for the recent war on Iraq, the Legal Adviser of the State Department has published on this issue. Taft, "Preemption, Iraq, and International Law." Taft also justifies the war on the grounds of past Council resolutions and suggests that the conflict was a "preemptive" use of force under Chapter VII of the Charter.

upholds past moral commitments shaping the *jus ad bellum.* In part this points to a failure even to recognize that these moral commitments underpin the contemporary norms governing the use of preemptive force; in part it also points to a failure to take seriously the importance of moral legitimacy. Instead, almost all of the public arguments in support of a revised right of preemption appeal only to values of expediency—that is, changes necessary to achieve certain security goals—outside a larger moral framework.[21] Although these arguments certainly have a place, sole reliance on them dangerously overlooks the importance of moral legitimacy for changes to and actions under the law of force.

We will turn to the important subject of moral legitimacy in Chapter 7, but for now it is sufficient to return to a point already raised in the Introduction. The longstanding moral tradition on the just war has enormously shaped the current norms governing the use of preemptive force. More than just a footnote to history, moreover, the moral commitments passed on through this tradition are widely held today. Achieving broad acceptance for changes to the law governing the use of preemptive force will demand making the case that these changes are in accord with the moral principles conveyed by the just war tradition.

The same also applies to particular decisions to use preemptive force under the new policy. A widespread perception that the United States is acting morally in its

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[21] A good example is Yoo, "Using Force." From 2001-03, Yoo served as a deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice. Yoo argues for a broad revision in the laws governing the use of force, based not on a model of self-defense, but on a public goods model that centers on the good of international stability. Among other alternatives, Yoo contrasts his approach with the "Moral Approach." He claims to offer an alternative that "seeks to shift the focus of the debate over the use of force toward instrumental considerations." P. 730. While espousing a narrow definition of the concept of "moral"—certainly moral arguments can be made in support of his position—Yoo represents the tendency among commentators to argue from expediency and neglect moral arguments. Two notable exceptions are Cook, "Ethical and Legal Dimensions," 797-815; and Buchanan and Keohane, "The Preventive Use of Force," 1-22.

decisions to use force has great practical value. Joseph Nye has written extensively about "soft power" as a crucial but often underappreciated tool in American foreign policy.[22] Effectively fighting the war on terror demands more than just military might. At the same time, acting according to widely held moral norms on the use of force is not only of pragmatic value, but a matter of faithfulness to America's core principles. The use of armed force is the ultimate form of coercion. If the United States is the great champion of liberty that President Bush described in his 2004 Inaugural Address, the decision to coerce by armed force must always fall within clear moral limits.

In the remainder of this work I will argue in support of a revised right of preemptive force that corrects for these failures, particularly in regards to clarifying the scope of the right and making the moral case that such a shift is in continuity with key moral norms that have shaped the standard in the past. To achieve these goals, I trace the evolution of a moral tradition on the use of preemptive force in Part II and show how this tradition gave birth to the norms of *due cause, necessity,* and *proportionality.* This account will also show how these norms function as part of a larger moral argument and reveal something about their conceptual structure. Drawing on this brief moral history, in Part III I attempt to retrieve this moral tradition for today and make the case for a revised right of preemptive force—a right governed by a concrete, well-defined standard for when states can act preemptively and a right consistent with underlying moral commitments that have shaped the law of force in the past.

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[22] Nye, *Soft Power.* Nye defines "soft power" as "the ability to get what you want through attraction rather than coercion or payments. It arises from the attractiveness of a country's culture, political ideals, and policies. When our policies are seen as legitimate in the eyes of others, our soft power is enhanced." P. x.

PART II

PREEMPTION AND MORAL TRADITION

Chapter 3

The Beginnings of a Moral Tradition: Augustine and Aquinas

Nearly all accounts of the right of anticipatory self-defense begin with the celebrated *Caroline* affair, recounted in Chapter 1. As appropriated today under the Charter system, the *Caroline* episode stands for three norms governing the decision by states to use preemptive force: *due cause, necessity* (as measured by imminence), and *proportionality*.[1] While the *Caroline* affair is the *locus classicus* of these norms in international law, the standard account of these norms fails to locate them within a much older moral tradition, what is often referred to as the *just war tradition*.

Even where this moral tradition is mentioned, the narrative told is almost always the same.[2] The Romans had a notion of the *justum bellum,* but they were concerned only with the meeting of certain formal requirements, such as an announcement of the injury to the enemy and a subsequent declaration of war. The idea of the *justum bellum* was taken up by Augustine and given substantive content, limiting the use of force to only those occasions with just cause. Transmitted through Aquinas, this tradition was later appropriated and secularized by early modern theorists of international law. With the emergence of sovereign states, however, the concept of just cause proved hopelessly subjective. The moral tradition, at best, spoke to the conscience of the sovereign but had little or no influence on the development of the positive law of force. The death of the moral tradition was confirmed with the virtually unlimited right of states to make war in

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[1] Following the language of the United Nations Charter, I employ the broader term *use of force,* rather than *war*. Although the latter term had a much broader meaning in the classic just war tradition, today scholars use the term *war* to refer to a specific legal condition arising between two or more states that does not encompass all uses of force.

[2] *See, e.g,* Bowett, *Self-Defence,* 4-8; Dinstein, *War, Aggression and Self-Defence,* 60-77; Feliciano and McDougal, *Minimum World Public Order*, 131-135.

the eighteenth and nineteenth centuries. Attempts to restrict the recourse to force after the world wars, culminating in the United Nations Charter, had no debt to the earlier moral tradition.[3] At least among scholars of international law, the story of the moral tradition on the just war and its relationship to the emergence of international law is one of gradual demise, a historical footnote with scant relevance today.

The reasons for this neglect are several. The tradition has always had at least a historical debt to the natural law tradition. With the rise of positivism, many scholars rejected just war theory as inescapably tied to natural law thinking and its concept of law. Positivism also lead scholars to focus on state practice in their attempts to give an account of law, causing them sometimes to miss the ways in which moral norms influence and were often embedded in the law of force. In addition, many scholars celebrate international law as a rational escape from religious dogma, concluding that the cultivation of the moral tradition within Christianity renders it irretrievable. This too easy dismissal obscures the more subtle ways in which the tradition influenced the development of the law of force.

My aims in Part II are two. First, against this standard account I intend to show that the contemporary norms governing the use of preemptive force were deeply shaped by the longstanding moral tradition on the just war. A simple partition between law and morality is not possible—neither as a matter of history nor as a matter of contemporary understanding. These norms did not appear full-formed in Augustine, but gradually developed over time within the tradition along Augustinian lines. And, as we will see,

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[3] With some voices suggesting at that time that the Charter marked a return to the just war idea, many scholars openly resisted the idea that this change had any connection to the moral tradition on the just war. *See, e.g.,* Nussbaum, "Just War—A Legal Concept?" 453-479; Kunz, "Bellum Justum and Bellum Legale," 528-534. Today, international law treaties simply leave out any mention of the development of these norms within the moral tradition. *See, e.g.,* Brownlie, *Principles,* 697.

this tradition developed alongside a rival, permissive account of preemption that increasingly won the day into the nineteenth century. Second, I intend to begin showing something about the conceptual structure of these norms, particularly the norm of *necessity* and the related requirement of *imminence,* which appear at the center of the preemption debate. In Part III I draw these strands together to show how the tradition might inform the contemporary discussion. My focus in this chapter is on early developments in the tradition, namely in the writings of Augustine and Aquinas. The classic tradition was taken up and shaped by multiple sources, but Augustine and Aquinas are by all measures the most important. Together they developed both a limited justification for war as a set of background claims upon which the idea of a just war makes sense, and a structure for moral decisionmaking about when to use force.

I limit the focus of this chapter in several ways. At no point do Augustine or Aquinas directly take up the issue of preemption, but their influence on these norms is clearly present. My interest in the moral tradition is as it gave rise to these norms, and I set aside any aspirations for a comprehensive or detailed account of the tradition as a whole.[4] I focus on that part of the tradition that concerns the decision to use force (what is often called the *jus ad bellum*). Certain parts of the tradition will be more important than others. For example, I give little attention to the tradition's requirement of *legitimate authority.* Lastly, I do not attempt here to offer a full account of how these norms developed. They show up both before Augustine and after in the centuries leading up to Aquinas. I examine Augustine and Aquinas as representative moments who illuminate the evolution of these norms in the moral tradition on the just war.

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[4] For a survey of the just war tradition up to Aquinas, *see* Bainton, *Christian Attitudes Toward War;* Cahill, *Love Your Enemies;* Johnson, *Ideology, Reason, and the Limitation of War;* Russell, *The Just War.*

I. Augustine and the Beginnings of a Moral Tradition

By all measures, Augustine is the most important figure at the beginning of the moral tradition on the just war.[5] Although he does not directly address all of the norms we are investigating, in one way or another each bears an Augustinian stamp. His most important contribution to the moral tradition is his justification for war, a set of background claims upon which the idea of a just war makes sense. At no point does he list these claims. Rather, they appear throughout his works and provide context to his writings on the use of force. These claims concern the human capacity for injustice, the good of political community, and the universality of justice. Drawing on these claims, Augustine suggests a structure for moral decisionmaking in the use of force centered on three criteria: *legitimate authority, just cause,* and *right intention.* After a few biographical comments, I will consider these background claims in some depth as well as the criteria Augustine develops for making decisions about when to use force.

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[5] The idea of a *justum bellum* appeared in classical sources well before Augustine. One of the earliest references concerns the formalistic Roman practice known as the *fetial* procedure, whereby the Romans would declare a "just" war. This practice was supposedly performed by a group of priests known as the *fetials* during the regal period (753 to 509 B.C.). References to this practice, however, are all much later, causing some scholars to doubt their authenticity. *See* Watson, *International Law in Archaic Rome;* Rich, *Declaring War in the Roman Republic;* Wiedemann, "The Fetiales: A Reconsideration," 478-490. Aristotle was one of the earliest writers to talk about a just war. *See, e.g., Politics,* 1255a, 3-1255b. Among other writers, one of the most important to make mention of the just war during the Republican period of Rome was Cicero. *See, De Officiis,* I.34-36, I.38. The primary Roman contribution was to invest the just cause with a legal structure. As Russell concludes: "The legal foundation of the Roman just war was the analysis of contractual obligation . . . . Breach of contract in private law justified a civil suit by the injured party to recover his *damna* and *iniuriae,* his damages and injuries. Similarly, in relations between states the injured city-state enjoyed rights to seek compensation and redress, acting both as judge and party in its own case. Hence every just war had to be occasioned by the prior guilt of the offending party." Russell, *The Just War,* 4-5. Within Christianity, the idea of the just war developed in the writings of Eusebius, Chrysostom, and Jerome. Ambrose, Augustine's senior contemporary, was especially influential on Augustine's thought. Ambrose's *On the Duties of the Clergy* borrowed from Cicero's *De Officiis,* including the latter's idea of the just war.

Augustine's life spanned the end of the fourth and the beginning of the fifth century.[6] The waning of the Roman Empire in the West was part of a larger shift from antiquity to the Middle Ages, and Augustine stood at its crux. His inner journey to Christianity, recounted in his *Confessions*, and his eventual appointment as a bishop in the north African town of Hippo are well known. With the toleration of Christianity and its eventual elevation to the official religion of the Empire in the first half of the fourth century A.D., Augustine faced the colossal task of re-positioning Christianity in this new context. Although recent scholars have challenged the generalization of Christianity as a purely pacifist religion in its first few centuries,[7] the move from persecuted sect to ascendant imperial religion nonetheless challenged many traditional Christian norms, especially regarding the use of force. Augustine's writings provide a limited case for war, departing from early pacifism, but also giving the Christian tradition a fundamentally different account of the use of force than the essentially *raison d' etat* notions of the Greeks and Romans.

Augustine's extended discussions of war as a moral issue are scattered and relatively few.[8] Nonetheless, references to war appear throughout his writings. In response to a request from Marcellinus, a high official at the court of Emperor Honorius, Augustine wrote the *City of God* in part as a defense against the claim that Christianity was responsible for the sack of Rome in 410 A.D. by Alaric and the Visigoths. This work makes frequent reference to civil wars, which so often marked life in the later

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[6] For general biographical accounts, *see* Brown, *Augustine of Hippo;* Wills, *Saint Augustine*. For works on Augustine's historical context, *see* Cameron, *The Late Roman Empire;* Elton, *Warfare in Roman Europe;* Brown, *Religion and Society in the Age of St. Augustine.*

[7] *See* Hunter, "Early Christians and Military Service," 87-94.

[8] Augustine's primary writings on war include: *On Free Will* (Book I); *Reply to Faustus, the Manichaean,* XXII; *Sermon 302; Letter 138, to Marcellinus*; *City of God* passim; *Letter 189, to Boniface*; *Questions on the Heptateuch,* VI.10; and *Letter 229, to Darius.*

principiate, and takes up moral questions about war and empire. Augustine drew his last breath with war at his doorstep, his city of Hippo besieged by the Vandals who swept across north Africa from the west.

A. *Background Claims to the Idea of a Just War*

1. *The Human Capacity for Injustice*

Standing behind Augustine's understanding of the just war is a distinct anthropology. Although Augustine offers this account in expressly theological terms, evoking doctrines of creation, sin, and redemption, the themes he describes appear in some form throughout the history of western thought, in both theological and secular versions.[9] Augustine's anthropology develops out of the biblical narratives of creation and fall. Due in part to his search for an answer to the problem of evil, Augustine continually returns to a description of the self in the created state, prior to the perversion of the will in its decision to find the good in something less than God, its highest good.[10] In this state, as Augustine describes it, the self was rightly ordered: in its own self, in relation to God, and in relation to others.[11] Justice marked this created state, since Augustine understands justice as a proper ordering in which each thing is given its due.[12] The decision to find one's ultimate good in something other than God, a break in the right ordering between the self and God, resulted in a pervasive disordering (and hence,

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[9] The most often mentioned figures in this tradition of Augustinian realism include Martin Luther, Thomas Hobbes, and Reinhold Niebuhr. Of course, among these heirs to Augustine's political thought, salient differences exist, as well. For example, Hobbes held that the state of nature is a state of war, whereas Augustine espoused a fundamental ontology of peace, rooted in his doctrine of creation.

[10] *See, e.g.*, Augustine, *City of God*, XII, XIV.1-15.

[11] This is the same condition Augustine describes in the eternal state. "But because, in our measure, we are made partakers of His peace, we know the perfection of peace *in ourselves, among ourselves, and with God.*" *City of God*, XXII.29 (emphasis added).

[12] *See Augustine, Of the Morals,* 15; *City of God,* IX.4, XIX.27.

injustice) within the self. One result of this disordering is a propensity in persons, either individually or collectively, to assert themselves over others. Augustine refers to this propensity as a "lust for domination."[13]

Although Augustine employs a wide range of images to describe this fundamental disordering, one he often invokes is the image of war. The self's break with God as its ultimate good produces a relentless conflict within the self. As Augustine concludes, "[man] was divided against himself."[14] "For the soul, now taking delight in its own freedom to do wickedness, and disdaining to serve God, was itself deprived of the erstwhile subjection of the body to it. Because it had of its own free will forsaken its superior Lord, it no longer held its own inferior servant in obedience to its will. Nor could it in any way keep the flesh in subjection, as it would always have been able to do if it had itself remained subject to God."[15] This conflict in the self is everlasting for the damned, who live in a perpetual state of war.[16]

This disordering within the self also spills out into conflicts between persons. Augustine observes with a tone of tragic irony that humans, created from one person as a symbol of their inherent sociality, now exist in a state of pervasive conflict. "Even the beasts, devoid of rational will . . . would live in greater security and peace with their own kind than men would, whose race had been produced from one individual for the very

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[13] Augustine, *City of God,* I (preface). At the same time, this trait stands in tension with the possibility for persons to act morally. For Augustine, this second possibility follows from his doctrine of creation and his tenacious belief that all being is fundamentally good. *See, e.g., City of God,* XIV.11-14. Augustinians keep these two traits together in different ways, sometimes emphasizing one more than the other, but never sacrificing one for the other. Augustine, for example, had a fairly bleak view of human potential for moral progress. "Our righteousness, all though true righteousness insofar as it is directed towards a good end, is in this life such that it consists only in the remission of sin rather than in the perfection of virtue." *City of God,* XIX.27.

[14] Augustine, *City of God,* XIV.15.

[15] Ibid., XIII.13.

[16] "What war, then, can be imagined more grievous and bitter than one in which the will is so much at odds with the passions, and the passions with the will, that their hostility cannot be ended by the victory of either?" Ibid., XIX.28.

purpose of commending concord. For not even lions or dragons have ever waged such wars among themselves as men have."[17] Even where a modicum of peace is achieved, the threat of conflict is always present. "For so great is the mutability of human affairs that no people is ever granted a security so great that it need never fear incursions hostile to this life."[18] War is the ultimate expression of the disordered self.

2. *The Good of Political Community*

It is under these conditions of fallenness that Augustine makes a limited case for war. Central to this argument is his account of the good of political community. I summarize this account in three parts. First, the most basic human good is a certain minimal order, or what Augustine calls an "earthly peace." For Augustine, peace is a right (or *just*) ordering. "The peace of all things lies in the tranquility of order; and order is the disposition of equal and unequal things in such a way as to give to each its proper place."[19] As with his discussion of justice and the other virtues more generally, Augustine speaks of a "true" or "perfect" peace, as well as an "earthly peace," which is the image or trace of the former. Perfect peace consists of a perfect ordering within the self, and with God and others.[20] Since a perfect ordering is a state in which everything is given its due, this peace is always just. Augustine leaves no doubt, however, that this peace will only finally be realized in the age to come, when the disordered self is re-ordered and sin is no longer a possibility.[21]

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[17] Ibid., XII.23.
[18] Ibid., XVII.13.
[19] Ibid., XIX.13.
[20] This peace is "a perfectly ordered and perfectly harmonious fellowship in the enjoyment of God, and of one another in God." Ibid., XIX.13; *see also* XXII.29.
[21] "But the peace which we have here, whether shared with other men or peculiar to ourselves, is only a solace for our wretchedness rather than the joy of blessedness." Ibid., XIX.27.

"Earthly peace" is a measure of order possible in this life. This earthly peace includes a relative absence of conflict and the attainment of certain basic goods. "God . . . has given to men certain good things appropriate to this life. These are: temporal peace in proportion to the short span of a mortal life, consisting in bodily health and soundness, and the society of one's own kind; and all things necessary for the preservation and recovery of this peace. These latter include those things which are appropriate and accessible to our senses, such as light, speech, breathable air, drinkable water, and whatever the body requires to feed, clothe, shelter, heal or adorn it."[22] In *On Free Will*, Augustine provides another catalog of some of these goods made possible by a minimal level of order: bodily goods such as food and shelter; liberty as freedom from a master; special relations with friends and family; and the possibility of personal property.[23] This order is secured not through a transformation of the self, but through the threat or use of coercive force. The temporal law "employs fear as an instrument of coercion, and bends to its own ends the minds of the unhappy people to rule whom it is adapted. So long as they fear to lose these earthly goods they observe in using them a certain moderation suited to maintain in being a city such as can be composed of such men."[24] Although justice and peace will only fully embrace in the next age, Augustine recognizes that some peace in this life is more just than others. War for the sake of mastery, for example, achieves a kind of peace, but an "unjust peace" that "hates a fellowship of equality under God."[25]

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[22] Ibid., XIX.13.
[23] Augustine, *On Free Will,* I.XV.
[24] Ibid.
[25] Augustine, *City of God,* XIX.12.

Second, the principal means of securing this order is the political community. Augustine holds a strong belief that humans are by nature social beings, who need each other to survive and flourish. This remains true for Augustine despite the widespread disorder in the world.[26] The political community, however, arose as an antidote for disorder, a remedial institution for securing earthly peace. Augustine never discusses in direct detail the origin of the political community, but his conclusion is clear. "[God] did not intend that His rational creature, made in His own image, should have lordship over any but irrational creatures: not man over man, but man over the beasts. Hence, the first just men were as shepherd of flocks, rather than as kings of men. This was done so that in this way also God might indicate what the order of nature requires, and what the desert of sinners demands."[27] While the political community is not part of the created order, it is part of God's providential order after the Fall. In a world where conflict rages in the self and often spills over into conflict between persons, the political community and its laws are necessary to preserve a modicum of order, so that the attainment of basic human goods is possible.[28]

Finally, war is justified when some harm sufficiently disturbs or threatens this minimal order. Since the political community is the primary remedial institution for preserving this minimal order, it is justified in defending itself when attacked. In some

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[26] "God chose to create the human race from one single man. His purpose in doing this was not only that the human race should be united in fellowship by a natural likeness, but also that men should be bound together by kinship in the unity of concord, linked by the bond of peace." Ibid., XIV.1. "There is nothing so social by nature as this race, no matter how discordant it has become through its fault." Ibid., XII.28. *See also* XII.22, 23.

[27] Ibid., XIX.15. "If men were always peaceful and just, human affairs would be happier and all kingdoms would be small, rejoicing in concord with their neighbours. There would be as many kingdoms among the nations of the world as there are now houses of the citizens of a city." Ibid., IV.15. For Augustine, the hierarchy in the family is natural, but the same in the political community is not. For further commentary on Augustine's view of the state, *see* Markus, "*De civitate Dei,* XIX, 14-15 and the origins of political authority," in *Saeculum,* 197-210; Deane, *The Political and Social Ideas of St. Augustine,* especially Chapter 4.

[28] See Augustine's discussion of "temporal law" in *On Free Will,* I.XV.

cases, it is also justified in punishing evil through the use of force, where such punishment might be necessary to preserve this earthly peace. Nonetheless, a just war is always a tragic necessity for Augustine, a sign of the disorder that followed from the free choice of the will against God.

Notice that this justification for war does not begin with an individual right of self-defense. Recent literature has criticized the just war tradition as resting on an untenable analogy to individual self-defense, what is often called the "domestic analogy."[29] This argument is an important challenge, as a criticism of the analogy, but for both Augustine and Aquinas the argument for using force does not build up from an individual right of self-defense, but builds down from the role that political community plays as the primary means for preserving peace. Augustine provides grounds for the use of force by a political community independent of the grounds for individual self-defense. This is not to say that principles developed for the use of force in the context of individual self-defense might not apply more broadly to the use of force on behalf of the political community. Often Augustine moves between individual and communal self-defense.[30] However, the just war tradition as developed early on does not ultimately rest on the domestic analogy. As a final observation, I briefly note that absent from Augustine's modest account is an argument that the political community is necessary for individual moral perfection. Its primary goal is to secure a minimal "earthly peace."

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[29] *See* Rodin, *War and Self-Defense.* While Rodin specifically critiques the just war tradition, other scholars have made the same argument against the contemporary international law of force. *See* John Yoo, "Using Force," 729-796. Whether or not just war theory depends on the domestic analogy is disputed. Michael Walzer, for example, rests great importance on the analogy in his seminal work. Walzer, *Just and Unjust Wars,* 58-61.

[30] *See, e.g.,* Augustine, *Reply to Faustus the Manichaean,* XXII.70-78.

3. *Political Community and the Universality of Justice*

Finally, an assumption that appears throughout Augustine's writings on the just war is that the use of force, individually or collectively, is always a moral act capable of moral assessment like any other human action. In his *Reply to Faustus the Manichaean*, Augustine notes three considerations for determining whether an act is good or evil: "The act, the agent, and the authority for the action are all of great importance in the order of nature."[31] He applies these three considerations to Abraham and his willingness to sacrifice his son, Isaac. That Augustine views war as a moral act is seen by the fact that Augustine's criteria for a just war roughly map on to these considerations. Just cause concerns the "act"; right intention the "agent"; and, of course, a consideration of the authority of the agent is present in both. Moreover, Augustine lays the same restrictions on the use of force when he is speaking to political decisionmakers as he does when he is speaking to individual Christians who question whether they can serve in the army. Augustine often addresses his writings to political leaders who make decisions about whether or not to wage war.[32] Not only are individuals under justice claims among themselves within a political community, but justice norms govern political communities in their relations with one another.

B. *The Marks of a Just War*

These three claims—the human capacity for injustice, the good of political community, and the universality of justice—form the context of the just war tradition as a structure for moral decisionmaking. In some form or another, these commitments

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[31] Ibid., XXII.73.
[32] *See* Augustine, *Letter 138; Letter 189; Letter 229.*

continue to inform the tradition. In addition to shaping these background claims, Augustine also raised the primary criteria in deciding whether or not to use force. Although Augustine does not enumerate them as such, his writings suggest that a just war will always carry three marks.

1. *Legitimate Authority*

The first mark of a just war is *legitimate authority.* In adopting this criterion, Augustine firmly rules out wars between private individuals, who can solve their disputes through the appropriate government channels. As laid out earlier, the political community is the remedial institution for securing an earthly peace. This requirement of legitimate authority exists in any act of killing. For a person to kill a man already condemned to die would be an act of murder, if the assailant was not the person appointed to perform the execution.[33] Likewise, suicide is murder precisely because the person who kills himself lacks the authority to do so.[34]

2. *Just Cause*

Most important for the development of the much later legal tradition, and the focus of our inquiry, is Augustine's requirement that political communities only go to war for *just cause,* an analogue to what I call *due cause* in the later legal tradition. Augustine's concept of just cause is quite broad. Nonetheless, this requirement introduces the fundamental concept of limited war, setting the tradition on a path distinct from both pacifism and realism. Although he does not spell out their connection, like later contributors to the moral tradition Augustine describes just cause from two aspects: as *that which precipitates the use of force* and as the *aim, or end in using force.*

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[33] Ibid.
[34] Augustine, *City of God,* I.17-20.

For Augustine, the event precipitating the use of force is limited to some *injury*.[35] The political community must have incurred some wrong, otherwise using force is unjust. "To wage war against neighbours, and to go on from there against others crushing and subjugating peoples who have done no harm, out of the mere desire to rule: what else is this to be called than great robbery."[36] Kingdoms built by such wars are nothing more than great bands of robbers.[37] Of course, the effect of this requirement in limiting the use of force will depend largely on what counts as an *injury*, and Augustine's understanding is quite broad. For example, he finds unjust the Roman war against the Sabines, when the latter sought to rescue their stolen women. However, "the Romans might with some justice have waged war against that people when they refused a request to give their daughters in marriage," on account of the "injury . . . by the refusal of marriage."[38] Nonetheless, Augustine is clear that not every injury occasions the resort to force.[39] Later theorists would refine and further limit the types of injury that give rise to just cause.[40]

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[35] "Just wars are those which have as their object vengeance for injuries received." Augustine, *Questions on the Heptateuch.* The Roman law concept of *iniuria* has both a broad and narrow meaning. Broadly construed, it means unlawfulness or the absence of a right. Narrowly construed, it is the name of a particular delict. *Iniuria* "embraced any contumelious disregard of another's rights or personality. It thus included not merely physical assaults and oral or written insults and abuse, but any affront to another's dignity or reputation . . . provided always that the act was done willfully and with contumelious intent." Nicholas, *An Introduction to Roman Law,* 216.

[36] Augustine, *City of God,* IV.6.

[37] Ibid., IV.4-6.

[38] Ibid., II.17.

[39] "It is the iniquity of the opposing side that imposes upon the wise man the duty of waging wars; and every man certainly ought to deplore this iniquity since, *even if no necessity for war should arise from it*, it is still the iniquity of men." Ibid., XIX.7 (emphasis added).

[40] While I focus on the just war theory, which concerns the use of force principally in service of the political community, a related but distinct idea that developed from Augustine through Aquinas is the holy war concept. Later theorists in the age of the crusades drew on Augustine's notion that a just cause can arise from the special command of God. "Another kind of war which without doubt could be called just is that which is undertaken on the command of God." Augustine, *Questions on the Heptateuch*; *see also City of God,* I.21-26. God's command to Abraham to sacrifice Isaac and for the Israelites to spoil the Egyptians are both examples. *City of God,* I.21; *Reply to Faustus,* XXII.73. By early modernity, proponents of the tradition had rejected the idea that a war might be just because commanded by God. For the development and later rejection of the holy war idea, *see* Johnson, *Ideology.* Despite its influence in later centuries, there is reason to think that this cause had only slight normative weight for Augustine. While his writings are filled with contemporary Roman examples of wars fought on account of some injury, he provides no

Augustine also employs the concept of just cause to identify the proper end in the use of force. From this aspect, just cause includes three ends: self-defense, punishment, and the restitution of goods taken. Augustine does not explicitly treat the subject of communal self-defense, though clearly he thinks that the use of force to defend the political community is just. His understanding of the role that the political community plays in securing a minimal level of order requires it. While concluding that most wars are waged out of a lust for domination, Augustine (reminding us that his loyalties were not only to Christ, but also to Rome) suggests that much of the Empire was built upon just wars of self-defense.[41] Speaking of wars that expanded the empire, he remarks: "Clearly . . . the Romans did have a just defence for undertaking and waging such great wars. They were compelled to resist the savage incursions of their enemies; and they were compelled to do this not by greed for human praise, but by the necessity of defending life and liberty."[42]

Communal self-defense does not rest on a prior right to individual self-defense, in part because Augustine explicitly rules out the latter.[43] "In regard to killing men so as not to be killed by them, this view does not please me, unless perhaps it should be a soldier or a public official. In this case, he does not do it for his own sake, but for others or for the state to which he belongs, having received the power lawfully in accord with his public character. . . . 'We are not to resist evil,' lest we take pleasure in vengeance which

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examples for a just war based on the divine command outside of Scripture. It is more Augustine's scriptural hermeneutic, and less his normative theory, that leads him to include this category. Perhaps more influential on later theorists who developed the holy war idea was Augustine's belief that war was part of God's divine order, sometimes used to punish sin.

[41] Until the last few decades, many historians accepted this view of "defensive imperialism." The seminal work attacking this view was Harris, *War and Imperialism in Republican Rome*.

[42] Augustine, *City of God,* III.10. *See also* IV.15.

[43] The legitimacy of using force for the purpose of individual self-defense was well established in Roman law. *Digesta Iustiniani,* 9.2.45.4. The Romanists later developed this idea in the twelfth and thirteenth-centuries, but not in relation to war.

nourishes the soul on another's wrong."[44] This prohibition, however, is best interpreted not as a rejection of individual self-defense as just cause, but rather a conclusion that individuals will always fail to have right intention when killing another in their own defense, the third mark of a just war that we will examine shortly. Augustine is elsewhere quick to recognize the moral asymmetry between assailant and victim that arises in this case.[45] Moreover, the same lethal force used for the protection of a third party is justified, presumably because the temptation of a wrong intention is significantly less. Augustine understands the soldier who uses lethal force in war under these terms: as one who fights for another, either the political community or some third-party. Of course, in these situations, the person using force must satisfy all the marks of a just war. The salient difference is that in the case of individual self-defense, Augustine suggests that a person could rarely if ever satisfy the requirement of right intention.

In addition to self-defense, just cause also arises for the purposes of *punishment* and *restitution of goods taken.* The use of force is not limited to stopping an incursion. In his *Commentary on the Sermon on the Mount,* Augustine develops a framework for using force in individual cases where an injury has already occurred. Injuries fall into two classes: the kind that can be repaired, and the kind that cannot be repaired. In cases of the former, the person responsible can "make amends without punishment."[46] Where restitution is impossible, however, the use of force is justified to punish the offender, when performed by someone possessing legitimate authority and right intention.[47] In a letter to Marcellinus, some twelve or thirteen years later, Augustine applies a similar

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[44] Augustine, *Letter 47,* 230.
[45] Augustine, *On Free Will,* I.V.
[46] Augustine, *Commentary on the Lord's Sermon on the Mount,* 66.
[47] Ibid., 62-63.

framework to the political community.[48] The ruler can wage war against those who have inflicted an injury and are unwilling to yield. In so doing, the community acts toward two ends: the moral correction of the wrongful state and the deterrence of future wrongdoing.[49] Augustine's notion of war as a means of punishment that God sometimes employs in God's providential rule of the world allows for a potentially quite expansive scope for a just war. Augustine does not offer a clear account of what injuries justify the use of force toward this end. Throughout the Middle Ages, canonists and theologians would draw on Augustine's idea of war for the purpose of punishment to offer accounts of the just war that were both narrow and broad in scope. By early modernity, however, theorists in the tradition were significantly restricting the scope of punishment.

3. *Right Intention*

The third and final mark of a just war is *right intention,* reflecting the centrality of the will in Augustine's ethics He uses *intention* in much the same way it is used today, to describe one's aim or purpose in killing. Recall that for Augustine, moral assessment looks to the *act,* the *agent* (which I take to include the *intention* of the agent), and the *authority.*[50] Augustine argues most forcefully for the importance of intention in his early treatise, *On Free Will.*[51] The morality of killing, he argues, depends in part on the

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[48] Augustine, *Letter 138, to Marcellinus. Marcellinus* was a high official at the court of Emperor Honorius and had written Augustine sometime earlier requesting a response to various challenges to the Christian faith that several of his peers had made, especially the charge that Christianity threatened to undermine the empire. Augustine's response is a summary of several ideas he later developed in *City of God.*

[49] Ibid., 46-47. The use of force (but not including war) for the purpose of religious correction is a major theme in Augustine's later writings on the Donatist Controversy. *See Letter 185, to Boniface; Letter 93, to Vincent.*

[50] Augustine, *Reply to Faustus,* XXII.73.

[51] Augustine identifies wrong intention with *lust,* which he defines as an act committed out of a "love of things which one may lose against one's will." *On Free Will,* I.IV. He further nuances this account, and opens a space for preserving temporal goods, by invoking his hierarchy of goods. "He who uses [temporal goods] badly is he who lovingly cleaves to them and is completely involved in them. He subjects himself to things which he ought to make subject to himself, and sets before himself as his chief goods those things

intention of the agent. Killing to gain another's possessions is on the other side of a moral divide from killing to rescue a third person whose life is threatened with no other means of escape.[52]

With Augustine the basic marks of a just war and the background claims that frame them are in place. His sober assessment of the human capacity for injustice and his belief that political communities must secure a minimal order led him to reject the Christian tradition of pacifism. At the same time, his belief that war is always a human act led him to reject the idea that justice does not apply to the relations between political communities. Augustine's insistence that recourse to force always satisfy the requirement of *just cause,* as a limit on both the events occasioning the use of force and the legitimate end in using force, lies at the beginning of the development of the contemporary legal norm I have called *due cause.* While he says nothing directly related to the other two norms of *necessity* and *proportionality,* he prepares the way for Aquinas to develop these norms in the context of his theory of moral action.

II. Aquinas and the Contours of a Moral Act

While the tradition continued to develop over the next several centuries, the most important figure after Augustine is Thomas Aquinas.[53] His systematic treatment of war is

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which he ought to subordinate and handle properly and so become good himself. He who uses them aright shows that they are good but not in themselves." *On Free Will,* I.XV.

[52] Through his emphasis on intention, Augustine attempts to reconcile the idea of a just war with the New Testament passages that seem to rule out the use of force by Christians. Augustine takes these passages to apply to the Christian's inward disposition. The Christian uses force out of love for the neighbor, either to protect innocent third parties or to punish and correct out of love. Augustine, *Commentary on the Lord's Sermon on the Mount,* 62-66; *Letter 138, to Marcellinus.*

[53] All medieval theories of the just war, including Aquinas's, depended on Gratian's *Decretum,* completed around 1140. The *Decretum* was a compilation of canon law. The most important text concerning warfare was Causa 23, which included a broad selection of Augustinian texts and solidified the stamp of Augustine on the tradition. The later Decretists, Decretalists, and theologians, including Aquinas, all drew on

limited to a few paragraphs. In response to the question, "whether it is always sinful to wage war?," Aquinas writes in II.II.40.I: "In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. . . . Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault. . . . Thirdly, it is necessary that the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil."[54] Aquinas gives even less space than Augustine to the subject of war in his writings, and at no point does he directly take up the issue of preemption. Nonetheless, like Augustine his influence on the tradition and the norms which are taken up into international law is profound.

Although Aquinas's simple formulation of the just war, drawing directly on Augustine, was widely adopted, he said very little in II.II.40.1 that was new. Rather, his most important contribution was his treatment of the decision to use force as an application of his carefully worked out theory of moral action. Although the canon lawyers contributed significantly to the development of the tradition, they did not develop it as part of a worked out moral theory. At no point does Aquinas spell out these connections and commentators routinely neglect them. Reading Aquinas's treatment of war through the lens of his larger theory, however, illuminates both the structure of the just war tradition as a moral argument, as well as the development of the norms that we late see announced in the *Caroline* episode. I begin with a few comments about Aquinas's life and historical context, before turning to an overview of his theory of moral action. With this general theory in place, we can then see how Aquinas develops the

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Gratian's text to develop their just war ideas. The most thorough overview of these developments between Augustine and Aquinas is Russell, *The Just War.*

[54] Aquinas, *Summa Theologica,* II.II.40.1.

moral tradition on the just war as an application of his theory of moral action, and what relevance this understanding has for the moral genesis of these norms.

Aquinas was born in 1225 to a wealthy and influential family in southern Italy. In 1245, under strong opposition from his family, Aquinas entered the Dominican order and went to the University of Paris and later to Cologne. There he studied with the German theologian Albertus Magnus, who introduced him to the study of Aristotle. Thomas received his license to teach in 1256 and spent the next eighteen years studying and teaching in numerous cities, including Paris, Naples, and Rome. His most important intellectual achievement was his *Summa Theologica*, begun in 1266, though never completed. At the vanguard of a new movement to appropriate Aristotle's thought, especially his ethics, the *Summa* was an attempt to synthesize Aristotle's writings with Christian theology.

Aquinas makes very little mention of the political events of his day, though they certainly shaped his thought.[55] By 1250, supreme political power no longer resided in the Holy Roman Empire, but in the hands of several strong national sovereigns such as the kings of England and France. At the same time, the papacy had considerable political influence, as evidenced by its ability to wage numerous crusades. Europeans undertook the first crusade in the late eleventh century at the initiative of the pope. During Aquinas's day, many crusades were launched to retake the Holy Land and to stop Islamic advances in Spain. Military religious orders, including the Knights Templar and the Teutonic Knights, supported the crusades. Aquinas's own order, the Dominicans, was closely associated with these efforts. Members often accompanied armies as chaplains. At the same time, the popes also conducted crusades against opponents of the papacy in

[55] *See generally* France, *Western Warfare in the Age of the Crusades*; Keen, *Medieval Warfare*.

Europe, both to quell heresy and to protect papal power against the claims of secular rulers. Although he justified crusading in principle, his nuanced argument restrains both their occasion and conduct.[56]

A. *A Theory of Moral Action*

While Augustine's writings are almost entirely occasional, Aquinas writes in a much more systematic fashion, offering a developed theory of moral action before he ever addresses the subject of war. In order to trace the relationship between Aquinas's theory of moral action and his treatment of the use of force, I begin with a summary of this theory under four headings.[57]

1. *Everything Acts Toward Some End.*

Aquinas's theory of moral action begins with the Aristotelian notion that everything acts toward some end.[58] Humans, unlike everything else which moves toward its end by natural inclination, move toward their end by exercise of their reason and will. The only suitable end for a being with both reason and will is God, as the universal

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[56] Aquinas argues that political rulers sometimes have an obligation to fight because of some injury committed not first against the community, but against God. *Summa*, II.II.188.3 ad 1. The possible injuries against God are several. Aquinas describes a war "for the defence of divine worship." Ibid., II.II.188.3. Presumably he had in mind the case where an enemy threatens the public practice of Christian worship. Aquinas also seems to support the crusades along these lines. Without further explanation, he notes that some people, as a matter of penance, are "enjoined to take arms in defence of the Holy Land." Ibid., II.II.188.3 ad 3. Elsewhere, Aquinas suggests an even more expansive notion of just war on account of an injury against God. In his treatment of faith, Aquinas addresses an issue faced by the Church since its ascendancy to political power under Constantine: should Christians compel unbelievers by force to believe? Consistent with his understanding of the will and its role in belief, Aquinas prohibits Christians forcing a person to believe. Faith is always a voluntary act of the will, which another person cannot compel. Ibid., I.II.6.1, 4. However, a ruler can justly wage war against heretics, who having once embraced the faith have broken their commitment. Ibid.

[57] For a more detailed account of Aquinas's theory of moral action, *see* Porter, *The Recovery of Virtue*, especially chapter 3; McInery, *Aquinas on Human Action*, Part I.

[58] Aquinas, *Summa*, I.II.1.1.

good.[59] Ultimately, this end involves a union between God and the self, and requires an infusion of grace to achieve what is beyond human capacity and which humans will finally not achieve until the next life.[60] In this life, however, humans strive for an earthly happiness, which is attainable through natural human capacities.

2. *Humans Reach Their End Appropriate to This Life through the Proper Ordering of Human Action.*

Human action is the primary means whereby humans reach earthly happiness.[61] Aquinas identifies several human *powers,* or capabilities for action, which exist in potency. Persons move toward their end insofar as they actualize these powers. Of these powers, most important for Aquinas's theory of moral action are the intellect and the will. Through the will, a person desires what the intellect apprehends.[62]

Together, reason and will make possible what Aquinas calls the *human act.* Human acts are a special type of those actions Aquinas calls *voluntary,* belonging distinctly to humans as rational beings. A human act is voluntary in the sense that the person is moved to act by a force properly within the agent toward an end. The agent has some knowledge of the end and is capable of deliberating about the means to it.[63] "The fact that man is master of his actions is due to his being able to deliberate about them, for since the deliberating reason is indifferently disposed to opposite things, the will can be

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[59] Ibid., I.II.2.8.
[60] Ibid., I.II.5.3, 5.5. "For since happiness is a perfect and sufficient good, it excludes every evil, and fulfils every desire. But in this life every evil cannot be excluded. For this present life is subject to many unavoidable evils . . . . Likewise neither can the desire for good be satiated in this life. For man naturally desires the good which he has to be abiding. Now the goods of the present life pass away . . . . Therefore it is impossible to have true Happiness in this life." Ibid., I.II.5.3.
[61] Ibid., I.II.3.5. Following Aristotle, Aquinas holds that the surest way to arrive at this happiness is through the contemplation of truth, which more closely approximates the continuous and singular qualities of perfect happiness. Ibid., I.II.3.2 ad 4.
[62] Ibid., I.80.1.
[63] Ibid., I.II.6.1.

inclined to either."[64] In other words, what distinguish "human acts" from those of animals are the human powers of reason and will. Through these two faculties, humans have the unique capacity to deliberate about their actions, and then act on a particular choice. On account of this capacity for deliberation and choice, humans can be assigned praise or blame.[65]

A person actualizes these distinctly human powers by performing certain activities. Both the intellect and the will are powers capable of determination in multiple ways, only some of which are appropriate to that power. Training the will by repeated action to act in a certain way leads to the development of a *habit.*[66] He explains, a "habit implies a disposition in relation to a thing's nature, and to its operation or end, by reason of which disposition a thing is well or ill disposed to this."[67] Mere activity, however, is not enough. Habits can be either good or bad, and only the former—what Aquinas calls *virtues*—actualize the powers in conformity with their nature and lead to the happiness possible in this life. "A good habit is one which disposes to an act suitable to the agent's nature, while an evil habit is one which disposes to an act unsuitable to nature. Thus, acts of virtue are suitable to human nature, since they are according to reason, while acts of vice are discordant with human nature since they are against reason."[68]

3. *The Normative Measure of Human Action is the Natural Law.*

As this last passage suggests, Aquinas's moral theory requires a normative concept of human nature that explains what constitutes an appropriate actualization of the human powers. Aquinas provides this measure through the concept of *natural law.* He

[64] Ibid., I.II.6.2 ad 2.
[65] Ibid., I.II.6.2 ad 3.
[66] "If the acts be multiplied a certain quality is formed in the power which is passive and moved, which quality is called a habit." Ibid., II.II.52.2.
[67] Ibid., I.II.49.4.
[68] Ibid., I.II.54.3.

understands *law* as a rule for action directing something to its end.[69] The most fundamental law is God's *eternal law*. This law exists in the Divine reason as God's unchangeable truth and is the source of all other laws.[70] Through this law, God directs all things to their proper end.[71] That portion of the eternal law that God has imprinted in humans as rational beings, directing them to their proper end, is the natural law (or more specifically, the *natural moral law*, that part of the eternal law that governs humans as morally responsible beings). Sin sometimes clouds right reason, persons can choose against the law, and application of the natural law to concrete cases is more difficult. Nonetheless, it remains the rule and measure of human action.[72]

To discover the content of the natural law, Aquinas starts with the Aristotelian assumption that practical reason is always directed toward some end, which the agent perceives as a good. From this observation of human action, Aquinas arrives at what he calls the "first principle in the practical reason," namely "that good is to be pursued and done, and evil is to be avoided."[73] From this first principle, all other precepts of the natural law follows such that "whatever the practical reason naturally apprehends as man's good belongs to the precepts of the natural law as something to be done or

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[69] Ibid., I.II.90.1.
[70] Ibid., I.II.91.1; I.II.93.1.
[71] "And so, as being the principle through which the universe is created, divine wisdom means art, or exemplar, or idea, and likewise it also means law, as moving all things to their due ends." Ibid., I.II.93.1.
[72] "Since all things . . . are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. . . . [T]his participation of the eternal law in the rational creature is called the natural law." Ibid., I.II.91.2.
[73] Ibid., I.II.94.2. Later critics have accused Aquinas of committing the is/ought fallacy: deriving moral norms from a description of human nature. Some contemporary interpreters of Aquinas have tried to rescue him from this charge. *See* Grisez, "The First Principle," 168; Finnis, *Aquinas,* 86-94. Presumably, even if Aquinas takes the step that his critics find unacceptable, this step is not problematic for Aquinas because of his belief that Divine reason pervades all existence, giving it order and directing all being toward its proper end.

avoided."[74] Therefore, to discover the basic content of the natural moral law, Aquinas looks to humans' natural inclinations toward various goods.[75]

He finds three goods in particular that humans seek, each giving rise to a moral imperative. The first good is self-preservation, a good humans share with everything else in the world. He concludes, "by reason of this inclination, whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law."[76] The second good that humans seek, as well as other animals, is the good of preserving one's own kind. It follows that sexual reproduction and caring for one's offspring are a part of the natural law, as well. Finally, "there is in man an inclination to good, according to the nature of his reason, which nature is proper to him; thus man has a natural inclination to know the truth about God, and to live in society. And in this respect, whatever pertains to this inclination belongs to the natural law."[77] In other words, Aquinas finds in natural law an imperative to live in community with God and other persons.

These three goods anticipate developments in the modern period, which have direct bearing on the standard governing the use of preemptive force. Although we will examine these developments over the next few chapters, I briefly make one observation now. Starting with Grotius in the seventeenth century, moral theorists begin to think

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[74] Aquinas, *Summa,* I.II.94.2.

[75] The obvious problem emerges as to whether every natural inclination signals the content of the natural law. Some desires, it would seem, are contrary to morality. The answer given by Finnis is suggestive. Aquinas "maintains, precisely as a metaphysician, that the goods cause the inclinations. Where the objects of an inclination—e.g. to hurt or to have *more than others* (precisely as such)—makes no sense as a *human good,* the inclination is not natural within the meaning of q. 94 a. 2. . . . The object of that 'natural' inclination is not a basic human good or *reason* for action. Had Aquinas been concerned here with the epistemological questions which preoccupy us today, he might well have described the kinds of *experience* of inclination . . . in which we first come to understand that this or that object of present interest to me is only an instance of a general . . . form of good . . . that can in principle be instantiated in the actions and lives of any human person and is in principle as beneficial and worth while for others as it is for me." Finnis, *Aquinas,* 93-94.

[76] Aquinas, *Summa,* I.II.94.2.

[77] Ibid., I.II.94.2.

about relations among states in terms of two moral principles: *self-preservation* and *sociability.* Formally, these same two principles appear in Aquinas's account of three fundamental goods and the moral claims they generate. The first good directly concerns self-preservation and the second is plausibly collapsed into the first, since reproduction is conceivably a form of self-preservation, as well. The third good creates the imperative "to know the truth about God, and to live in society." The divine dimension drops out, but this good is akin to what modern theorists starting with Grotius call *sociability.* Although we will turn to this story in the following chapters, two traditions on the use of preemptive force develop out of different ways of relating these two principles: a permissive tradition that finally derives *sociability* from *self-preservation,* and a tradition continuous with the ideas of Augustine and Aquinas, that insists that *sociability* is finally independent. This good that compels humans to live in society arises from what is most distinctly human, which suggests that it cannot be derived from the good of *self-preservation* that humans share with the whole created order.

Starting from these basic precepts, Aquinas describes a natural law by which persons can discern the kinds of actions that will develop the good habits, or virtues, necessary for achieving the completion and happiness possible in this life. These general precepts of the natural law do not strictly determine the moral status of most human actions. Acting morally almost always involves an exercise of the practical reason to apply these general precepts to particular situations. "On the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles but not as regards the particular determinations of individual cases."[78] Rather, "it is from

[78] Ibid., I.II.91.3 ad 1.

the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters."[79]

4. *Finally, the Natural Law Measures Action According to the Three-Fold Structure of a Human Act.*

The moral assessment of any action must look to three distinct but related parts of the human act: the *object,* the *circumstances,* and the *end.*[80] First, every act includes an *object.* The object of an act specifies the kind of action taken.[81] Theft and adultery are the objects of two acts that Aquinas often mentions by way of example.

Sometimes the object of an act alone will determine whether an act is good or evil, but more often one must look to the act as it is shaped by *circumstances.* Aquinas describes the circumstances of an act in much the same way as we use the term today, to describe those features that are distinct from but surround any human action and are often relevant for assessing whether it is good or evil. "Whatever conditions are outside the substance of an act and yet in some way touch the human act are called circumstances."[82] Some of the circumstances Aquinas mentions include: *when, where,* and *how* the action occurred; *what is done; why* an act is done; and *who* commits the act.[83] These nine circumstances all shape the moral status of a human act.

Lastly, every act is toward some *end.* The end is the goal that the agent hopes to attain in performing a certain action.[84] It explains a person's purpose for acting as she

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[79] Ibid., I.II.91.3.
[80] This account is found in Aquinas's "Treatise on Human Acts," Ibid., I.11.18-20.
[81] Ibid., I.II.18.2, 6.
[82] Ibid., I.II.7.1.
[83] Ibid., I.II.7.3.
[84] Ibid., I.II.18.6. *See also* I.II.18.4 and I.II.19.2.

does.[85] *Intention*, which figures so prominently in both Augustine and Aquinas's discussion of the just war, is "an act of the will in regard to the end," such that "it considers the end as the term towards which something is ordered."[86] Using Aquinas's example, someone might steal for the purpose of committing adultery. In this case, the *object* is theft, but the *end* is adultery.

Determining the moral status of a human act involves a careful assessment of these three parts and their relationships to one another. In general, a morally good act requires what Aquinas calls a "proportionality" (not to be confused with the norm of *proportionality)* between the willed object, under a particular set of circumstances, and toward a proper end. The measure of proportionality is the natural law, although its application to concrete actions is always an exercise of practical reason, as stated earlier. This manner of moral assessment looks to both the external act (the *object* and *circumstances)* and the internal act (the *end*). The act may fail to be good at any point in this relationship between the object, its circumstances, and its end.[87]

This moral assessment starts with the *object*. Isolated from their circumstances and end, some objects of human action are good or evil absolutely.[88] Other acts that proceed deliberately from human reason may be morally neutral in themselves, and depend on their circumstances and end for their moral status. Sometimes, the object is

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[85] For Aquinas, the end functions as the "final cause," in Aristotle's sense of the term, coming first in the order of intention, but last in the order of execution. Ibid., I.II.20.1. The interior act of the will, then, operates as the efficient cause of the external action. Ibid., I.II.20.1.

[86] I.II.12.1 ad 4. Elsewhere he states, "the movement of the will to the end as acquired by the means is called intention." Ibid., I.II.12.4 ad 3.

[87] "Nothing hinders an action that is good in one of the ways mentioned above from lacking goodness in another way. And thus it may happen that an action which is good in its species or in its circumstances, is ordered to an evil end, or vice versa. However, an action is not good absolutely, unless it is good in all those ways." Ibid., I.II.18.4 ad 3.

[88] "If the object of an action includes something in accord with the order of reason, it will be a good action according to its species; for instance, to give alms to a person in want. On the other hand, if it includes something contrary to the order of reason, it will be an evil act according to its species; for instance, to steal, which is to take what belongs to another." Ibid., I.II.18.8.

morally neutral, but under the given circumstances and toward an improper end the act is evil.[89] Stroking one's beard is morally neutral, but as a signal for an assassin to shoot his victim, it takes on a very different moral status. In most cases, however, the moral status of an action depends on the circumstances that shape the action. In addition to looking for proportionality between the object and the end of an action, Aquinas also looks for the same between the circumstances that touch an object and its end. "Now, everything that is directed to an end should be proportionate to that end. But acts are made proportionate to an end by means of a certain commensurateness, which results from due circumstances."[90] Circumstances such as *who* commits the action, or *where* the action takes place can all affect its moral status. Finally, Aquinas looks to the act's *end.* The end as the object of the will has special importance for determining the moral status of an act insofar as the end precedes the external action in the order of intention.[91] Following this line of reasoning, Aquinas concludes that a person who steals to commit adultery "is, strictly speaking, more adulterer than thief."[92]

B. *Just War as Applied Theory*

With this brief overview in hand, we can now see how Aquinas repositioned and developed the Augustinian legacy on the just war within his carefully developed theory of moral action. Reading Aquinas in this way, I suggest, will show how the moral tradition on the just war passed on the norms of *due cause, necessity,* and *proportionality.*

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[89] Ibid., I.II.18.9.
[90] Ibid., I.II.7.2.
[91] "Now that which is on the part of the will is formal in relation to that which is on the part of the external action, because the will uses the limbs to act, as instruments . . . . Consequently the species of a human act is considered formally with regard to the end, but materially with regard to the object of the external act." Ibid., I.II.18.6. *See also* I.II.20.1 ad 2; ad 3.
[92] Ibid., I.II.18.6.

Like Augustine, Aquinas deems the decision to go to war and the conduct of war as both human acts, capable of moral assessment. Recall that a morally good act requires proportionality between the willed object, under a particular set of circumstances, toward the proper end. Although Aquinas does not draw the connections in his writings on war, the three-fold requirements of *legitimate authority, just cause,* and *right intention* all correspond to specific considerations in the moral assessment of any human act.

For Aquinas, the first component of any act is its *object.* Most generally, the object in question is the act of *going to war.* The most important object for Aquinas in the act of going to war is that of *killing.* Killing, however, like the objects of many other actions, is not morally determinate. In other words, knowing the object does not settle the moral status of the act. Following Augustine, Aquinas accepts that killing is sometimes morally justified. Therefore, to determine whether a person commits a moral evil in killing, or in going to war more generally, we must consider this object in relation to both its *circumstances* and its *end.*

Recall that Aquinas identified several circumstances that may be relevant to the moral assessment of an action. The requirements of legitimate authority and just cause each correspond to a particular circumstance that can shape the moral status of a human act. Legitimate authority concerns the circumstance of *who.* The morality of using force will always depend in part on the agent authorizing the action. Aquinas makes a primary distinction between the *sovereign* and the *private person* and suggests two reasons why only the former has the proper authority to go to war: the opportunity for a private

person to seek redress from the sovereign for wrongs committed against him and the special care for the common good that God commits to the sovereign.[93]

Like legitimate authority, the requirement for just cause is also a circumstance and corresponds to the question of *why*. Legitimate authority alone is never sufficient, without a satisfactory answer to the question of why the ruler of the political community makes the decision to go to war. The sovereign must in part show a wrong of sufficient character to warrant going to war. Following Augustine, Aquinas concludes that the presence of such a wrong justifies a war of self-defense, punishment, or for the purpose of restoring goods taken.[94] Failure to satisfy the circumstance of *why* would result in the action taking on an entirely different moral status. As we will see shortly, Aquinas's theory of moral action suggests that other circumstances are relevant as well, even though he does not list them in his three-fold summary of the *jus ad bellum.*

Lastly, the criterion of *right intention* is simply the requirement that the agent act toward a proper end. Aquinas requires that the "belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil."[95] Stated differently, "those who wage war justly aim at peace."[96] In this way, then, the

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[93] Ibid., II.II.40.I. Although not the focus of my investigation, it is worth noting that Aquinas and other medieval writers in the just war tradition espoused a very different conception of sovereignty than that which came after the Treaty of Westphalia. Sovereignty was contingent upon the ruler's service to the common good, and was not simply an unchallenged fact where rule is exercised over a particular territory. As James Turner Johnson interprets the medieval tradition, a ruler who does not fulfill his charge to serve the common good is not a sovereign, but a tyrant who can and should be deposed. Johnson, "Aquinas and Luther on War and Peace," 17n1.

[94] Aquinas, *Summa,* II.II.40.1. Following Augustine's lead, Aquinas offers an extended discussion of the role of punishment in God's providential maintenance of the moral order in *Summa Contra Gentiles,* III.II.140-146. Russell argues that by this time, the canonists had all but discarded the punitive function of war and limited the ends of force to the *repulsion* of injuries. *The Just War,* 221. While the theologians, including Aquinas, followed Augustine in this respect, at least by the time of the neo-Scholastics, theologians such as Vitoria were strictly limiting the scope of punishment.

[95] Ibid., II.II.40.1.

[96] Ibid., II.II.40.1 ad 3.

requirements of legitimate authority, just cause, and right intention map on to the central considerations in determining the moral status of any human act.

C. *The Evolution of* Due Cause, Necessity, *and* Proportionality

This reading of Aquinas's just war theory illuminates the evolution of the norms identified in the seminal *Caroline* case, governing the use of preemptive force. As I will suggest, Aquinas re-shaped the concept of just cause, placed the norm of proportionality firmly in the tradition, and anticipated the norm of necessity.

1. *A Reshaping of Just Cause*

a. *The Two Aspects of Just Cause*

Aquinas follows Augustine in viewing just cause from two aspects. Both speak of just cause as the *precipitating event*, which is always some injury, some wrong. At the same time, both speak of just cause as *the aim in using force.* The appropriate ends mentioned are self-defense, punishment, and restitution of goods taken.[97] Augustine, however, never explained how these two ways of talking about just cause are related.

Aquinas's theory of moral action, however, suggests a way of tying these two aspects together. As stated earlier, the requirement of just cause corresponds to the circumstance that explains *why* a person acts. For Aquinas, circumstances that affect the moral quality of an act touch the act at some point; either the act itself, the effect of the act, or the act's cause.[98] The circumstance that explains *why* touches the act at the point of its final cause. Here, Aquinas borrows Aristotle's familiar account of the four causes.

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[97] Aquinas does not list self-defense directly in II.II.40.1 when he speaks of just cause, but it is clearly assumed. In his discussion of legitimate authority he says that the sovereign has the authority to use force for the protection of the political community.

[98] Ibid., I.II.7.3.

The final cause is the *telos,* "that for the sake of which" an action is done. To use the term most commonly employed by Aquinas, the final cause is the *end* of the action. So just cause is a circumstance of the act of going to war that touches the act at the point of its end.

Aquinas suggests a close conceptual tie between just cause as the *precipitating event* (or *injury),* and just cause as the *legitimate end* (i.e., self-defense). In II.II.40.1 he states: "Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault." Citing Augustine, he then says that just cause understood as the end in using force follows from this injury. "*Therefore* Augustine says: 'A just war is usually described as one that avenges wrong, when a nation or state has to be punished . . . or to restore what it has seized unjustly.'"[99]

Two observations follow. First, the end of any just use of force is determined by the injury that gives rise to it. In other words, the harm establishes the boundaries of the response. Internal to the concept of just cause is a link between the injury and the appropriate ends of force. In no case does just cause warrant any response whatever. For both Aquinas and Augustine, self-defense, punishment, and restitution of goods taken are the only legitimate ends of force insofar as they are all predicated on the presence of some injury. The appropriate end of force is always tethered to the particular injury. This connection is especially important for the norm of proportionality, which Aquinas develops and I examine shortly.

A second observation concerns the importance of just cause for Aquinas. After listing the circumstances of the human act, Aquinas goes on to say that the circumstance concerning *why* a person acts is the most important of all of them. "Acts are properly

[99] Ibid., I.II.40.1. Quoting Augustine, *Questions on the Heptateuch* (emphasis added).

called human according as they are voluntary. Now, the motive and object of the will is the end. Therefore that circumstance is most important of all which touches the act on the part of the end, namely, the circumstance 'why.'"[100] The end has priority for Aquinas because it is the reason any particular action happens in the first place.[101]

b. *Injury as a Fault*

While Aquinas accepted Augustine's requirement that just cause only arises in the case of some injury, he also refined the concept. Just cause, he explained, requires an injury marked by *fault* (*culpa*). "Those who are attacked should be attacked because they deserve it on account of some fault."[102] In Aquinas's theory of moral action, *culpa* takes on special meaning. A fault arises where a person acts voluntarily. The human act is distinct from other actions because it is a *voluntary act.* "An action is imputed to an agent when it is in his power, so that he has dominion over it. And this is the case in all voluntary acts, because it is through his will that man has dominion over his actions . . . . Hence it follows that good or evil, in voluntary actions alone, renders them worthy of praise or blame [*culpa*]; and in actions of this kind, evil, sin and guilt are one and the same thing."[103] Forcing someone to harm another person can render that person's harmful act involuntary, since the action does not depend on the agent's will, but on some force external to the will.[104] Likewise, ignorance can also lead to involuntariness where it leads a person to do something she would otherwise not do, on account of her lack of

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[100] Aquinas, *Summa,* I.II.7.4.
[101] On my interpretation, just cause is directly connected to and establishes the proper end in using force. Right intention is the orientation of the will toward this proper end. Since Aquinas placed such emphasis on the orientation of the will toward the proper end, it is not surprising that just cause would have such importance for Aquinas.
[102] Aquinas, *Summa,* II.II.40.1.
[103] Ibid., I.II.21.2.
[104] Ibid., I.II.6.5.

knowledge for something she is not responsible to know.[105] Aquinas requires subjective guilt, not the mere objective fact that another has committed some harm.

c. *The Good of Political Community*

As for Augustine, standing behind the concept of just cause is an account of political community as a good that provides a justification for the use of force. Aquinas argues that the political community is necessary for humans to have the types of relationships they need to attain the highest goods possible in this life. Following Aristotle, Aquinas believes that attaining both the intellectual and the moral virtues requires friendships.[106] Virtue requires that a person do good acts for other people, delight in these acts, and receive the help of others in doing good. These activities all require that persons live in community.[107]

In his treatise *De Regimine Principum,* Aquinas equates this community with the political community, or at least assumes that the latter is necessary to preserve smaller communities that flourish within it.[108] The ruler must secure the common good of the political community. He argues that securing the common good sometimes requires that the ruler wage war against those who threaten the community. "[B]ecause the end of our living well at this present time is the blessedness of heaven, the king's duty is therefore to secure the good life for the community in such a way as to ensure that it is led to the

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[105] Ibid., I.I.6.8.
[106] Ibid., I.II.4.8.
[107] "It seems that the end for which a community is brought together is to live according to virtue; for men come together so that they may live well in a way that would not be possible for each of them living singly. For the good is life according to virtue, and so the end of human association is a virtuous life." Ibid., I.XV.
[108] Aquinas, *De Regimine Principum.* This writing is part of a much larger treatise, the rest which scholars attribute to Tolommeo of Lucca. Although there has been some dispute over the authorship of *De Regimine Principum,* the prevailing view is that Aquinas abandoned the treatise after the death of its dedicatee in December 1267, and that Tolommeo later continued and finished it.

blessedness of heaven."[109] Fulfilling this duty involves establishing the good life in the community, preserving it, and improving it. When enemies attack the community, the ruler has the responsibility to defend it, restore goods unjustly taken, and punish the aggressors. Notice that while both Aquinas and Augustine reach the same conclusion, that war is sometimes morally justified to defend the political community as the primary means to secure peace, they do so by very different means. Most noticeably, while Aquinas draws on a thick account of human nature and the human telos, Augustine draws on a much thinner argument for securing earthly peace as a minimal measure of order.

2. *Necessity and Proportionality*

The norm governing the precipitative event and legitimate end of force, what the moral tradition calls *just cause,* was of central importance to both Augustine and Aquinas. Augustine never directly raised the norms of *necessity* and *proportionality*, however, and Aquinas does not list them among the just war criteria he formulates in II.II.40.1. Nonetheless, he directly discusses proportionality and implies necessity in his discussion of individual self-defense, and he anticipates both in his theory of moral action.[110]

I begin with proportionality. Aquinas announces this norm in his consideration of whether a person can kill another in the case of individual self-defense. Unlike Augustine, Aquinas allows for killing as an act of individual self-defense under his

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[109] Ibid., I.16.

[110] The historical antecedents of necessity and proportionality lie at least as far back as the Roman law concepts of *incontinenti* and *modernamen inculpatae tutelage* in the context of individual self-defense. The former relates to the norm of necessity and concerns the time in which a person can respond to a violent attack upon her person. *The Digest of Justinian,* 43.16.3.9. The latter relates to the principle of proportionality and requires moderation in a forceful response relative to the circumstances. *Codex Iustinianus*, 8.4.1. Both norms are suggested in this passage from the *Digesta:* "Those who do damage because they cannot otherwise defend themselves are blameless. . . . [I]t is permitted only to use force against an attacker and even then only so far as is necessary for self-defense." *The Digest of Justinian,* 9.2.45.4. These ideas appear throughout the writings of the canonists.

principle of "double effect." The act of killing can have two effects: preserving one's own life and slaying the aggressor. One does not commit murder so long as her intention is the former, since according to the natural law everything acts to keep itself in being.[111]

Aquinas articulates the norm of proportionality as an additional limit on the use of force to defend one's life. "And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful."[112] Stated simply, the norm of proportionality requires that the amount of force used is necessary for securing the end. Later theorists in the tradition sometimes refer to this norm as "proportionality of ends." Although proportionality shows up later in the tradition under the criteria governing both the decision to go to war and the conduct in war, here it is an aspect of the former. Using force is not just if the proposed use, construed broadly and not in all its specific uses that cannot be foreseen, is not proportional to the end of self-defense, punishment, or the restitution of goods taken. This account of proportionality suggests a close relationship between the norm of proportionality and just cause, since it is the latter that identifies the legitimate ends in using force.

Although Aquinas does not directly address the norm of necessity, it is implied in his discussion of proportionality. "Wherefore if a man, in self-defense, uses more than *necessary* violence, it will be unlawful."[113] Here, the person considering the use of force must ensure that the amount and kind of force is necessary for reaching the legitimate end. Judgments of proportionality, then, assume that the use of force is necessary in the first place. In one sense, judgments of *necessity* and *proportionality* are both judgments

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[111] Aquinas, *Summa*, II.II.64.7.
[112] Ibid.
[113] Ibid., II.II.64.7 (emphasis added).

of necessity, in a more general sense.[114] The first judgment is whether it is necessary to use force to reach a legitimate end. Following upon it is a second judgment about whether this proposed use of force is necessary to reach that end. The norm of necessity, then, is conceptually prior to the norm of proportionality.

Neither of these norms is included among Aquinas's just war criteria. Nonetheless, in addition to his discussion of individual self-defense, both norms are anticipated in his theory of moral action. As summarized earlier, the moral status of an act depends on proportionality (in its more general sense) between the willed object, under a particular set of circumstances, toward a proper end. Just cause and legitimate authority are judgments about the circumstances of an action: the *why* and *who* of any action. Right intention is the act of willing a proper end. Although Aquinas includes these two circumstances that are always relevant to determining whether the use of force is just in his three-fold criteria for a just war, his theory of moral action includes several other circumstances that are potentially relevant. The circumstance that considers *when* an act is done bears a close relation to the norm of necessity. This norm concerns the issue of when a political community decides to use force relative to other ways that the community might reach the same end. Among the reasonable means for reaching the end of self-defense, the use of force is always the last option. *Necessity*, then, is primarily a question of *when.*

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[114] Judge Schwebel perceptively made this observation in his dissenting opinion for the *Nicaragua Case.* "In fact, the requirements of 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the state only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale." International Court of Justice, *Nicaragua Case,* 368. *See also* McDougal and Feliciano, *Minimum World Public Order,* 242.

Assessments of proportionality correspond to at least two other circumstances: *how* an act is performed and *what is done.* The latter, Aquinas explains, touches the act at the point of its *effect.*[115] Every action has one or more effects, or what Aquinas elsewhere refers to as *consequences.*[116] Depending on whether the agent foresaw or could have foreseen the effects of her action, the consequences can shape the moral status of the act. Proportionality of ends looks to both of these circumstances. How does the agent use force and with what effect? A use of force is just only if the proposed means of force and its anticipated effect are proportional to the end.[117] In summary, while Aquinas does not include the norms of necessity and proportionality among the just war criteria he inherits from Augustine, he touches on them in his discussion of individual self-defense and his theory of moral action anticipates their later development within the tradition.

In Augustine and Aquinas we see important early steps in the evolution of the norms governing preemption and the use of force more generally. Augustine provided both a structure for moral decisionmaking and a set of background claims on the basis of which the just war argument makes sense. Aquinas set the criteria of legitimate authority, just cause, and right intention within his nuanced theory of moral action. In so doing, he illuminated the concept of just cause and its relation to the legitimate ends of force, as well as anticipated and developed the norms of necessity and proportionality. In

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[115] Aquinas, *Summa,* I.II.7.3.

[116] Aquinas employs the term *effect* in his explanation of the principle of double effect, noting that an action can have multiple effects, only one of which is intended. Ibid., II.II.64.7. Elsewhere, he uses the term *consequences* in his discussion of external actions, I.II.20.5.

[117] Commenting on the meaning of *proportionality* in the international law of force, McDougal and Feliciano note: "It is primarily in terms of its magnitude and intensity—the consequentiality of its effects—that alleged responding coercion must be examined for its 'proportionality.'" *Minimum World Public Order,* 241.

the next three chapters we examine the continuing development of these norms within the moral tradition, as well as a rival account of preemption, in the modern period.

Chapter 4

Rival Traditions in the Early Modern Period: Just War and 'Just' Fear

Although the basic framework of the moral tradition on the just war was formed in the Middle Ages by Augustine and Aquinas, it was not until the early modern period that proponents of the tradition gave sustained attention to the issue of preemption. Specifically, they extended the tradition in two ways. First, they developed various tests to determine where *just cause,* understood as an *injury,* arises absent an actual attack. Second, they refined the principle of *necessity,* a separate and subsequent requirement of exhausting reasonable alternatives that took on special importance in this context. Together, these norms carved out a limited space for the use of preemptive force.

At the same time, the moral theory standing behind these norms continued to evolve, as well. The neo-Thomist theologians of sixteenth-century Spain developed and transmitted to the modern world the doctrine of the just war along the basic lines of Aquinas's moral theory. The most important shift in the underlying theory took place with Grotius. The changes he inaugurated were not lost by later proponents of the tradition, such as Pufendorf, who accepted his starting point but tried to compensate for perceived weaknesses in the underlying theory.

The just war account of preemption, however, was not the only tradition on the use of force that held sway from the Renaissance forward. In fact, there was a second, rival moral tradition on the use of preemptive force that was present in the early modern period. This second, broadly permissive account was part of an evolving *raison d'état*

theory of statecraft.[1] It encompasses a wide range of theorists, all of whom deny or severely limit an international theory of justice: that is, they all deny that justice generates norms binding on states in their relations with one another. This conclusion is based on at least one, but usually two grounds. First, despite their differences, proponents of this rival tradition all believed that the demands of justice were impractical to the necessities of political rule in the emerging state system. Some theorists reached this conclusion through a cynical path: the prince's aim is to maintain and increase his power, and a close adherence to traditional morality will only hinder this pursuit. For them, the preemptive use of force was a morally unproblematic tool of statecraft. Others reached this conclusion out of their own appraisal of what is possible in an international order lacking many of the legal institutions that secure justice in the domestic realm. For these theorists, a normative theory of justice between states is an aspiration, but only under a radically different international order. Second, many proponents of this rival tradition on the use of preemptive force also reached the conclusion that justice does not extend to the relations among states for a stronger reason. As we will see in Chapter 5, they conceived of states as moral persons, only subject to justice claims that they first take upon themselves.

Like the just war tradition, this account of war and politics has roots going back much earlier, into classical times. In fact, its flourishing among humanist writers in Renaissance Europe corresponded to a revival of interest in the writings of Tacitus, a

[1] For the main lines of the interpretation that follows in Part II, Richard Tuck's *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* was especially suggestive. Tuck's subject is both broader and narrower than my own. He focuses on theories of international order rather than the more narrow issue of preemption, and gives much less attention to the just war tradition after the neo-Thomists.

Roman historian often associated with a prudential politics.[2] The term *raison d'état* (or among the Italian humanists, *ragion di stato*), appeared in the middle of the sixteenth-century, and by the publication of Botero's *The Reason of State* (1589) it was a widely discussed conception of statecraft.[3] Among the Italian humanists, and most notably Machiavelli (who never used the term, but came to personify its most potent expression), the doctrine was primarily developed as a practical discourse about statecraft. Machiavelli's *The Prince* was part of a long line of "advice books" to rulers, meant to impart worldly wisdom rather than plot out a carefully-worked out theory. Thomas Hobbes (1588-1679) did not self-consciously place himself within this tradition of thought, yet he adopted the basic idea and provided the tradition with a theoretical foundation that would have lasting influence, even today.

Although my focus is on the just war tradition, and the account of preemption that arose from it, a parallel account of this rival tradition is important for several reasons. First, the just war doctrine of preemption developed in direct conversation with this tradition, at least by the early modern period. From the neo-Thomists forward, proponents of the just war tradition often self-consciously set their accounts against this more permissive tradition. Moreover, this rival tradition gained ascendancy within political theory and by the nineteenth-century it was the accepted theory among scholars of international law for describing the system of sovereign states, in which states were largely unregulated in their decisions to use force. The history of the just war tradition is not a narrative of steady acceptance. While we might conclude that the tradition has

[2] *See* Burke, "Tacitism, Skepticism, and Reason of State," 479-498; Skinner, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance,* Chapter 9, "The Humanist Critique of Humanism."
[3] Speaking of his travels to the courts of many European rulers, Botero remarks: "I have been greatly astonished to find Reason of State a constant subject of discussion and to hear the opinions of . . . Machiavelli and . . . Tacitus frequently quoted." Botero, *The Reason of State,* xiii. Botero's work spawned a whole line of works with the same title that appeared over the next few decades.

nearly triumphed today, as we will see the story of its development is also one of eclipse. Finally, a parallel account of this alternative tradition is important insofar as it directly shaped the moral tradition on the just war. As much as the scholar might yearn for a pure tradition from Augustine forward, history offers no such account. As we will see, the moral commitments underlying these traditions intersected in important ways.

In the next three chapters I trace the development of the just war tradition on the use of preemptive force, paying attention as well to its rival, beginning in the early sixteenth-century and continuing into the nineteenth. The figures I choose are only representative of the most important developments during this time period. While my interests are theoretical, these conceptions mirror geo-political developments and to a limited extent I will note these connections.

I. Vitoria and the Salamanca School: Retrieval of the Thomistic Tradition

The most important proponents of the just war tradition in the early modern period were the neo-Thomists of sixteenth-century Spain.[4] The revival of Aquinas's thought that they led ensured the transmission of this tradition into the modern era. As we will see, the tradition they passed on was taken up and reshaped by Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1694), Christian Wolff (1679-1754), and Emmerich de Vattel (1714-1767). Among the Spanish neo-Thomists, I focus on Francisco de Vitoria (ca. 1485-1546), as both the earliest and most important figure in this school of thought and the most important early modern theorist to apply the just war tradition to the issue of preemption.

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[4] *See* Fernandez-Santamaria, *The State, War and Peace;* Hamilton, *Political Thought in Sixteenth-Century Spain;* Skinner, *The Foundations of Modern Political Thought, Vol. II: The Reformation,* 135-172.

Vitoria entered the Dominican Order (Aquinas's own) in 1504 and was sent to study at the University of Paris, where he stayed from 1509 to 1523. His teacher was Pierre Crockaert (1450-1514). Although Crockaert lectured early on from Peter Lombard's *Sentences,* the traditional university text, he soon began teaching from Aquinas's *Summa,* which for the past two centuries had been widely attacked. With the aid of Vitoria, Crockaert published a commentary on the last part of the *Summa* in 1512. A committed Thomist, Vitoria returned to Spain in 1523 where he eventually took the Prime Chair of Theology at the University of Salamanca. He published nothing during his lifetime, but his writings were transmitted through some surviving manuscripts and the lecture notes of his students. His most important writings include his commentary on Aquinas's *Summa,* delivered as lectures to his students, and several discourses on the nature of civil power and the Spanish conquest in the New World. Vitoria wrote in response to several contemporary social and political challenges, but the two most significant were the growing threat of Lutheranism and the issue of Spanish conquest in the New World. It was especially in the context of the latter challenge that Vitoria developed his thoughts on war.[5] Following Vitoria were several influential theologians who ensured the influence of Thomistic thought in the modern age. These included Dominican theologians, such as Domingo de Soto (1494-1560) and Fernando Vazquez (1509-1566), and later Jesuits as well, including Luis de Molina (1535-1600) and Francisco Suarez (1548-1617).

Vitoria's just war doctrine rests upon a moral theory that, along its main lines, bears the clear marks of Aquinas. Vitoria develops many of his ideas, in fact, in the form of commentary on the *Summa.* At the center of this theory is the notion of a moral

[5] The two most important writings are *On the Indians* and *On the Law of War,* both delivered in 1539.

universe governed by laws that flow, at least in part, from God's reason.[6] We saw the basic features of this theory in the previous chapter. An "eternal law" structures the universe, giving it order and harmony. This law directs everything in the cosmos, including humans, toward some end. That portion of the eternal law accessible to humans, governing their acts, and leading them to their earthly end is the *natural law.* Rooted in God's reason, this law is unchanging and comprehensible, imprinted on the human mind. For humans, the precepts of the natural law are revealed in their natural inclinations toward a good. These include *self-preservation,* an inclination shared with all substances, *procreation,* an inclination shared with all animals, and *sociability* and a *desire for divine truth,* the rational inclination unique to humans and pointing them toward living with others and knowing God. From these three basic inclinations Aquinas explicates the natural law. Human laws are valid insofar as they are derived from, or not in conflict with, the natural law. Human actions in the sphere of the political are never outside this moral order.[7]

The commonwealth is part of this moral order. Humans did not always live in political communities, but these associations emerged to provide for human needs and for the perfection of the soul, and in this way are natural and necessary for humans to reach their end. "Since, therefore, human partnerships arose for the purpose of helping to bear each other's burdens, amongst all these partnerships a civil partnership (*ciuilis societas*) is the one which most aptly fulfils men's needs. It follows that the city (*ciuitas*) is . . . the

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[6] *See* especially Vitoria's commentary on Aquinas's treatise on law. "On Law: Lectures on *ST* I-II.90-105," 153-204.

[7] This conclusion, in itself and apart from Aquinas's broader project, does not rule out the possibility of "two governments," in the sense later used by Luther to describe Christ's rule in the Church and God's rule in the world, the temporal sphere. For both Luther and Aquinas, the Christian ruler is subject to a moral order and the constraints of justice in his dealings with other political communities.

most natural community, the one which is most conformable to nature."[8] The commonwealth can lawfully use force against another person or political community, but only in the case of some injury. Citing Augustine and Aquinas, Vitoria concludes: "the sole and only just cause for waging war is when harm has been inflicted."[9] Since natural law forbids the killing of innocent persons, some injury is necessary. "We may not use the sword against those who have not harmed us; to kill the innocent is prohibited by natural law."[10] Nonetheless, where there is a sufficient injury and the other criteria of the just war doctrine are satisfied, a commonwealth can and sometimes must use force. Without recourse to force, the commonwealth would not achieve its purpose of helping persons attain their earthly end. Although the Machiavellian threat was not as pressing in Vitoria's time as it was among the later neo-Thomists, it was this same account of a moral universe ordered by God's *ratio* and the resulting claims of justice between individuals and the political communities they form that would shape the neo-Thomist response.[11]

Neither Augustine nor Aquinas had addressed the issue of preemption. The perduring requirement in the tradition that just cause always requires some *injury* might well seem to preclude the possibility of using preemptive force, insofar as preemption by definition is using force prior to an actual attack. As we will see, however, Vitoria carefully extended the just war norms to provide a limited case for the use of preemptive

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[8] Francisco de Vitoria, *On Civil Power,* 3-44. Although beyond the scope of this project, Vitoria gives close attention to the issue of civil power, including its scope, its source, its purpose, the possibility of rebellion, and the best type of government. *On Civil Power,* an early discourse delivered in 1528, is his most concise writing on the subject. Since Vitoria's thought on the subject develops, however, the reader should supplement this discourse with other later writings, especially his commentary on Aquinas's *Summa,* particularly the treatise on law and the treatise on justice.

[9] Vitoria, *On the Law of War,* 303.

[10] Ibid., 304.

[11] Perhaps the most important statement of this response was Peter Ribadeneira's *Religion and the Virtues of the Christian Prince* (1595).

force. Although Vitoria was probably not the first person in the tradition to treat the subject, after Vitoria the issue shows up in all the major writers working within the tradition.

Vitoria's primary statement on the issue of preemptive force appears in his commentary on Aquinas's *Summa* II.II.64.7, "whether it is lawful to kill someone in self-defence."[12] In commenting on the *Summa,* Vitoria typically summarizes Aquinas's answer to the particular article and then addresses one or more "doubts" raised by the passage. These doubts are usually associated with particular individuals who have criticized Aquinas, or sometimes are questions suggested by the text that Vitoria, himself, raises. After stating the doubt, Vitoria anticipates possible answers and then provides his own.

One of the doubts that Vitoria raises in respect to the article on self-defense is: "If the Doctor's conclusion is true, i.e., that it is lawful to kill an attacking enemy, would it be lawful to anticipate him and seek to intercept and kill him?"[13] Vitoria seems to raise this "doubt" himself, since he does not cite anyone else. He then poses a hypothetical: "If I were a poor man, and did not have the wherewithal to hire guards and allies, and my enemy were a noble or rich man, and I know that he is recruiting guards and allies to kill me, then the question is whether it is lawful for me to preemptively kill him, 'to kill him before he kills me.'"[14] The hypothetical raises this primary moral question: can a person use force first, in self-defense, if the circumstances are such that failure to do so would deny the individual an effective defense?

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[12] Francisco de Vitoria, *On Homicide & Commentary on* Summa theologiae *II-II Q. 64.*
[13] Vitoria, *Commentary on II.II.64.7,* 201.
[14] Ibid., 202-203.

This 'doubt' primarily concerns the requirement of just cause. Recall that for Aquinas (and Augustine, as well), *just cause* has two related aspects: just cause understood as the *precipitating event* and just cause understood as the *legitimate end* in using force. The 'doubt' that Vitoria raises is perplexing because of the fact that it satisfies one aspect of just cause but seemingly not the other. In other words, a person in the situation Vitoria describes acts toward the legitimate end of self-defense—in the way that Vitoria describes the situation, a failure to respond at some point prior to the attack would otherwise effectively preclude an effective defense—but the injury or precipitating event has not yet occurred, understood as an actual physical attack. As we saw in Aquinas, the *injury* precedes and determines the *legitimate end*, making the situation especially problematic. At the same time, the lawfulness of using force toward the end of self-defense is one of the most basic precepts of the natural law, but this situation seems to deny its exercise. Vitoria concludes that natural law must allow the individual to use force first. "I have a right to defend myself and my life 'within the bounds of blameless defense.' But there is no other way to defend myself except to anticipate him."[15] He worries, however, that allowing such a right might open Pandora's box, giving "a great excuse to men everywhere to kill other men."[16]

Responding to this dilemma, Vitoria carves out a limited space for the use of preemptive force with two moves. His first move is to nuance the concept of *just cause.* He does this by rethinking the concept of *injury*, as the *precipitating event,* in terms of its relationship to the other aspect of *just cause,* which is the *legitimate end.* In the tradition,

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[15] Ibid., 203.

[16] Elsewhere he states: "it certainly is dangerous to speak so and too much license would be given to men everywhere to kill their enemies. Thus it is necessary to speak with moderation and caution lest scandals arise, and therefore, this should in nowise be preached." Ibid.

this concept of injury was understood in its most tangible sense: in the case of physical attack as an actual harm—a wound already inflicted or a blow being struck. Vitoria concludes that if there is such a case where a person would be harmed with no effective means to defend himself, then the concept of injury must be nuanced. Against the charge that the person acting in anticipation of an act under the scenario described is the *attacker,* Vitoria states: "this is not to attack, but rather it is to defend oneself. Indeed, the other is attacking when he is preparing himself to kill him," assuming that there is "no one means to defend oneself . . . except preempting the enemy."[17] Later writers will refer to an "incomplete injury," but as much is already implied by Vitoria's response. While the *precipitating event* is conceptually prior to the *legitimate end,* insofar as the injury gives rise to the end, here it is the end of self-defense that shapes the concept of injury.

The second way in which Vitoria nuances the concept of just cause, following this re-conceptualization of an *injury,* is to provide a standard for determining when this injury arises prior to the actual attack. In other words, if the concept of injury in some limited cases extends beyond the actual infliction of the harm, what is the standard for determining when this situation arises? Extending the example he mentions earlier, Vitoria says that a person would be justified in using force if, "supposing that he has journeyed to another city, he knows with scientific certitude that his enemy will seek him and kill him."[18] Vitoria is deliberately stringent: such a man "knows with scientific certitude," *scit certitudine scientiae,* that his enemy will attack him. This standard seems to require both *certainty of intent* and *sufficient means.* Although his standard is vague,

[17] Ibid.
[18] Ibid.

later writers in the tradition will provide a concrete list of tests that the potential victim must satisfy before the use of preemptive force.

In addition to nuancing the concept of *just cause* in these two ways, Vitoria also employs a separate but related *principle of necessity,* meant to ensure that the conditions of the hypothetical he poses are always present before the use of preemptive force. This principle appears both in the context of his discussion of preemption, as well as elsewhere in Vitoria's writings. He conceives of necessity in terms of "last resort," a requirement that the potential victim exhaust all reasonable alternatives prior to using force. The man Vitoria describes has "no other way" to defend himself. In developing his answer, he explains: "If the man has some [other] means to defend his life, such as flight to another city where, without a great loss of his property, he would be safe from his enemy, he should do that and not preemptively strike his enemy. For so to strike him would *not be a means necessary to defend himself* 'within the bounds of blameless defense,' since he could defend his life in another way."[19] Although this principle of necessity has special importance in the context of the preemptive use of force, it is also a more general principle that Vitoria raises in other contexts. For example, in discussing the use of force against the Indians who have violated a natural law right of the Spanish, Vitoria considers several alternatives that the Spanish must pursue prior to using force to secure their rights.[20]

Although Aquinas's moral theory anticipated the principle of *necessity,* he never explicitly developed it. As we saw earlier, Aquinas identified several circumstances in

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[19] Ibid. This principle does not require that the person relinquish a significant amount of his property to avoid using force. Elsewhere Vitoria states: "It is lawful to make armed resistance for the defence of property, as admitted in the decretal *Olim causam quae* (X.2.13.12) adduced by Nicolaus de Tudeschis." Vitoria, *On the Law of War,* 299.

[20] Vitoria, *On the Indians,* 154.

relation to the end of a human act, all of which might shape the moral status of the act. One of these circumstances was the question of *when* the action occurred, and I suggested in Chapter Three that the principle of necessity would fill this role. In Vitoria we see the tradition extended along these lines. *Necessity* for Vitoria is largely a question of *last resort*: even if one has just cause to use force, *when* the potential victim chooses to use such force relative to other alternatives one might pursue can shape the moral status of the act. Moreover, as Aquinas's moral theory also suggested, this circumstance is relative to the end of the action. Where the end of using force is self-defense, *necessity* asks whether this particular use of force is necessary to achieve that end.[21]

While Vitoria develops this account of preemption in terms of individual self-defense, it seems that he meant it to apply to the commonwealth, as well. In one or two places he suggests a right of preemption belonging to the political community. In his commentary on the *Summa,* II.II.64.7, a marginal gloss on the discussion of the preemptive use of force states: "It is lawful for the emperor for the defense of the republic to get a start on war, if he knows that another hostile king is conspiring against his kingdom. Therefore, in the same way, it is lawful for me to get a start on my

[21] Although the principle of proportionality is not the focus of our inquiry, this principle also shows up throughout Vitoria's writings. In his commentary on II.II.64.7, Vitoria follows Aquinas's account of self-defense, but says that this act "is to be understood 'within the bounds of blameless defense.' That is to say, that I not do more to defend myself than is necessary, so that if it is enough to use a shield, a sword should not be drawn or other weapons used." Ibid., 193. In his discourse *On the Indians,* Vitoria says that the Spanish can use force if attacked by the Indians, "but so far as possible with the least damage to the natives, the war being a purely defensive one." 154. Later he argues that the Spanish have a natural law right to preach the Gospel, and may use force to secure this right where no other reasonable alternatives avail, "but always with a regard for moderation and proportion, *so as to go no further than necessity demands . . .* and with an intent directed more to the welfare of the aborigines than to their own gain." Ibid., 158 (emphasis added). One of Vitoria's primary criticisms of the Spanish in the New World is that they grossly violated this norm. Ibid. Aquinas had explicitly developed this principle in this context, with the same requirement: a person can use no more force than is necessary to achieve the legitimate end, here, of self-defense. Presumably, Vitoria meant this general principle to apply in the context of preemptive uses of force, as well.

enemy."[22] In fact, the analogy here is working in the opposite direction: from the political community to the individual. Furthermore, in *On the Law of War,* Vitoria alludes to the possibility of using force first in some cases. Answering the question whether a Christian can wage war, Vitoria states in his final proof for the affirmative that many "good men" "have not only protected their homes and property with defensive war, but also punished the injuries committed *or even planned* against them by their enemies."[23] Whether or not the same standard applies in the case of states, Vitoria does not determinatively answer, and the standard in both passages is quite vague. The marginal gloss seems to equate the two acts. At the same time, Vitoria often qualifies the use of force by states in comparison to individuals on account of structural differences between the two and because much more is at stake for the political community.[24]

Vitoria's account of preemption is a careful extension of the just war tradition, drawing on the theory of a moral act laid out by Aquinas. Specifically, Vitoria nuances the concept of just cause and posits the principle of necessity as a requirement that the potential victim exhaust all reasonable alternatives prior to using preemptive force. Although later proponents in the tradition rework the moral theory lying behind it and nuance the standard that Vitoria develops, his account becomes the benchmark of the just war tradition on preemption from this point forward.

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[22] Vitoria, *Commentary on II.II.64.7,* 234n246.
[23] Vitoria, *On the Law of War,* 298 (emphasis added).
[24] Following Aquinas, Vitoria says that only the political community, and not an individual, has a right to use force toward the end of restoring goods taken or to punish the enemy so as to deter future harm. *On the Law of War,* 300. Whereas the commonwealth must be "self-sufficient," an individual has the protection of the political community for these other two ends.

II. The 'Just Fear' Alternative: Machiavelli and Gentili

At the same time as Vitoria and other neo-Thomists were extending the just war tradition to address the issues of conquest in the New World, the Lutheran heresy, and preemption, a rival tradition on the use of force, holding a permissive account of preemption, was emerging. The advocates of this alternative view were deeply formed by humanism. By the end of the sixteenth-century this alternative tradition was mainstream, discussed not only among Renaissance scholars but also in the courts of princes. As mentioned earlier, numerous works appeared discussing the idea of *ragion di stato* and there was widespread interest in the writings of Tacitus, a classical heir to this tradition. What brings together all the proponents of this tradition is not a shared theory, but a general agreement that the political community has broad rights to use preemptive force. With Hobbes, the tradition received a theoretical foundation that would prove quite enduring, showing up in nineteenth-century treatises on international law and alive today. The common thread that runs from Hobbes forward is the general belief that while justice governs relations among citizens, it does not do so among states. The theorists I examine in this section do not devote much attention to developing an underlying theory, as Hobbes later would. Rather, their focus is on statecraft.

A. *Machiavelli*

Although the raison d'état account of war has roots in antiquity, the most important representative in the early modern period is Niccolò Machiavelli (1469-1527). No account of this tradition can overlook Machiavelli, if only because he is its most notorious proponent (with Hobbes registering a close second) and because he put the

tradition's claims in their starkest form. Prior to writing his most important work, *The Prince,* Machiavelli served in the government of the Florentine republic from 1498-1512.[25] The republic collapsed in 1512 and the Medici family, in exile during the years of the republic, were restored to their position of power. Florence took on the character of most northern Italian city-states at that time, governed by a single, strong ruler. Having lost his position in government, Machiavelli wrote *The Prince* in 1513, hoping to gain approval of the new ruler and a position of influence. In writing *The Prince,* Machiavelli joined a long tradition of advice books for princes going back at least to the thirteenth-century. At the same time, *The Prince* was also a repudiation of the kind of advice given by previous humanist writers. Earlier humanists had often written for the citizens of the republic and championed the virtues necessary to sustain liberty. Since most of the early republics had fallen to strong rulers, Machiavelli was not alone in addressing the prince rather than the citizenry. He did tread a new path, however, in rejecting the medley of classical and Christian virtues that his predecessors had commended to the noble ruler.

Machiavelli does not hedge his starting premise. "Many have imagined republics and principalities that have never been seen or known to exist. However, how men live is so different from how they should live that a ruler who does not do what is generally done, but persists in doing what ought to be done, will undermine his power rather than maintain it. . . . Therefore, a ruler who wishes to maintain his power must be prepared to act immorally when this becomes necessary."[26] Supporting this premise is a deeply pessimistic view of human nature. "For this may be said of men generally: they are

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[25] For an overview of this history, *see* Skinner, *The Foundations of Modern Political Thought Vol. I: The Renaissance;* Rubinstein, "Italian Political Thought, 1450-1530."
[26] Machiavelli, *The Prince,* 55.

ungrateful, fickle, feigners and dissemblers, avoiders of danger, eager for gain."[27] Pursuing the traditional virtues, Machiavelli argues, will only lead to loss of power. He does not commend always acting contrary to the traditional virtues. In fact, the prince will at minimum want to retain an appearance of these virtues when possible. "One must be sufficiently prudent to know how to avoid becoming notorious for those vices that would destroy one's power . . . . Yet one should not be troubled about becoming notorious for those vices without which it is difficult to preserve one's power."[28]

Machiavelli joins to this prudential account of politics a broad permission—even encouragement—to use force prior to being attacked if deemed beneficial for the political community. "Wise rulers . . . have to deal not only with existing troubles, but with troubles *that are likely to develop,* and have to use every means to overcome them. For if the first signs of troubles are perceived, it is easy to find a solution; but if one lets trouble develop, the medicine will be too late."[29] He praises the Romans who knew that "wars cannot really be avoided but are merely postponed," and therefore chose to start them at a time and place to their advantage.[30]

The parallels with Augustine's anthropology are obvious: both espouse a strong account of the human capacity for injustice. Why then do they offer such different, even rival, accounts of preemption and war in general? One of the most important explanations surely concerns the purpose of the political community. Remember that for Augustine the political community is a remedial institution meant to secure a minimal "earthly peace," or order, which requires basic goods like health, shelter, liberty, a space

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[27] Ibid., 59.
[28] Ibid., 55.
[29] Ibid., 10-11 (emphasis added).
[30] Ibid., 11.

for meaningful relationships, and the possibility of property, among other goods. The political community is limited to using force in its external relations to only those cases where it is threatened by some *injury*. Augustine's understanding of war, then, begins with a normative account of the political community and the purpose it serves. Machiavelli's account of the kingdom and its purpose bears very little resemblance to Augustine's. Above all else, the prince wields the power of his position to secure and enlarge his own glory. This end is reflected in his permissive account of preemptive force and war more generally. In his *City of God,* Augustine finally condemned the pursuit of *gloria,* both one's own and that of the polis.

While Machiavelli does not directly target the just war tradition or its proponents, *The Prince* is a clear repudiation of its norms and the moral claims that shape it. Assuming the legitimacy of a prince maintaining and increasing his power, Machiavelli sweeps away the more traditional limits on the use of force as detrimental to this end. He confesses that his "advice would not be sound if all men were upright," but because they are "treacherous" the prince has no other choice.[31] His conclusions are brazenly prudential: rather than constructing a new morality, the impression is left that the ruler often operates outside of morality. While *The Prince* earned him much notoriety, it did not earn him a position in the new government. Nonetheless, his ideas proved enormously influential.

B. *Gentili*

As the writings of Alberico Gentili (1552-1608) show, similar conclusions were sometime reached even by those who employed the language and forms of the just war

[31] Ibid., 62.

tradition. Born on the Italian peninsula, Gentili trained for law at the University of Perugia where he was immersed in humanist sources and methods. His family's Protestantism, however, required that he make a hasty escape in 1581, eventually to settle in England. Gentili taught law at Oxford and became Regius Professor of Civil Law in 1587, a chair he kept for almost twenty years. His most important work was *On the Law of War,* first published in 1588.

Throughout the work, Gentili employs the basic concepts of the just war tradition to accomplish his task. The law of nations is nothing but the law of nature. "We hold the firm belief that questions of war ought to be settled in accordance with the law of nations, which is the law of nature."[32] This law of nature is a "portion of the divine law," implanted within all rational beings.[33] Although sometimes dim, obscured by human weakness, it is nonetheless accessible to those who faithfully seek it. Rightly discerning this law is crucial, as it defines the basis of just relations in the international realm.

Gentili follows the just war tradition in identifying the circumstances under which a commonwealth can justly go to war. Like the theologians before him, he raises the central question of "whether wars can be just," and places his own thought in the company of Augustine and his heirs.[34] A just war always requires *just cause.* "It is brutal to proceed to murder and devastation when one has suffered no injury."[35] He cites Augustine in support and chides the barbarian in Tacitus's *Annals* who proclaims that "might makes right." The principle of necessity understood as last resort appears

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[32] Gentili, *On the Law of War*, 5.
[33] Ibid., 7-8.
[34] Ibid., 28.
[35] Ibid., 34.

throughout the text.[36] He proposes that the political community should first seek to settle its disputes through an arbiter, prior to using armed force.

In two different ways, however, Gentili shows himself to be more the heir of Machiavelli than Augustine. First, he rejects the longstanding belief within the just war tradition that a war cannot finally be just on both sides. In *On the Indians,* Vitoria had said that one side to the conflict might fight out of "invincible ignorance," but finally justice fell only on one side. Vitoria and others extended this logic to rule out wars for the sake of empire, since in such wars one side would fight a just war to extend its territory and the other side would fight a just war of defense.[37] Gentili gestures toward a "purest and truest form of justice," perhaps in the mind of God, but concludes: "we aim at justice as it appears from man's standpoint." In terms of human justice, he concludes that in nearly all wars both sides fight justly. The practical effect is to deny justice a role in limiting the occasion and conduct of war.

In one telling passage, Gentili takes up the same example as Augustine and offers an opposing moral assessment. Augustine had argued that the Romans fought unjustly against the Sabines, the latter seeking to recover the women taken by the Romans.[38] Gentili concluded that the Romans fought a just war of defense.[39] Gentili's account of defense foreshadows the expansive right of "self-preservation," that will play such an important role for Hobbes and those who follow after him.

Second, and most important for our purposes, Gentili adopts a broadly permissive account of preemption. He raises the issue in a chapter entitled, "Defense on the Grounds

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[36] "Whereas there are two modes of contention, one by argument and the other by force, one should not resort to the latter if it is possible to use the former. The necessity which justifies war . . . arises when one is driven to arms as the last resort." Ibid., 15.
[37] Vitoria, *On the Indians,* 155; Vitoria, *On the Law of War,* 302, 312.
[38] Augustine, *City of God,* II.17.
[39] Gentili, *On the Law of War,* 59.

of Expediency." He explains: "I call it a defence dictated by expediency, when we make war through fear that we may ourselves be attacked. No one is more quickly laid low than one who has no fear, and a sense of security is the most common cause of disaster . . . Therefore . . . those who desire to live without danger ought to meet impending evils and anticipate them."[40] Gentili cites numerous authorities in support of his position. Noticeably absent are any sources from the just war tradition; rather, he turns almost exclusively to classical sources. He presents his permissive account as if it was common intuition, citing several proverbs: "'Meet a disease half-way', 'check it as the start, otherwise remedies are prepared too late.' 'Neglected fires always spread'" and so on.[41]

The standard Gentili offers is broadly permissive: the attacking state must have a "just fear." In the case of individual self-defense, he states: "Now a just fear is defined as the fear of a greater evil, a fear which might properly be felt even by a man of great courage."[42] This standard, however, is too stringent for the political community. Rather, he says that it can justly use preemptive force "even when it may happen that no damage is done; even though there is no great and clear cause for fear, and even if there really is no danger, but only a legitimate cause for fear."[43]

Gentili describes this strategy of preemption as a necessary tool for maintaining a "balance of power" among the rulers of Europe. "Since there is more than one justifiable cause for fear, and no general rule can be laid down with regard to the matter, we will merely say this . . . namely, that we should oppose powerful and ambitious chiefs."[44] The modern origin of the "balance of power" concept traces to the city-states of Renaissance

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[40] Ibid., 61.
[41] Ibid., 62.
[42] Ibid.
[43] Ibid., 63.
[44] Ibid., 64.

Italy, and Gentili is one of the earliest theorists to apply the same concept to the emerging European state system.[45] He praises the policies of Lorenzo de' Medici, who sought to align the other city-states against the threatening power of Venice and calls for the same action in his day against Spain.[46] He concludes the chapter, "a defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible."[47]

Gentili's ideas on preemption were almost certainly passed to Francis Bacon (1561-1626), his contemporary and friend. In Bacon's 1624 discourse, *Considerations Touching a War with Spain,* Bacon urged England to make war with Spain, which was growing in power. He invoked the same standard—"wars preventive upon just fears are true defensives"—and urged such a war to maintain a balance of power in Europe.[48] Bacon openly attacked the neo-Thomists as "fitter to guide penknives than swords" for their insistence that every use of force must follow an *injury.* "A just fear is justified for a cause of an invasive war, though the same fear proceed not from the fault of the foreign state to be assailed."[49]

Gentili's invocation of the language and forms of the just war tradition, and its natural law foundation, is finally misleading. Although Gentili does not deny a just moral order from a divine perspective, such is of no use in governing relations among states. The practical effect of his position is to shelter from moral scrutiny the decisions sovereign rulers make about going to war. Moreover, his "just fear" standard gives

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[45] *See* Luard, *The Balance of Power,* 1-7; Sheehan, *Balance of Power,* 29-36.
[46] "Is not this even to-day our problem, that one man may not have supreme power and that all Europe may not submit to the domination of a single man? Unless there is something which can resist Spain, Europe will surely fall." Ibid., 65
[47] Ibid., 66.
[48] Bacon, *Considerations Touching a War with Spain,* 202, 208.
[49] Ibid., 205.

warrant for the broad use of preemptive force. In a candid moment, Gentili signals his debt to Machiavelli. Acknowledging the latter's notoriety, Gentili concludes: "If I give a just estimate of his purpose in writing, and if I choose to reinforce his words by a sounder interpretation, I do not see why I can not free from such charges the reputation of this man who has now passed away. . . . There is no doubt that Machiavelli is a man who deserves our commiseration in the highest degree."[50]

By the close of the sixteenth-century, two rival traditions on the use of force were firmly in place. Vitoria and the neo-Thomists who followed him ensured the transmission of the just war tradition into the modern period. At the same time, Machiavelli, Gentili and others advocated a competing tradition that espoused a much more permissive account, allowing for the use of preemptive force on the basis of mere fear. As Gentili's use of just war language and forms suggests, moreover, the two traditions would not proceed untouched by each other. This fact is seen most clearly in the work of Grotius, who extended Vitoria's account of preemption, but at the same time prepared the way for Hobbes.

[50] Gentili, *On Embassies,* 156.

Chapter 5

The Modern Turn: Grotius and Hobbes

In the modern period, Hugo Grotius (1583-1645) and Thomas Hobbes (1588-1679) were the most important theorists in the evolving traditions on war and preemption. Grotius passed along the just war criteria governing the use of preemptive force, borrowing from Vitoria but also significantly advancing the standard. He developed several tests for determining when just cause arises absent an actual attack, moving beyond Vitoria's single requirement that the agent acting preemptively "knows with scientific certitude" that the other will attack. Turning to the separate requirement of *necessity,* Grotius is the first significant theorist to include a requirement of *imminence,* although he limits its application to the context of individual self-defense. At the same time, Grotius develops a strikingly new theory underlying these concrete norms. His theory marks the decisive turn from medieval to modern natural law.

Hobbes borrows from this theory, but in support of a highly permissive account of preemption. Persons in a state of nature have no moral commitments to one another. Rather, at the center of Hobbes's theory is the singular right of self-preservation. Acting preemptively against another is a highly rational response for persons who live outside the social contract. Since states exist in a state of nature with each other, the same is true of international politics. With this account, Hobbes provides a theoretical basis for the permissive tradition on preemption that proves remarkably enduring, showing up in some form down to the present.

I. Grotius: Advancing and Recasting the Just War Tradition

Grotius was a native of the Netherlands, where he lived until 1594. At the University of Leyden he studied philology, history, theology, and law, before earning a doctorate of law at the University of Orleans, France. His own religious convictions were Protestant and perhaps closest to Dutch Arminianism, and he was a strong advocate of tolerance for religious minorities. He served two different capacities in public office before political enemies accused him of treason and had him placed in prison. In 1621 Grotius escaped to Paris where he lived in exile for the next decade. He devoted the first three years in Paris to writing *On the Law of War and Peace,* which he published in 1625. Eventually he was appointed Swedish ambassador to France in 1634. This office placed Grotius in a critical position, where he negotiated an agreement by which France entered the final stage of the Thirty Years War as an ally of Sweden. He held this position until his death in 1645, only a few years prior to the signing of the Treaty of Westphalia.

A. *Preemption and the Development of Practical Norms*

Grotius's account of preemption is a clear and robust development of the project Vitoria began.[1] Grotius was well-versed in the writings of the neo-Thomists, and especially Vitoria whom he references extensively. He develops his account as an overt

[1] Richard Tuck places Grotius wholly on the side of those espousing a permissive account of war. "The view taken of Grotius in the conventional histories of international law badly misrepresents his real position. Far from being an heir to the tradition of Vitoria and Suarez . . . he was in fact an heir to the tradition Vitoria most mistrusted, that of humanist jurisprudence." Richard Tuck, *The Rights of War and Peace,* 108. Tuck bases this conclusion almost entirely on an interpretation of Grotius's view of international punishment and the implications this view has for the treatment of native peoples. On this count Grotius and the Salamancan School are on opposite sides, and Grotius explicitly rejects their position. *On the Law of War and Peace,* II.XX.40, 506. However, Tuck strangely gives no attention to Grotius's view of preemption, an issue he mentions in regard to other figures he considers and a place where Grotius is clearly extending the thought of the neo-Thomists.

rejection of *fear* alone as a legitimate basis for preemption.[2] Citing Gentili in a marginal note, Grotius concludes: "Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it becomes too great, may be a source of danger."[3] He again aims his criticism at Gentili when he remarks, "those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived."[4]

Grotius begins by considering preemption in the context of individual self-defense. I quote the seminal passage at length.

> V.—War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed. 1. The danger, again, must be immediate and imminent in point of time. . . . [I]f the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled . . . . 2. Further, 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. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences.[5]

Like Vitoria, Grotius thinks of an injury as beginning earlier than the actual blow. When he extends this discussion to public wars, he refers to "a wrong action commenced but not yet carried through."[6] He devotes a large portion of the above passage trying to articulate several standards for deciding when an injury occurs (or is "commenced") prior to the actual attack. Both Vitoria and Grotius look for something objective rooted in the

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[2] The primary passages are: II.I.5, 173; II.I.17, 184; and II.XXII.5, 549.
[3] Grotius, *On the Law of War and Peace,* II.I.17, 184.
[4] Ibid., II.I.V, 173.
[5] Ibid., II.I.5, 173-175.
[6] Ibid., II.I.16, 184.

nature of the threat, not in the subjective mood of the person considering using force, i.e., *fear.*

Grotius moves beyond Vitoria in identifying several criteria for determining when someone has the requisite certainty that an enemy will attack. Implied in the passage above, and stated directly in his discussion of public war, is a requirement that the person considering using force discern the *certain intent* of the enemy to attack. By itself, *intent* is never a sufficient ground for the use of preemptive force, but it is a necessary ground.[7] Also included in the passage above is the requirement that the potential aggressor have *sufficient means* to attack. The enemy is one who has "weapons." In addition, although Grotius does not say it directly, the examples he offers suggest that there must be some kind of *active preparation* on the part of the potential aggressor. The aggressor not only chooses an end (*intention*), and has the means to reach that end, but also has done something active toward that end: "he has formed a plot, or is preparing an ambuscade, or . . . is putting poison in our way, or . . . is making ready a false accusation and false evidence."[8] Finally, the attack must also be *imminent.* This requirement is a measure of temporal proximity. In the example provided, the enemy "seizes weapons in such a way that his intent to kill is manifest." There is some outward act that initiates the attempt to harm such that the actual harm is close at hand. As the language suggests, the potential victim may not in fact discern the fulfilling of these three requirements over a stretch of time; they may all come together with one single action and signal an intent to harm that one did not previously realize. While the requirements are distinct, an *imminent* attack

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[7] In his chapter "On Punishment," Grotius writes: "Purely internal acts . . . cannot be punished by men . . . . However, this does not prevent internal acts, in so far as they influence external ones, from being taken into consideration, not on their own account, but in the light of the external actions which receive from them the quality of their desert." Ibid., II.XX.18, 487. For his explanation of why this is the case, *see* II.IV.3, 221.
[8] Ibid., II.I.5, 174.

almost always entails the two other requirements, as well.[9] Although Vitoria's standard may have entailed *certain intent* and *sufficient means,* he did not require that the threat be *imminent.*

In addition to considering the concept of just cause in the context of a coming harm, Grotius also articulates the independent principle of *necessity*: a person cannot use force to stop a coming danger that satisfies just cause if some reasonable alternative to the use of force exists. Grotius states the principle often as a general limitation on the use of force,[10] and it is evident in this passage, as well. It shows up in his consideration of using force where one or more of the above requirements are not met. The examples he mentions—someone who has "formed a plot" or is "putting poison in our way"—are all examples where the potential attack falls short of being *imminent.* In these situations Grotius generally rules out the use of preemptive force, with the important exception that a person can act where she is certain that she cannot avoid the danger in any other way. The operative principle here is *necessity.* "Generally, in fact, the delay that will intervene affords opportunity to apply many remedies." The idea is that where the threat is not imminent, it is almost always the case that there is some other reasonable alternative for neutralizing the threat. Although we return to it in Part III, note that for Grotius *imminence* serves as a proxy for *necessity*.

Grotius next considers preemption in the context of the state. "What has been said by us up to this point, concerning the right to defend oneself and one's possessions,

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[9] An attack could not be *imminent* if the potential attacker lacked the *sufficient means.* It is conceivable, however, that a person could face an imminent threat by a person who did not intend to harm. On this count, Grotius still sanctions the use of force for self-defense. "Even if the assailant be blameless . . . the right of self-defence is not thereby taken away; it is enough that I am not under obligation to suffer what such an assailant attempts." Ibid., II.I.3, 173.

[10] For example, speaking of *private wars* of self-defense, Grotius writes: "If an attack by violence is made on one's person, endangering life, and no other way of escape is open, under such circumstances war is permissible, even though it involve the slaying of the assailant." II.I.3, 172.

applies chiefly, of course, to private war; yet it may be made applicable also to public war, if the differences in conditions be taken into account."[11] The differences Grotius has in mind are two. First, the individual right of self-defense remains only as long as the individual lacks effective protection from the public powers. Where this protection is available and effective, the right lapses. Second, the individual's right to use force extends only to self-defense; where an injury has already occurred only the state has the right to use force to vindicate the victim's rights and punish the aggressor. Lacking a higher authority, however, states must take these functions upon themselves.

Grotius goes on to explain that a state's right to punish injuries committed against it allows for a use of force absent the presence of an imminent threat. "Hence for [states] it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance . . . by inflicting punishment for a wrong action commenced but not yet carried through."[12] Grotius does not explain why the standard for states is more lenient, though one reason is likely the need to create a credible deterrent. Deterrence is one of the primary goals of punishment for Grotius and it is the exclusive task of the state, not of individuals.[13]

In the primary section on the state's use of preemptive force, Grotius makes again the point that certainty of the aggressor's intent alone is never sufficient.[14] The intent must be "revealed by some fact," some action that is meant "to bring this about." The act

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[11] Ibid., II.I.16, 184.
[12] Ibid. I am not certain why Grotius explains this expanded right of preemption for states in terms of punishment rather than self-defense. The most plausible explanation is that self-defense and punishment, in Grotius's mind, come quite close to each other at certain points. Grotius identifies three legitimate ends for punishment: for the good of the aggressor; for the good of the person harmed; and for the good of all people. Ibid., I.XX.6-9, 469-478. In regard to the second end, the good of the person harmed, Grotius has in mind the need to create an effective deterrent to keep the person from harming the victim in the future. Ibid, I.XX.8, 472.
[13] Ibid., II.XX, 8-9, 472-478.
[14] Ibid., II.XX.39, 503.

must be "planned and initiated."[15] It seems that the other criteria are all relevant: *certain intent; sufficient means;* and *active preparation.* However, in addition to these requirements and absent an imminent threat, Grotius adds the additional requirement of *magnitude of harm.* Not all threats in the civil realm that are planned and initiated are punished, but only those that are serious, and so the same in the international realm. "Crimes that have only been begun are therefore not to be punished by armed force, unless the matter is serious, and has reached a point where certain damage has already followed from such action, even if it is not yet that which was aimed at; or at least great danger has ensued."[16] Therefore, the measures of *magnitude of harm* are twofold: either the occurrence of some actual harm, though short of the final end which the aggressor intends, or the presence of "great danger," an admittedly vague term.

We are now in a position to see why Grotius so forcefully rejects the idea that *fear* is a sufficient basis for the preemptive use of force. He makes the point succinctly: "We have said above that fear with respect to a neighbouring power is not a sufficient cause. For in order that a self-defence may be lawful it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour, but also regarding his intention."[17] The "just fear" argument of Gentili wrongly looks only to the requirement of *sufficient means* to find just cause for going to war, absent knowledge of the potential aggressor's *clear intent* and perhaps *active preparation.* The problem with using force at this moment, moreover, is that it violates the requirement of necessity: the world we live in cannot operate under the principle of "kill or be killed" and a state can never exhaust all reasonable alternatives where it lacks even knowledge of the potential

[15] Ibid., II.XX.39.
[16] Ibid., II.XX.39, 504.
[17] Ibid., II.XXII.5, 549.

enemy's intent.[18] "That the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us."[19]

B. *Grotius and Modern Natural Law Theory*

Underlying Grotius's account of preemption is a moral theory that in some ways marks a striking departure from the Thomistic account that had reappeared forcefully in the sixteenth-century with the Salamancan School. Grotius is often taken to mark the beginning of a distinctly modern natural law theory. To understand this shift that Grotius represents, it is important to understand at least two developments that confronted Grotius in the early years of the seventeenth-century.[20]

One important development is the rise of skepticism in the sixteenth-century, fueled by both struggles over the means of religious knowledge in the Reformation and a retrieval of classical skeptic sources in the Renaissance.[21] This reappearance of skepticism was enormously influential. Perhaps more than anything else, it explains the obsession with epistemology that marked modern philosophy. Finding a foundation for knowledge was especially important for a defense of morality, against the skeptics who described persons as driven by self-interest alone. This skepticism threatened the case for a just and universal moral order, accessible to and binding on all persons and governing

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[18] Ibid., II.I.5, 174.
[19] Ibid., II.I.17, 184.
[20] *See* Haakonssen, "Divine/Natural Law Theories in Ethics," 1317-1357; Hochstrasser, *Natural Law Theories;* Tuck, "The 'Modern' Theory of Natural Law," 199-119; Schneewind's chapter on Grotius is also helpful, *The Invention of Autonomy,* 58-81. On the more particular but related issue of the development of natural rights from medieval to modern times, two works representing the debate between continuity and discontinuity are Tierney, *The Idea of Natural Rights,* and Tuck, *Natural Rights Theories.*
[21] The seminal work on the rise of skepticism is Popkin, *The History of Scepticism.* On this same subject, *see also* Larmore, "Scepticism," 1145-1192; and Schneewind, *The Invention of Autonomy,* 42-57.

the relations between states. In *On the Law of War and Peace* (1625), Grotius explicitly takes up this defensive task.[22]

As a result, modern natural law theory began with the burden of finding a firm foundation to defeat the moral skeptic. Grotius and those who follow after him begin with the task of finding a single point of understanding that all humans can accept, and from which other moral truths follow. They find this shared point of understanding in an account of human nature. Unlike the Thomistic account, however, which was a deeply metaphysical account of the self and its ends, the modern theorists offer a minimal account of human nature, which they believe all persons can share.

A second important development was the intensity of conflict among parties who did not share the same religious commitments. Two events were especially important: the seventeenth-century confessional wars that divided Europe along religious and national lines and the wars that took place in the context of exploration in the New World. Grotius sought a concept of natural law as a set of unchanging and universal moral norms that all people could access, simply on account of their nature as rational beings. This achievement, he and many others hoped, could mediate the conflicts in Europe and abroad. Increasingly throughout the modern period natural law theory was lifted from a robust theological framework that accounted for the self and its ends, and

[22] In the Prolegomena to his work, he identifies the Greek skeptic Carneades as exemplifying his main opponent. "Carneades . . . was able to muster no argument stronger than this, that, for reasons of expediency, men imposed upon themselves laws, which vary according to customs . . . ; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice." Grotius, *On the Law of War and Peace,* 10-11.

placed in a framework that relied on only a minimal account of human nature that was thought to be something upon which all persons could agree.[23]

Grotius applied his new account of natural law to restraining the use of force. He outlines the main features of this account in his Prolegomenas to *On the Indies* (1604)[24] and *On the Law of War and Peace* (1625). There he lays out several principles of the natural law as he conceives it. He defines the law of nature as "a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity, and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[25] Although Grotius does not use the term, he elucidates these laws by employing the concept of a "state of nature," a concept that proved influential for several centuries.[26] On the basis of the laws governing individuals in a state of nature, Grotius also discerns those laws governing relations between political communities. They are in a state of nature with one another, and are bound by the same or similar laws as individuals in a state of nature. This

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[23] Grotius also speaks of the *jus gentium,* or law of nations. This law "has received its obligatory force from the will of all nations, or of many nations." Ibid., I.I.XIV.1, 44. This law of nations is in most cases more permissive than natural law, for example allowing soldiers to kill women and children of the enemy. Ibid., III.IX., 468-649. While this allowance in the law of nations releases the perpetrator of such acts from punishment, the act is still censured under the natural law.

[24] Grotius always referred to this work as *De Indis,* and not until the nineteenth-century did an editor assign it the name, *On the Law of the Prize.* The Dutch East India Company had sought for some time to form trade routes to Asia, which at that time the Portuguese dominated. In 1603, a captain affiliated with the Company seized a Portuguese ship loaded with wealth. A Dutch court held a hearing on the issue and decided that the Company could keep most of the profits from the goods. Several Mennonite shareholders, however, opposed the decision to retain the goods as unjust. The Company entreated Grotius to write a defense of the decision and the result was *De Indis,* dealing with the moral-legal status of prize and booty. He argues that the Company has a right to the goods because it acquired them in a just war as judged by the natural law. Except for a chapter on maritime law, the apology was not published until 1864. While Hobbes and others following Grotius would not have read it, the Prolegomena to this work sheds much light on the sometimes confusing introduction to his much more widely read work, *On the Law of War and Peace.*

[25] Grotius, *On the Law of War and Peace,* I.I.1-, 38-39.

[26] Quentin Skinner argues that the "state of nature" as a heuristic device is present in the political writings of the neo-Thomists and that the notion of political authority requiring consent had a long history within the Thomistic tradition, that was developed further in the sixteenth-century by the Salamancan School. Skinner, *The Foundations of Modern Political Thought, Vol. II: The Reformation,* 154-166.

analogy becomes the central tool for thinking about the relations between states into the nineteenth-century, and was employed by both rival traditions.

Recall that one of Grotius's aims is to provide a basis for moral knowledge against the challenge of skepticism. As Grotius understands them, the skeptics argued that nature impelled all persons to act toward their own self-interested ends, threatening the possibility of justice between persons or between states.[27] His strategy is to accept the antecedent of this claim, but deny its consequent. In other words, persons do act from self-interest, but this conclusion does not preclude a just moral order.

His starting point is the "fundamental law" of nature: God has created all things to pursue their own interest, with the result that persons have a right above all else to seek their own preservation.[28] He describes this fundamental law of self-preservation in terms of two laws: "First, that It shall be permissible to defend [one's] life and to shun that which threatens to prove injurious; secondly, that It shall be permissible to acquire for oneself, and to retain, those things which are useful for it."[29] These laws are "indisputable axioms," observable among humans and animals alike and shared by the skeptics.

Following after this fundamental law of nature is what Grotius calls the "law of sociability."[30] In the earlier work, he describes it in terms of two negative duties: "Let

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[27] Grotius, *On the Law of War,* 11.

[28] Grotius, *On the Indies,* 9-11; "Every animal from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it. . . . [Hence] it is one's first duty to keep oneself in the condition which nature gave to him." *On the Law of War and Peace,* 51.

[29] Grotius, *On the Indies,* 10.

[30] In his Prolegomena to *On the Law of War and Peace,* Grotius begins his response to Carneades, the representative skeptic, with his principle of sociability, without any mention of the prior law of self-preservation. In answering the question "whether it is ever lawful to wage war?" in Book I, Chapter 2, however, he begins with the "first principle of nature," self-preservation, and then turns to the second law of sociability. Richard Tuck offers a convincing explanation of the confusion surrounding these laws in the second work, as compared to the first. Tuck begins by noting that the second edition of *On the Law of War*

no one inflict injury upon his fellow. [And] let no one seize possession of that which has been taken into the possession of another."[31] Grotius finds this second law in both human instinct and reason. He describes sociability as a "trait," an "impelling desire for society" or a "social impulse," and one of "the affections shared in common with other creatures."[32] At the same time he locates it in "the sovereign attribute of reason," and describes it as something worked out in "the power of discrimination."[33] Grotius also thinks that this law of nature is the basis both for a universal society among all persons, "the brotherhood of man," and the particular political communities that persons eventually formed at some point in the past. "Among the traits characteristic of man is an impelling desire for society, that is, for the social life—not of any and every sort, but peaceful, and organized according to the measure of his intelligence."[34] The sometimes "mutual accord of nations" is a sign of this sociability in the realm of inter-state relations.[35]

Related is Grotius's notion that human sociability is the basis for *justice*, which governs not only relations within a state, but also relations between persons *qua* persons, and by extension between states as well. Describing human sociability, he writes: "now, men agree most emphatically upon the proposition that it behoves us to have a care for

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and Peace, the edition most often read today, includes a heavily reworked introduction in which sociability is given a much more prominent role than it has in an earlier edition, which is closer to the structure that appears in *On the Indies.* Tuck explains this change not as a shift in thought, but toward a much more practical concern in his own life. When he rewrote the introduction in December 1631, Tuck explains, Grotius was seeking to return to the Netherlands from where he was exiled, and wanted his work to be more appealing to the Calvinist culture of his opponents who were worried about the implications of a system that started with self-interest as its fundamental law. Tuck, *The Rights of War and Peace,* 94-102.

[31] Ibid., 13. In *On the Law of War,* 11-13, 52-54, Grotius conceives of it as one law of sociality.

[32] Grotius, *On the Law of War,* 11; *On the Indies,* 11, 14. Children, he notes, even before they develop their rational faculties seem drawn to others by pure sympathy. *On the Law of War,* 12.

[33] Grotius, *On the Indies,* 11; *On the Law of War,* 13.

[34] Grotius, *On the Law of War*, 11.

[35] Grotius, *On the Indies,* 12.

others . . . . Here we have the starting-point of that justice, properly so called."[36] As a product of both human reason and a natural impulse that God has implanted in all persons, this justice is not contingent upon the agreement of persons to form a society and the laws they pass, but applies to all persons, and all states, on the grounds of nature. For Grotius, justice in a state of nature is concerned exclusively with negative duties.[37] As we will see, positive duties, or what Grotius calls "mutual aid," show up only in the civil state where persons have freely bound themselves to others.

This law of sociability is Grotius's response to the skeptic, for whom "might makes right." After announcing this law in *On the Law of War,* Grotius concludes: "Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded."[38] His argument seems to be twofold. First, if Grotius is correct it is clear that the skeptic is defeated because it stands as an empirical fact that humans do not just seek their own; that in their actual actions, people act in ways that are good for others. Sociability is grounded in nature. A second way his argument might respond to the skeptic, moreover, is by showing that the skeptic's own starting premise of self-interest leads to sociability. Grotius is difficult to interpret at this point, but it seems that he holds both explanations.[39]

Introducing the law of sociability in the earlier work, Grotius says that God willed this second law because humans could not preserve themselves without it. He then

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[36] Ibid.

[37] One exception may be a duty to punish evil. In *On the Indies,* Laws 5 and 6 state: "First, Evil deeds must be corrected; secondly, Good deeds must be recompensed." 15.

[38] Grotius, *On the Law of War,* 11. He reaches the same conclusion in *On the Indies:* "The foregoing observations show how erroneously the Academics—those masters of ignorance—have argued in refutation of justice, that the kind derived from nature looks solely to personal advantage, while civil justice is based not upon nature but merely upon opinion; for they have overlooked that intermediate aspect of justice which is characteristic of humankind." 13.

[39] "That law [of sociability] is not founded on expediency alone." *On the Law of War,* 17.

quotes Seneca: "'You must needs live for others, if you would live for yourself.'"[40] Earlier, Grotius seems to conclude that justice is rooted in the paramount impulse that persons have to preserve their own beings. Immediately after introducing the law of self-preservation, Grotius states: "consequently, Horace should not be censured for saying, in imitation of the Academics, that expediency might perhaps be called the mother of justice and equity. For all things in nature . . . are tenderly regardful of self, and seek their own happiness and security."[41] The implication is that the skeptic's starting premise, carried through on its own, leads to justice. Persons need something like justice if they are going to hold on to property, produce goods, and have everything else that one needs to survive and flourish.[42] Where self-preservation and sociability conflict, the former must win.[43] Moreover, individuals and states are by right their own judges of what is necessary for their self-preservation.[44] For a later theorist like Hobbes, the door was left open for a theory in which sociability, and the justice claims it engenders limiting the use of force, is swallowed up by self-preservation.

On the basis of these two laws, Grotius moves to an account of the formation of the state and finally the relations between states. I only mention briefly his account of the

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[40] *On the Indies,* 11.
[41] Ibid., 9.
[42] At the least, Grotius is clear that the natural impulse of self-interest reinforces sociability. "The state which transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace." Grotius, *On the Law of War,* 16. Even the "great states," which seem self-sufficient, need other states. "There is no state so powerful that it may not some time need the help of others outside itself." Ibid., 17.
[43] Law Thirteen states: "In cases where the laws can be observed simultaneously, let them all be observed; when this is impossible, the law of superior rank shall prevail." Ibid., 29. The superior law, he explains, is determined in part by its *purpose*, and "from the standpoint of purpose, that which concerns one's own good is preferred to that which concerns another's good." Ibid.
[44] Grotius, *On the Indies,* 29. This notion of every individual's right to be her own judge outside of civil society is evident in one of Grotius's earliest writings. "In the event that recourse to one's overlord is not possible, the individual receives a sort of a right to pass judgment, that is, as far as is necessary for the just execution of his rights. This does not come about by the force of positive law, but of natural law . . . . and there can be no doubt that if we imagined a state existing before positive law, then this would be the prevailing situation." Grotius, *Commentarius in Theses XI,* 245.

origin of the state.[45] After a period of existing in what later theorists would call the "state of nature," persons decided to form smaller units, the *respublica,* both for security and to realize the benefits of cooperative efforts. The formation and continuation of the *respublica* is contingent upon the individual consent of those persons who enter into it.[46] Although he does not use the language, the idea present is that of a *social contract.* Within civil society, justice takes on a different shape, including not only negative but also positive duties to others.[47] By entering civil society, individuals largely give up their right in the state of nature to be their own judge and enforce their own claims.[48]

States, moreover, retain the same or similar rights that individuals had prior to the formation of the *respublica.* This conception of states remaining in a "state of nature" is shared among all of Grotius's heirs. Like individuals, states remain judges in their own cases, but for Grotius they are not free from the bounds of justice.[49] The law of nature, and particularly the law of sociability, is binding on all persons, and by extension all states, even in war. Accordingly, the central norm is negative and requires that one state not commit an 'injury' against another and respect its rightful property claims.

On this foundation of modern natural law theory, a significant reworking of its medieval ancestor, Grotius places the traditional just war criteria as restraints on the use

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[45] The account in *On the Law of War and Peace,* 14-15, is muddled and thin. A much fuller account is found in *On the Indies,* 19-20.

[46] Grotius holds a notion of *tacit consent* among those not party to the original contract. *On the Indies,* 20.

[47] He makes the contrast apparent: "First, individual citizens should not only refrain from injuring other citizens, *but should furthermore protect them,* both as a whole and as individuals; secondly, Citizens should not only refrain from seizing one another's possessions . . . *but should furthermore contribute individually both that which is necessary to other individuals and that which is necessary to the whole.*" Grotius, *On the Indies,* 21 (emphasis added).

[48] "Even though the precepts of nature permitted every individual to pronounce judgment for himself and of himself, it is clear that all nations deemed it necessary to institute some orderly judicial system, and that individual citizens gave general consent to the project. For the latter, moved by the realization that otherwise their own weakness would prevent them from obtaining their due, bound themselves to abide by the verdict of the state. . . . [Therefore] no citizen shall seek to enforce his own right against a fellow citizen, save by judicial procedure." *On the Indies,* 24.

[49] Ibid., 27-28; *On the Law of War,* 19.

of force. Here he is especially indebted to Vitoria, who he cites in *On the Indies* and *On the Law of War and Peace* 126 times.[50] The entire work is structured around the basic framework of the just war doctrine. Book I deals with legitimate authority, in terms of the evolving concept of state sovereignty. Book II deals with the just causes for war. Finally, Book III addresses just means for fighting a war.

In sum, Grotius significantly advances the just war account of preemption, providing a clear set of criteria for determining when just cause arises absent an actual attack, as well as introducing the requirement of *imminence* into the tradition as a limitation on individual self-defense. At the same time, he transforms the moral theory underlying these concrete norms, marking the move from medieval to modern natural law theory. For Grotius, the fundamental law is *self-preservation,* followed by a law of *sociability,* which creates justice claims that exist outside the social contract, binding states in their relations with one another. The preeminence he assigns to *self-preservation,* however, leaves open the door for Hobbes to develop a very different account of preemption.

II. Hobbes: Preemption and the "State of Warre"

Thomas Hobbes (1588-1679) is the single most important figure in the permissive tradition on the use of preemptive force, first given voice in the early modern period by Machiavelli and Gentili. His intellectual debts are many, especially to Grotius in spite of the fact that they espoused very different accounts of preemption and the use of force. Hobbes provided a worked out theory to support a permissive account of preemption,

[50] Borschberg concludes that Vitoria is the single most important influence on Grotius. Borschberg, "Hugo Grotius: a Profile of His Life," 48n145. In his early and short *Commentarius in Theses XI,* he cites Vitoria twelve times, more than any other person. Ibid., 48-52.

drawing on the modern natural rights theory that Grotius so forcefully dispersed into the intellectual air of the seventeenth-century. For Hobbes, it is fair to say, persons—and by extension, states—are compelled by both passion and reason to act preemptively against others. Preemption is the practical and inevitable outcome of the "state of nature." Despite being scorned as an atheist, relativist, and defender of absolutism by his contemporaries and later generations of scholars,[51] his ideas about the self and the state managed to exert enormous influence. As we will see, his notion of states standing in a naturally lawless state of nature will continue to resonate in the major international law treatises of the nineteenth-century.

A. *Hobbes's Background*

Hobbes received a typical humanist education, taking his B.A. from Oxford in 1608.[52] In the early years of his career, prior to publication of *On the Citizen* (1642) and *Leviathan* (1651), Hobbes had considerable contact with Bacon and perhaps Gentili, as well. He likely heard Gentili lecture at Oxford, and he worked as an occasional assistant to Bacon.[53] In addition, Hobbes's earliest works show sustained attention to the classical sources, including Tacitus, that were so influential on the *raison d'état* theory of statecraft that blossomed in the seventeenth-century.[54] Hobbes's first publication was a

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[51] For a survey of the reactions to Hobbes's ideas by his contemporaries, *see* Mintz, *The Hunting of Leviathan.*

[52] For a summary of Hobbes's life, *see* Malcolm, "A Summary Biography of Hobbes."

[53] Richard Tuck goes so far as to suggest that Hobbes prepared Bacon's 1624 letter to Prince Charles, *Considerations Touching a War with Spain. The Rights of War and Peace,* 127. Even if Tuck is wrong on this count, their practical conclusions on the use of preemptive force were quite similar.

[54] In 1620 an original collection of essays anonymously published contained a number of essays written by Hobbes's charge, the younger Cavendish. One of the essays included in the collection was "A Discourse upon the Beginning of Tacitus," which emphasized the power of opinion and encouraged the ruler to manipulate the beliefs of his subjects. The work bears several similarities to Hobbes's later works and may well have been written by him. Malcolm, "A Summary Biography of Hobbes," 19.

translation of Thucydides into English. He was also almost certainly familiar with the writings of Grotius, as well.[55]

Hobbes's own political commitments were with the royalists, and his political philosophy gives a strong defense of absolute monarchy. His first work on political theory, *The Elements of Law* (completed in 1640), took up this task, which he continued in his later political writings during and shortly after the civil war.[56] Unlike Grotius, Hobbes's political thought focuses on civil rather than international concerns. Entwined in the events of his day, this comes as no surprise. Nonetheless, his thought has clear implications for the international realm, which he at times makes explicit.

B. *The Hobbesian Theory of the Self and State*

Like Grotius, Hobbes develops his conception of the state and, with much less attention, the relationship between states, by beginning with an account of the self. He begins with a fairly developed moral psychology.[57] Borrowing the new science, Hobbes thinks of humans as clusters of atoms in space, constantly moving on the basis of desire and aversion. He employed this notion of constant desire at the center of life to reject explicitly Thomistic accounts of desire resting in some final good.[58] He goes on to

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[55] A copy of *On the Law of War and Peace* was included among the books in the Cavendish library during the 1620s, while Hobbes lived there. A library catalog lists the book in Hobbes own hand. *See* Hamilton, "Hobbes's Study and the Hardwick Library," 450. Tuck notes that Hobbes was closely associated with a group in the 1630s known as the 'Tew Circle' who were enthusiastic readers of Grotius. Tuck, *Philosophy and Government 1572-1651,* 272, 305.

[56] This work was an English summary of a larger three-part work he was completing, the last part which was the later *On the Citizen.*

[57] For a helpful overview of Hobbes's moral psychology, *see* Schneewind, *The Invention of Autonomy,* 82-87.

[58] While Grotius also rejected the deeply teleological account of the self present in the medieval natural law tradition, Hobbes's rejection is explicit. "The Felicity of this life, consisteth not in the repose of a mind satisfied. For there is no such *Finis ultimus,* (utmost ayme,) nor *Summum Bonum,* (greatest good), as is spoken of in the Books of the old Morall Philosophers. Nor can a man any more live, whose Desires are at

explain that the reason for this endless desire is a constant need to secure the fulfillment of one's desires for the future.[59] As we will see, this insatiable thirst for security lies behind the *fear* that characterizes the state of nature, making it a state of war.

Hobbes then takes up several different kinds of desire, one of which is the desire for power.

> In the first place, I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth only in Death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more. And from hence it is, that Kings, whose power is greatest, turn their endeavours to the assuring it at home by Lawes, or abroad by Wars."[60]

Power is the means to provide the security that persons need to ensure fulfillment of their future desires. With this account of human desire, the stage is set for a drama of unceasing conflict.[61]

Prior to forming political communities, this self exists in a "state of nature." Hobbes seems to be the first writer to assign this term to a concept that was already

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an end." Hobbes, *Leviathan,* XI.47, 70. For Aquinas, achieving one's *summum bonum,* only complete in the next life, was a state of repose and the complete fulfillment of one's desires.

[59] "Felicity is a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later. The cause whereof is, That the object of mans desire, is not to enjoy once onely, and for one instant of time; but to assure for ever, the way of his future desire. And therefore the voluntary actions, and inclinations of all men, tend, not onley to the procuring, but also the assuring of a contented life." Ibid.

[60] Ibid.

[61] As Schneewind observes, this account of the human desires rules out the possibility of persons naturally united toward a common good, as was the case with Aquinas. Schneewind, *The Invention of Autonomy,* 85. Although Hobbes is often described as a modern heir to Augustine on account of his realist account of human nature, the relation is limited. For Hobbes, conflict follows by necessity from his moral psychology, lacking any sense of moral fallenness that pervades Augustine's account. Hobbes expressly rejects that the state of war is a result of human sin. Denying that this natural condition is one of fallenness, he says: "The Desires, and other Passions of man, are in themselves no Sin." *Leviathan,* XIII.62, 89. Moreover, Hobbes is ultimately optimistic about the power of humans, acting according to reason, to escape this condition. In the Dedication of *On the Citizen,* Hobbes states: "If the patterns of human action were known with the same certainty as the relations of magnitude in figures, ambition and greed, whose power rests on the false opinions of the common people about right and wrong, would be disarmed," and he goes on to blame the failure of past philosophers to "employ a suitable starting point" to teach the knowledge of truth. P. 5.

present in Grotius: the condition in which persons live outside of the political community.[62] The state of nature for both Grotius and Hobbes is not simply a heuristic device, but also a present reality. Hobbes often points to the New World in its unsettled parts as an example of a present-day state of nature.[63] More important for our purposes, like Grotius, Hobbes conceives of states as existing in a state of nature. "But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons, and their eyes fixed on one another."[64] His description of what an individual can rightfully do in a state of nature is by extension the same for the state, which is nothing but an "Artificiall Man."[65]

Like Grotius, Hobbes asserts that the fundamental right of persons in a state of nature is one of self-preservation. The origin of this right is spelled out most clearly in *On the Citizen:*

> Amid so many dangers . . . we cannot be blamed for looking out for ourselves; we cannot will to do otherwise. For each man is drawn to desire that which is Good for him and to Avoid what is bad for him, and most of all the greatest of natural evils, which is death; this happens by a real necessity of nature as powerful as that by which a stone falls downward. It is not therefore absurd, nor reprehensible, nor contrary to right reason, if one makes every effort to defend his body and limbs from death and to preserve them. And what is not contrary to right reason, all agree is done justly and of *Right.* For precisely what is meant by the term *Right* is the liberty each man has of using his natural faculties in accordance with

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[62] "On the basis therefore of the foundation I have laid, I show first that the condition of men outside civil society (the condition one may call the state of nature) is no other than a war of all men against all men." *On the Citizen,* Preface.14, 12.

[63] "It may peradventure be thought, there was never such a time . . . . and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America* . . . have no government at all; and live at this day in that brutish manner." *Leviathan,* XIII.63, 89.

[64] Ibid., XIII.63, 90.

[65] Ibid., Introduction.1, 9.

> right reason. Therefore the first foundation of natural *Right* is that *each man protect his life and limbs as much as he can.*[66]

This fundamental right follows in two steps. First, Hobbes claims that persons are compelled by an exceedingly strong force to seek their own individual good toward the end of self-preservation. As we have already seen, nature has implanted this desire in each person. Hobbes describes the operation of this desire in terms of a physical law of nature. It is a "real necessity."[67] The result, as observed earlier, is something close to inevitable conflict. Second, Hobbes reasons that if nature has created this inescapable drive in persons, then persons must have a natural right to act toward their self-preservation. The goal of self-preservation becomes the primary and most important end toward which persons are oriented.

Although Grotius placed limits on this right of self-preservation, Hobbes boldly concludes that the right of self-preservation is nearly unlimited. He follows Grotius in asserting that individuals are the first and final judges of whether an act follows from this right, a claim following from his belief in the natural equality of persons and the absence of a higher judge.[68] In *Leviathan* he reaches the conclusion that persons have a right to all things with the claim that "there is nothing [a person] can make use of, that may not be a help unto him, in preserving his life against his enemyes."[69] Since only the individual can judge whether her actions contribute to her preservation, there is little or no room to question or object to another's actions on the grounds that they are not

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[66] Hobbes, *On the Citizen,* I.7, 27.
[67] Although Hobbes speaks differently at times, here there is not a resemblance but an identity between the desires and physical laws. Although I will not pursue this aspect of Hobbes's thought now, this strong notion of necessity follows from Hobbes's materialism and consequent determinism: minds are nothing more than small particles, atoms, that follow the same general laws of the universe as do observable objects. For more on this subject, *see* Schneewind, *The Invention of Autonomy,* 88-92.
[68] "By natural law one is oneself the judge whether the means he is to use and the actions he intends to take are necessary to the preservation of his life and limbs or not." Hobbes, *On the Citizen,* I.9, 27.
[69] Hobbes, *Leviathan,* XIV.64, 91.

necessary for self-preservation.[70] Persons in a state of nature have a right not only to another's material goods, but even his life. "In [a state of nature], every man has a Right to every thing; even to one anothers body."[71]

For Grotius, the right of self-preservation was not nearly as broad, but was limited by his law of natural sociability. Hobbes, however, openly rejects such a law, even Grotius's minimal law with its negative duties of non-malfeasance.[72] Hobbes accepts that the promptings to form society, political or otherwise, are from nature; what he rejects, however, is that these promptings create any moral commitments among persons qua persons, except perhaps to leave the state of nature. Even in forming society, it seems, persons act only out of self-interest. "All society, therefore, exists for the sake either of advantage or of glory, i.e. it is a product of love of self, not of love of friends."[73] The result for Hobbes is that the fundamental right of self-preservation is the beginning and end of morality in the state of nature. There is no normative principle of sociability that mitigates this absolute right. The state of nature is a state of one absolute right, but seemingly no obligations.[74] Grotius's suggestion that sociability derived from self-preservation left the door open for this position developed by Hobbes.

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[70] At one point Hobbes suggests that a very narrow segment of actions could never, on any interpretation, be deemed to contribute to one's self-preservation. "I cannot see what drunkenness or cruelty (which is vengeance without regard to future good) contribute to any man's peace or preservation." Hobbes, *On the Citizen,* III.27, 54.

[71] Hobbes, *Leviathan,* XIV.64, 91. "In the pure natural state, or before men bound themselves by any agreements with each other, every man was permitted to do anything to anybody, and to possess, use and enjoy whatever he wanted and could get." *On the Citizen,* I.10, 28.

[72] The key passage is *On the Citizen,* I.2, 21-25.

[73] Ibid., 24. Commentators on Hobbes dispute whether or not he subscribed to some form of psychological egoism. Although this passage seems to suggest that he does, it is enough for my purposes to hold that self-interest is the primary, if not the sole, operative motive in human behavior.

[74] Tuck finds a certain minimal sociability in Hobbes, close to Grotius's negative duties. He reasons that recognizing one's own right of self-preservation leads one to recognize a similar right on the behalf of others that creates a duty to respect that right. *On the Law of War and Peace,* 132. I find neither the passages he cites nor the explanation he offers convincing, for reasons already laid out in my interpretation.

C. *The Natural State of War*

The result is that the state of nature is a state of war. He famously concludes: "Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man."[75] If not one of actual fighting, this state is marked by insecurity and a disposition to fight. The primary reason for this outcome is the "continuall feare" that persons have toward one another.[76] This fear is the principal reason persons are compelled by reason to leave the state of nature and enter into a social contract with others.[77]

A person in the state of nature acting according to reason is compelled to protect himself through the use of force, and especially the use of *preemptive force.* In perhaps the most telling passage for our purposes, Hobbes states: "And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by forces, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him: And this is no more than his own conservation requireth, and is generally allowed."[78] Hobbes is careful to point out that the will to strike first in anticipation of future harm is characteristic not only of the malevolent but also the modest man. "Even if there were fewer evil men than good men, good, decent people would still be saddled with the constant need to watch, distrust,

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[75] Hobbes, *Leviathan,* XIII.62, 88.
[76] Ibid. "The cause of men's fear of each other lies partly in their natural equality, partly in their willingness to hurt each other. Hence we cannot expect security from others or assure it to ourselves." Hobbes, *On the Citizen,* I.3, 25-26.
[77] *See, e.g.,* Hobbes, *On the Citizen,* I.13, 30. *Leviathan,* XIV.64-65, 92; *On the Citizen,* II.3, 34.
[78] Hobbes, *Leviathan,* XIII.61, 88. "Feare of oppression, disposeth a man to anticipate, or to seek ayd by society: for there is no other way by which a man can secure his life and liberty" Ibid., II.49, 71-72.

anticipate and get the better of others, and to protect themselves by all possible means."[79] The reason is that using preemptive force against others is the rational response of a person in the state of nature. Recall that nothing more characterizes persons in the state of nature than *fear,* and fear not of an imminent attack but of possible future attacks. He carefully defines fear as "any anticipation of future evil."[80] In this situation, striking first is the rational response. As rational, it is also a right.

The rational actor in the state of nature, moreover, does not follow any of the careful tests laid down by Grotius, but is willing where prudence allows to attack anybody who might now or in the future threaten him. Following the analogy between persons and states that Hobbes makes throughout his political writings, this same permissive right to act preemptively characterizes states in their relationships to other states. Like individuals, the sovereign acts toward his own self-interest, namely, self-preservation, and has a natural right to attack anyone and everyone who might pose a threat. Although the route to this conclusion traverses a carefully worked out theory of individuals and states, a theory largely absent in earlier writers, the practical conclusions about the use of preemptive force are the same as for Machiavelli, Gentili, and Bacon. Invoking the language of Gentili and Bacon, Hobbes concludes that "justified fear" grants a right to strike first. [81] It is fair to say that for Hobbes, a nearly unlimited right to the preemptive use of force is the rational and final outcome for persons and states existing in state of nature. More than anything else, the state of nature is a state where actors rightfully strive to strike first.

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[79] Hobbes, *On the Citizen,* Preface to the Readers, 11.
[80] Ibid., I.2, 25.
[81] *On the Citizen,* XIII.7, 144.

In this state of nature there is no justice. "To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall virtues."[82] This conclusion is not surprising, insofar as we have seen that the state of nature is a state of absolute individual right absent any obligations to other persons. In this condition, the measure of right is simply interest.[83] "Nothing that one does in a purely natural state is a wrong against anyone, at least against any man. . . . For injustice against men presupposes Human Laws, and there are none in the natural state."[84]

As these passages suggest, justice is possible only subsequent to the social contract. Why this outcome? Most often Hobbes points to the absence of political institutions. Only with a "common power" over otherwise equal persons does the fundamental right of self-preservation rationally permit consideration of claims coming from other persons.[85] Another explanation is apparent in Hobbes's political writings, however, and that is the idea that individuals are under no obligations to other persons until they take such upon themselves through consent. Hobbes starts with the solitary,

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[82] Hobbes, *Leviathan,* XIII.63, 90. For a passage on the absence of justice in the relations between states, *see* Ibid., XXVIII.165, 219.

[83] "In the state of nature the Measure of *right* [*ius*] is Interest [*Utilitas*]." Hobbes, *On the Citizen,* I.10, 28.

[84] Ibid. Persons can sin against the law of nature in at least two ways. First, by claiming to act toward the end of one's self-preservation, but not believing it so. Ibid., I.10, 29. Acting purely for the sake of cruelty is one example. Ibid., III.27, 54. Moreover, it would seem that persons all sin against the law of nature by refusing to leave the state of nature. In both cases, these sins are not against other persons, since only individuals can be judge of their own actions. If persons do sin by refusing to leave the state of nature, Hobbes would differ from Kant who as we will see says that a person or state that refuses to leave the natural state injures other persons or states.

[85] "Injustice actually there can be none, till the cause of such feare be taken away; which while men are in the naturall condition of Warre, cannot be done. Therefore before the names of Just, and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants." Hobbes, *Leviathan,* XV.71, 100-101.

rights bearing individual stripped of any moral commitments to other persons. His concept of *justice* is tailored to this conception of the self, and is limited only to covenants into which persons enter. The "Originall of Justice," he says, "is the making of Covenants."[86] Any claims laid upon the self prior to its consent would somehow violate this sovereign self—and by extension, the sovereign state. Where the first argument is perhaps best thought of as a practical limitation disallowing justice outside of the social contract, this second argument is a *moral* limitation.

Grotius and Hobbes reach nearly opposite conclusions about the use of preemptive force. Grotius significantly advances the standard set out by Vitoria, providing a set of concrete tests for when just cause ripens prior to an actual attack and including *imminence* as a measure of temporal proximity in the case of individual self-defense. For Hobbes, "Anticipation" (i.e., preemption) is the rational response in a state of nature. With Hobbes comes an enduring theoretical foundation for the permissive tradition on the use of preemptive force. Despite their opposing conclusions on preemption, I have also suggested that Hobbes's underlying theory owed a substantial debt to Grotius. Both start with the self in a state of nature carrying the fundamental right of self-preservation. Although Grotius places justice in the state of nature through his principle of sociability, its seeming dependence on self-preservation threatens to destroy it. With Hobbes, this threat is realized. For those who could not accept this conclusion, the task was to put sociability—and international justice—on a solid foundation.

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[86] Ibid.

Chapter 6

Evolution and Eclipse: From Pufendorf to Hall

From the publication of *Leviathan* in 1651 through the end of the nineteenth-century, the story of the moral tradition limiting the use of preemptive force is a narrative of evolution and eclipse. The most important early response to the "Hobbesian heresy" was made by Samuel Pufendorf (1632-1694). While accepting the general theoretical lines staked out by Grotius, Pufendorf reached for a robust notion of sociability to restrain the use of force. Although Pufendorf was widely read for several decades, the story of the just war tradition after him is largely one of eclipse. Vattel marks the transition, and with Rousseau and Kant, what can appropriately be called the "Hobbesian tradition" on the use of force was incorporated into mainstream political theory. As international law blossomed into a distinct discipline in the nineteenth-century, international law theorists such as Edward Hall borrowed Hobbes's idea of an international state of nature to explain the sovereign state and the nearly unlimited right of war that states enjoyed during that time. The eclipse, however, was not total. Profound changes took place in international law in the twentieth-century, regarding the *jus ad bellum* generally and also regarding the use of preemptive force. As we have already seen, the *locus classicus* for the contemporary norms on the use of preemptive force is the *Caroline* affair, and the standard penned by then-Secretary of State, Daniel Webster.

I. Pufendorf's Just War Restatement

After Grotius, the most important theorist in the just war tradition to develop the norms governing the preemptive use of force was Samuel Pufendorf (1632-1694). While innovative in many ways, Pufendorf's writings on the relationships among states and the use of force fall firmly within the lines of modern natural law theory set out by Grotius. His project is an attempt to forge a defensible alternative to Hobbes's state of war, with its nearly unlimited right to use preemptive force. Toward this end he attempts to retrieve and reshape Grotius's principle of sociability. Enormously influential in his day and for several decades after his death, Pufendorf transmitted the Grotian standard on the use of preemptive force in a concise and clear formulation that would ensure its vitality for the future.

Pufendorf was born in Saxony, the son of a Lutheran pastor.[1] He entered the University of Leipzig to study theology in 1650, just two years after the Treaty of Westphalia brought a lasting end to the Thirty Years War. Westphalia was perhaps the single most important event shaping the political context in which Pufendorf wrote.[2] Two of the most important reasons for the pan-European war were the attempt to halt the hegemonic ambitions of the Hapsburg dynasty, whose territory had spread across Europe, and the clash between Lutherans, Calvinists, and Catholics among the German principalities. The treaty prepared the way for Europe to develop into a collection of independent states, equal among themselves and sovereign in their internal affairs. In part, it was thought that this arrangement would prevent another grasp at European

[1] For background on Pufendorf's life *see* the editor's introduction to Samuel Pufendorf, *On the Duty of Man and Citizen,* xiv-xxxvii; as well as the editor's introduction to the Carnegie Endowment publication, Samuel Pufendorf, *On the Law of Nature and Nations,* 11a-62a.

[2] For an historical account of the conflict *see* Asch, *The Thirty Years War.* A helpful summary of the significance of these events for the formation of the international social order is Adam Watson, *The Evolution of International Society,* 169-197.

hegemony. Pufendorf's career included service for both the Swedish and later Prussian governments, as well as many years as a professor of natural and international law, first at the University of Heidelberg and later at the University of Lund. His two most important works for our purposes are *On the Law of Nature and Nations* (1672) and *On the Duty of Man and Citizen According to Natural Law,* a compendium to the much larger work that he published one year later and which was widely circulated in European universities.

A. *Sociability, Justice, and the State of Nature*

While I focus on Pufendorf's attempt to rescue the just war tradition and its limited allowance for the use of preemptive force from the menace of Hobbes and the weaknesses in Grotius, it is important to see first that Pufendorf shares their same language, which is unmistakably that of modern natural law theory.[3] Like Grotius, Pufendorf attempts to find a law capable of governing the relations between states that transcends confessional and cultural differences (assuming certain minimal beliefs about God: namely, that God exists and obligates).[4] With stark resolve, Pufendorf bluntly concludes that the *jus gentium*, or law of nations *is* the natural law. His account of the

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[3] For secondary sources on Pufendorf's moral theory as it relates to his account of the relations between states, *see* Dufour, "Pufendorf," 561-568; Haakonssen, *Natural Law and Moral Philosophy,* 35-46; Tuck, *The Rights of War and Peace,* 140-165; Schneewind, *The Invention of Autonomy,* 118-140.

[4] In his Preface to *On the Duty of Man and Citizen According to Natural Law,* Pufendorf identifies three sources whereby a person can know her duty: reason, civil laws, and divine revelation. These three sources point to three distinct disciplines: natural law, civil law, and moral theology. Each of these disciplines has its own method of obtaining knowledge, and the integrity of each requires keeping them separate. Grotius had made a similar distinction, but not with near the same rigidity and in practice he often brought "the principle of charity" into his discussion of natural law. The primary reason Pufendorf insists on this separation is his notion of natural law as a science that can deliver certain results. Preface, 6-9.

natural law starts with a description of the self in a state of nature. In a passage that could have been peeled from the pages of *Leviathan,* Pufendorf writes:

> Someone living in natural liberty does not depend on anyone else to rule his actions, but has the authority to do anything that is consistent with sound reason by his own judgment and at his own discretion. And owing to the inclination which a man shares with all living things, he must infallibly and by all means strive to preserve his body and life and to repel all that threatens to destroy them . . . and since in the natural state no one has a superior to whom he has subjected his will and judgment, everyone decides for himself whether the measures are apt to conduce to self-preservation or not.[5]

Self-preservation is a basic feature of human nature and each person must be the final judge of her actions in a state of nature. This state is one of "war, fear, poverty, nastiness, solitude, barbarity, ignorance, savagery."[6] Persons are compelled by reason and their natural inclinations to seek security in civil society, which they do through a social contract.[7] In forming a commonwealth, the citizens are collectively one person in a state of nature.[8] Finally, like Grotius and Hobbes, Pufendorf analogizes this condition of the self in a state of nature to the present condition of states, one with another.[9]

Pufendorf insists that God's will, and not mere advantage, produces the obligating force of natural law. This insistence was in part an attempt to make possible justice claims between persons qua persons, outside the social contract.[10] To discern this natural law Pufendorf looks to human nature. Like Hobbes, he adopts an empirical approach that observes the "nature, condition, and desires of man," and from these observations arrives

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[5] Ibid., I.8, 117.
[6] Ibid., I.9, 118.
[7] For an overview *see* Pufendorf, *On the Duty of Man,* V.1-9, 132-134.
[8] "A state so constituted is conceived as one person [*persona*], and is separated and distinguished from all particular men by a unique name; and it has its own special rights and property . . . . Hence a state is defined as a composite moral person." Pufendorf, *On the Duty of Man,* V.10, 138.
[9] "Commonwealths and their officials may properly claim for themselves the distinction of being in a state of natural liberty." Pufendorf, *On the Law of Nature,* II.II.4, 163.
[10] Both Pufendorf and Hobbes are voluntarists; that is, both think that *will,* rather than *intellect* or rational nature more generally is the source of law, its content and obligation. While Pufendorf located the source of law in God's will, Hobbes placed it in the will of the sovereign. Hence, for Hobbes law arises only in the civil state established by the social contract.

at the fundamental law of nature.[11] Like both Grotius and Hobbes, Pufendorf begins with the observation that all humans, like animals, seek their own preservation.[12] This natural tendency of humans gives rise to a right of self-preservation to "secure and do everything that will lead to their preservation," within the limits of the natural law.[13] At the same time human dependency points to the "fundamental law of nature," which for Pufendorf is the duty of sociability.

> It is quite clear that man is an animal extremely desirous of his own preservation, in himself exposed to want, unable to exist without the help of his fellow-creatures . . . . For such an animal to live and enjoy the good things that in this world attend his condition, it is necessary that he be sociable, that is, be willing to join himself with others like him, and conduct himself towards them in such a way that, far from having any cause to do him harm, they may feel that there is reason to preserve and increase his good fortune.[14]

From this fundamental law of nature follows all the other laws of nature: those things which necessarily work to the sociable attitude Pufendorf takes as commanded by God, and those things that destroy it are forbidden. He departs from Grotius in concluding that this sociability requires some measure of mutual aid. It is not sufficient merely not to harm another person. "A man has not paid his debt to the sociable attitude if he has not thrust me from him by some deed of malevolence or ingratitude, but some benefit should be done me, so that I may be glad that there are also others of my nature to dwell on this earth."[15]

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[11] *On the Law of Nature,* II.III.13, 201-203.
[12] A person "has the greatest love for himself, tries to protect himself by every possible means, and tries to secure what he thinks will benefit him, and to avoid what may in his opinion injure him." Ibid., 205.
[13] Pufendorf, *On the Law of Nature,* II.II.3, 158.
[14] Ibid, II.III.15, 207-208.
[15] Pufendorf, *On the Law of Nature,* III.III.1, 346. Pufendorf limits obligatory mutual aid to those acts which confer on another something that could be of use to oneself, but which can be conferred without any appreciable loss. He cites as examples a state allowing a foreigner use of its water or granting safe passage across the state's land. Ibid., III.III., 346-378.

Importantly, this law of sociability governs in the state of nature. In other words, Pufendorf arrives at a certain minimal morality, including negative but also some positive but imperfect duties, between persons. "By a sociable attitude we mean an attitude of each man towards every other man, by which each is understood to be bound to the other by kindness, peace, and love, and therefore by a mutual obligation."[16] The natural law, which is foremost a law of sociability, works to limit the right of self-preservation within the state of nature.[17]

Pufendorf attempts to reclaim a minimal and universal justice between persons—and by extension, between states—by presenting the law of sociability as harmonious with, but finally independent of, the right of self-preservation. On the one hand, he argues that sociability is harmonious with the right of self-preservation. Hobbes notoriously concluded that persons living outside the threat of a common power live in a state of fear that prompts them, above all else, to act preemptively against others who pose a present or even possible future threat. Pufendorf disagrees. "That equality of strength, which Hobbes proposes, is more likely to restrain the will to do harm than to urge it on. Surely no man in his senses wants to fight with a person as strong as he is, unless he is under some necessity."[18] Against the claim of incongruity, Pufendorf asserts

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[16] Ibid., II.III.15, 208.

[17] Ibid., II.II.3, 158. At the same time, Pufendorf holds that one's right of self-preservation and the willingness of some to harm others must temper this sociability. "As it is the duty of an honest man to be content with his own, and not to injure others . . . so it is the part of a cautious man . . . to such a degree only to believe all men are his friends as to realize that they may nevertheless at any moment become his enemies, and to maintain peace with them on the understanding that it may soon break out into war." Ibid., II.II.12, 177; *see also* II.V.6, 273. The result is that the state of nature and the civil state are brought much closer than appears in Grotius, and certainly in Hobbes.

[18] Ibid., II.II.8, 170. Pufendorf supports this conclusion by turning to observations that show the state of nature is not always a state of war. "It is not proper to oppose a state of nature to a social life, since even those who live in a state of nature can, and should, and frequently do, lead a mutually social life." Ibid., II.II.5, 166. He looks especially at the international realm: "It is contrary to the judgment of all nations to maintain that even those states which are joined by treaties and friendship are in a mutual state of war." Ibid., II.II.8, 171.

that sociability is necessary for one's preservation. On the other hand, not only is sociability harmonious with the right of self-preservation, but it is also finally independent of it. Its origin lies in human nature.

> Although by the wisdom of the Creator the natural law has been so adapted to the nature of man, that its observance is always connected with the profit and advantage of men . . . yet, in giving a reason for this fact, one does not refer to the advantage accruing therefrom, but to the common nature of all men. For instance, if a reason must be given why a man should not injure another, you do not say, because it is to his advantage, although it may, indeed, be most advantageous, but because the other person also is a man, that is, an animal related by nature, whom it is a crime to injure.[19]

While Grotius gave reason to believe that self-preservation was the ultimate principle, Pufendorf is firm that sociability is finally independent from it.

B. *Pufendorf on Preemption*

This theory of universal justice justifies the limits Pufendorf places on preemption.[20] His account follows the analysis first laid down by Vitoria and continued by Grotius, beginning with the concept of *just cause.* First, the concept of *injury* is extended to include some cases where the actual attack has not yet occurred. Pufendorf refers to the notion of an "incomplete injury"[21] and says in some cases that the "aggressor" is not the first one to use force, but the one who was first preparing to do harm.[22] Second, Pufendorf closely follows Grotius in providing criteria for determining when *just cause* ripens prior to the actual attack. As with Grotius, these criteria differ in the case of an individual in civil society or in the case of individuals or states in a state of

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[19] Ibid., II.III.18, 214.
[20] Pufendorf offers his account of preemption in two main passages: *On the Law of Nature,* II.V.6-9, 272-278 (preemptive uses of force by individuals); and Ibid., VIII.VI.1-5, 1292-1296.
[21] Ibid., VIII.VI.5, 1296.
[22] Ibid., II.V.6, 274-275.

nature. Rejecting the criterion of *fear* as a sufficient standard, Pufendorf says generally that for any use of preemptive force, "cases of innocent defence commonly require a danger that is at hand, and, as it were, right upon one, and they do not allow a mere suspicion or uncertain fear to be sufficient cause for one person to attack another."[23] If the requirements of just cause are satisfied, then the person or state considering the use of preemptive force must meet a second and independent requirement of necessity, understood as *last resort* or the exhaustion of reasonable alternatives.

Like Grotius, Pufendorf begins by making a distinction between the use of force by individuals and the same by a state, using the former to illuminate the latter. Pufendorf begins with the individual, insisting on the importance of distinguishing between the individual in a state of nature and the same within civil society.[24] Lacking the same protections that individuals have in civil society, a person in the state of nature must have more latitude to use force prior to an actual attack.[25] As we will see, the criteria he adopts for individuals outside the bounds of civil society is nearly mirrored in what he says about states. "If I am to attack another under the name of my own self-defence, signs are required, forming a moral certainty, of his evil design upon me, and intention of harming me, so that, unless I anticipate him, I may expect to receive the first blow. . . . But even if a person shows the desire as well as the ability to work harm, still even this fact gives me no immediate reason to proceed against him, if he has not yet put his purpose into action against me."[26] This standard includes the same requirements seen

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[23] Ibid., II.V.6.
[24] Pufendorf criticizes Grotius for not making clear this second crucial distinction in the context of an individual use of force between the use of force in a state of nature and the same in civil society. *On the Law of Nature,* II.V.3, 267; Ibid., II.V.7, 275-276. This point pertains primarily to what an individual can do within civil society and is implied in Grotius's text, if not always clearly stated.
[25] Ibid., II.V.6, 272-273.
[26] Ibid., II.V.6, 273-274.

in Grotius: *clear intent; sufficient means;* and *active preparation.* Moreover, like Grotius he also requires that the use of preemptive force meet the separate requirement of last resort. If the above criteria are met, a person can use force "provided there be no hope that, when he has been approached as a friend, he will put off his evil intention."[27]

The standard is more stringent for an individual in civil society, due to the alternative forms of relief available from the civil power.[28] Speaking of preemption in this context, Pufendorf writes: "It seems possible to lay down the general rule that the beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him."[29] He provides as an example a person who is charged by another person wielding a sword, intending to kill in a matter of seconds. The potential victim in this case can justly fire his gun while the person charging is still at some distance. The criteria for the preemptive use of force in the context of civil society is the same as that in the state of nature, with one addition in the case of the former: the person considering the use of such force must look to the temporal proximity of the attack, as measured by its "imminence."[30] As for Grotius, this criterion does not apply to a state of nature. Furthermore, although Pufendorf does not spell it out, presumably where an attack is *imminent,* he takes the criterion of *necessity* or

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[27] Ibid., 274.

[28] "But, as a matter of fact, an equal license is by no means allowed those who live in states. . . . If I hear [that a person] is preparing to injure me, or if I find him making fierce threats, . . . he should be haled before our common sovereign, and made to give bond to keep peace. If he refuses to do this, then it will be proper for me to secure my safety in the same way as if I were living in a state of natural liberty." *On the Law of Nature,* II.V.7, 275.

[29] Ibid., II.V.8, 276.

[30] Ibid., II.V.9, 277.

last resort to be satisfied, just as we saw it was satisfied in the case of an actual attack where another is inflicting or has inflicted the blow. Again, *necessity* or *last resort* has an independent standing that only in some cases is satisfied by the presence of an *imminent* threat.

In "On the Law of War," a later chapter discussing the use of force by states, Pufendorf applies nearly the same standard to states as he articulated for individuals in a state of nature. His treatment of preemption comes in the context of rejecting the fear of a powerful neighbor as a just cause for war. "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 us. For an uncertain suspicion of peril can, of course, persuade you to surround yourself in advance with defences, but it cannot give you a 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 to do so . . . it should be presumed that he will perform his duty in the future."[31] *Certain intent* and *active preparation* are stated explicitly as requirements, and presumably the latter also includes *sufficient means.* Again, even if just cause arises, the state considering the use of preemptive force must also satisfy the requirement of last resort.[32] At no point, however, does Pufendorf predicate preemption in this context on the presence of an imminent threat.

In one sense, preemption lay at the center of Hobbes's political theory, the practical outcome of persons who live in a state of constant fear. This emphasis on

[31] Ibid., VIII.VI.5, 1296.
[32] Ibid., VIII.VI.4, 1295. Pufendorf departs from Grotius in two minor ways. Unlike Grotius, he places preemption under the rubric of self-defense where Vitoria placed it, rather than punishment. Ibid., VIII.VI.3, 1294. In addition, he does not expressly develop the criterion of *magnitude of harm* that Grotius had in the context of states deciding to use preemptive force, although the idea appears elsewhere in *On the Law of Nature and Nations.* Ibid., II.V.3, 267.

preemption by Hobbes in part explains the considerable attention Pufendorf devotes to the issue. In the chapters on individual and state self-defense, Pufendorf gives more attention to preemption than he does to uses of self-defense more generally or in response to an actual attack. The question about when an individual or a state could use preemptive force had become a central test for determining what one person (or state) owed another *qua* person, outside the bounds of civil society. Pufendorf displayed a keen awareness of what the just war restraints required in way of an underlying theory. The account of preemption he passed on was more lucid and concise than that of Grotius, even if the norms were largely the same. As we will see, Pufendorf's account was drawn upon well into the nineteenth-century.

II. Toward Eclipse in the Eighteenth-Century

Although the two traditions on the use of force are discernible throughout the eighteenth-century, the most remarkable development is the way in which the rival Hobbesian tradition eclipsed the moral tradition on the just war. This development in many ways mirrored the geo-political developments that followed in the hundred years after Westphalia, particularly the coming to age of strong, sovereign states, in both theory and practice.

Grotius, Pufendorf and other proponents of the just war tradition had insisted that the primary norms governing states in their decisions to use force were the natural law norms of the just war tradition, most importantly the requirement of *just cause*. Grotius recognized the *jus gentium* as a law of custom emerging from the practice of states, but his focus was on the natural law to provide the unchanging norms necessary for

international peace and stability. Pufendorf made a similar point in a more radical way, by simply defining the content of the *jus gentium* in terms of the natural law, giving no theoretical importance to actual state practice. In the eighteenth century, however, the most influential proponents of the just war tradition, Christian Wolff (1679-1754) and Emmerich de Vattel (1714-1767) effected a radical shift in the tradition that signaled its eventual eclipse. Their accounts of preemption clearly reflected the influence of Grotius and especially Pufendorf. Nonetheless, they severely limited the applicability of these norms by ascribing them to only the conscience of the sovereign, while leaving the decision to go to war as a matter of law largely unregulated. Moreover, the two most prominent political philosophers in the nineteenth-century, Jean-Jacques Rousseau (1712-1778) and Immanuel Kant (1724-1804), openly embraced a Hobbesian account of the relations between states, granting broad permission for states to use preemptive force. By the beginning of the nineteenth-century, it seems, few disputed that nations co-exist in a state of war.

A. *Toward Eclipse: Vattel*

Vattel was born in Prussia, though he spent most of his career in diplomatic service as an adviser to the Elector of Saxony. His most important work was *The Law of Nations* (1758). Applauding Christian Wolff's *The Law of Nations Treated According to a Scientific Method* (1749), Vattel states explicitly that his goal is "to facilitate for a wider circle of readers a knowledge of the brilliant ideas contained in [Wolff's treatise on the Law of Nations]."[33] Although Wolff was the more original theorist, I focus on Vattel

[33] Vattel, *The Law of Nations,* Preface, 7a.

for the reason that his treatise on international law proved far more influential in the United States and in the development of international law over the next hundred years.

Although Vattel's *Law of Nations* does not come at the end of an expansive philosophical system, as did the comparable works by Pufendorf and Wolff, it is evident that he shares many of the general commitments held by his predecessors.[34] He subscribes to the now commonplace account of states as moral persons living in a state of nature and possessing the rights of natural liberty.[35] These rights arise from duties that a state has, both to itself and others. [36] Vattel affirms that "the right of self-preservation carried with it the right to whatever is necessary for that purpose," insofar as the means are not unjust.[37]

Vattel agrees with Pufendorf that the natural law lays down a separate principle of sociability that is finally harmonious with the right of self-preservation. His argument for a fundamental law of sociability is largely along Pufendorfian lines: humans are not self-sufficient and need each other to live happily and improve their condition, which points to the normative conclusion that humans must live together and cooperate. "The general law of this society is that each member should assist the others in all their needs, as far as he can do so without neglecting his duties to himself."[38] This law finds its most intensive application in civil society, but it governs all persons even in a state of nature, including states in their relationships with each other.[39]

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[34] For secondary sources on Vattel's moral and political theory, *see* Hochstrasser, *Natural Law Theories,* 177-183; Tuck, *The Rights of War and Peace,* 191-196; Ruddy, *International Law in the Enlightenment*; Whelan, "Vattel's Doctrine of the State."
[35] These themes appear throughout his works, but *see* Vattel, *The Law of Nations,* Introduction.1-4, 3.
[36] Ibid., Introduction.3, 3.
[37] Ibid., I.II.28, 14.
[38] Ibid., Introduction.10, 5.
[39] "Since the universal society of the human race is an institution of nature itself, that is, a necessary result of man's nature, all men of whatever condition are bound to advance its interests and to fulfill its duties.

In a chapter entitled "The Just Causes of War," Vattel repeats the general lines of the just war tradition regarding the decision to use force. "The right to use force, or to make war, is given to Nations only for their defense and for the maintenance of their rights. . . . We may say, therefore, in general, that the foundation or the cause of every just war is an injury, either already received or threatened."[40] Even where a state has just cause for war because of some actual injury that has occurred, the natural law forbids a state to resort to armed force before it has exhausted other reasonable alternatives.[41]

On the issue of preemption, Vattel echoes the norms developed by Grotius and Pufendorf. At the same time, reflecting the European international order that had developed since Westphalia, he suggests that the standard should be interpreted liberally so as to allow states to maintain the balance of power. His account appears in consideration of the now "celebrated question" of whether states can use force out of fear of a neighboring state that is growing in power.[42] His starting point is the duty a state has to augment its military and economic power to defend itself. In a previous chapter Vattel had explained that "a state is powerful enough when it is able to . . . repel any attacks

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No convention or special agreement can release them from the obligation. When, therefore, men unite in civil society and form a separate State or Nation . . . their duties towards the rest of the human race remain unchanged." Ibid., Introduction.11, 6.

[40] Ibid., III.III.26, 243.

[41] Ibid., II.XVIII.338-340. Later he says that in an *offensive war* (wars toward the ends of reparation and punishment), the use of force is only just if it is marked by an "inability to obtain the thing otherwise than by force of arms. Necessity is the sole warrant for the use of force." Ibid., III.III.37, 246. Elsewhere he explicitly adopts the language of "last resort". *See, e.g.,* Ibid., III.III.25, 243.

[42] Vattel mentions a right of preemption in several places, without giving any clear standard. "A Nation or State has the right to whatever can assist it in warding off a threatening danger, or in keeping at a distance things that might bring about its ruin." I.II.20, 14. "The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor." II.IV.50, 130. Like Grotius, he seems to classify preemption as an offensive war of punishment, meant to "forestall an injury which [another state] is about to inflict upon him, and avert a danger which seems to threaten him." III.I.5, 236. The most important passage on preemption, and the one in which he mentions some standards, is in his discussion of using force to ensure a balance of power. III.III.42-50, 248-253.

which may be made upon it. It can place itself in this happy situation either by keeping its own forces upon a level or above those of its neighbors, or by preventing the latter from acquiring a position of predominant power."[43] He qualifies this seemingly broad duty states owe themselves by saying that the natural law prohibits a state from reaching this end by unjust means.[44] Affirming the tradition, he concludes that absent some injury, the use of force on the basis of fear alone is prohibited. "Since war is only permissible in order to redress an injury received, or to protect ourselves from an injury with which we are threatened, it is a sacred rule of the Law of Nations that the aggrandizement of a state can not alone and of itself give any one the right to take up arms to resist it."[45]

Vattel's criteria for declaring an injury prior to an actual attack both continues and departs from the standard that developed from Grotius through Pufendorf. In addition to *sufficient means* (i.e., *power,* which alone is not sufficient), he is clear that the state must be certain of the other state's *intent.* "Power alone does not constitute a threat of injury; the will to injure must accompany the power." Vattel, however, is much more liberal in his measure of *intent.* A state can discern intent from a variety of factors, all of which are open to broad interpretation. "As soon as a State has given evidence of injustice, greed, pride, ambition, or a desire of domineering over its neighbors, it becomes an object of suspicion which they must guard against."[46] Later, he suggests that a state can justly strike first where the potential aggressor "betrays his plans by preparations or other advances," suggesting the requirement of *active preparation.*[47] As both Pufendorf and

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[43] Ibid., II.XIV.185, 77.
[44] Ibid., II.XIV.184, 77.
[45] Ibid., III.III.42, 248.
[46] Ibid., III.III.44, 249.
[47] Ibid., III.III.49, 252. Tuck misses these limitations, simply concluding that Vattel gives broad license to attack hegemonic powers. Tuck, *On the Rights of War and Peace,* 193.

Grotius concluded, Vattel does not require that states act only against an imminent threat.[48]

Although his standard is less clear than Pufendorf's, he does offer two additional measures: the *magnitude* and the *probability of the harm.* "One is justified in forestalling a danger in direct ratio to the degree of probability attending it, and to the seriousness of the evil with which one is threatened. If the evil in question be endurable, if the loss be of small account, prompt action need not be taken; there is no great danger in delaying measures of self-protection until we are certain that there is actual danger of the evil."[49] Both of these measures were present in the tradition historically, though only Grotius had applied the former measure to the issue of preemption specifically.

Nonetheless, Vattel describes a standard that on many counts is quite lax. For example, where a state anticipates a future harm that meets all of the four criteria listed, Vattel says that states should look for the "smallest wrong" as an occasion to use force. [50] He later concludes: "There is perhaps no case in which a State has received a notable increase of power without giving other States just grounds of complaint. Let all Nations be on their guard to check such a State, and they will have nothing to fear from it."[51]

While Vattel suggests a more liberal standard for the use of preemptive force, even more important for the future of the just war tradition is the limits he places on the tradition's scope of applicability. Both Grotius and Pufendorf had recognized a body of

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[48] Vattel does not give any sustained attention to the parallel rights of individuals, as did Grotius and Pufendorf. Although he is working with the domestic analogy quite clearly, his subject matter is strictly the *law of nations*. Vattel does say, however, that the norms governing a state's use of preemptive force are more generous than those governing an individual, since more is at stake. III.III.44, 249.

[49] Ibid.

[50] Ibid., III.III.45, 250.

[51] Ibid. Vattel's position is complicated, and both Hochstrasser, *Natural Law Theories in the Early Enlightenment,* 181, and Tuck, *The Rights of War and Peace,* 193-195, err in simply identifying Vattel with the raison d'état tradition. Vattel is clearly headed in this direction, but he is better interpreted as a transitional figure.

rules outside of the natural law that arose from state practice. Grotius's hope for shared norms that would limit the use of force and reach across confessional and cultural lines looked entirely to the natural law, to which he devoted the vast portion of his seminal work. Pufendorf, moreover, recognized the presence of various customs regarding war, but he refused to ascribe to these customs the term *law of nations,* which he instead simply identified with the natural law.

Following the lead of Wolff, however, Vattel makes a distinction between the moral norms of the just war and the enforceable law governing states the centerpiece of his thought. "Let us . . . leave to the conscience of sovereigns the observance of the natural and necessary law in all its strictness; and indeed it is never lawful for them to depart from it. But as regards the external operation of that law in human society, we must necessarily have recourse to certain rules of more certain and easy application, and this in the interest of the safety and welfare of the great society of the human race. These rules are those of the *voluntary* Law of Nations."[52] The necessary law of nations is ascribed to the inner forum of the conscience, while the more permissive voluntary law of nations is the legal norm which structures society. The former is morally binding, while only the latter is legally binding.

In regards to the law governing the use of force, the just war restraints are all a part of this "necessary law of nations" and applied to the conscience of the sovereign. The voluntary law of nations, however, assumes that both sides to the conflict hold a just cause.[53] He says that "regular war, as regards its effects, must be accounted just on both sides." This law is silent as to the justice of going to war in the first place. Unlike

[52] Vattel, *The Law of Nations,* III.III.189, 304.
[53] Ibid., III.III.190-192, 305-306.

Hobbes, Vattel denies that states have a *right* to use force at will; but the permission to do so under the voluntary law of nations leads to a similar outcome in practice.

Vattel gives several reasons for this division between the necessary and voluntary law of nations, the most important of which is an outworking of the idea that states are free moral persons living in a state of nature. "It belongs to every free and sovereign State to decide in its own conscience what its duties require of it, and what it may or may not do with justice. If others undertake to judge of its conduct, they encroach upon its liberty and infringe upon its most valuable rights."[54] At the heart of Vattel's distinction between the necessary and voluntary law of nations is the notion of the state as a free person living in a state of nature and bearing a fundamental right of self-preservation. At least since Grotius, theorists used this analogical tool to explain the steadily growing idea of state sovereignty. Proponents of the just war tradition had resisted an unfettered right of freedom by employing varying ideas about a separate principle, often called the principle of *sociability,* that placed states in a moral order limited by the constraints of justice. The freedom implied by a strong account of states existing as moral selves in a state of nature and the universal justice which the just war tradition assumed, however, were never finally commensurable. The former always threatened to eclipse the latter. In Vattel, this eclipse is underway.

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[54] Ibid. Vattel first makes this claim in the Preface to his work. Wolff had arrived at the "voluntary law of nations" from the "fiction" of a "supreme state" that all states are compelled by nature to enter. The voluntary law of nations was to this supreme state what the civil law was to the individual state. Wolff, *The Law of Nations,* Prolegomena.12-22, 13-18. Although strained, this theory was meant in part to give the voluntary law of nations some sense of democratic legitimacy, rooted in the good of the whole. Vattel expressly rejects this concept and concludes that the voluntary law of nations can be derived simply from the concept of states as free moral persons in a state of nature. Vattel, *The Law of Nations,* Preface, 9a-10a.

B. *The Triumph of Hobbes: Rousseau and Kant*

1. *Rousseau*

At the same time as Vattel was confining the just war restraints to the conscience of the sovereign, Jean-Jacques Rousseau and later Immanuel Kant were forcefully restating the Hobbesian tradition. While both Rousseau and Kant made important contributions to the development of liberal thought, their theories of justice *within* a state were uneasily joined to an account of the relations between states that was recognizably Hobbesian. A tradition marked early on by intellectual outcasts such as Machiavelli and Hobbes was now widely accepted. In this section I briefly examine the broadly permissive account of preemption that both Rousseau and Kant adopted.

Rousseau's most important political writings, *The Discourses* and *The Social Contract,* were published, respectively, just a few years before and after the 1758 publication of Vattel's *The Law of Nations.*[55] Although Rousseau does not directly engage Vattel, these writings show him well acquainted with the writings of Grotius, Hobbes, and Pufendorf, against whom he develops his account of the state of nature and civil society. Despite his sustained effort to set his project against that of Hobbes, it is striking the degree to which Rousseau adopts a Hobbesian position on the use of force among states, and preemption in particular. Rousseau rejects Hobbes's identification of a state of war with the state of nature. Admitting that his state of nature is purely heuristic, Rousseau says that humans originally lived peaceful, solitary, self-sufficient lives, easily fulfilling their true needs. Only in their sociable interactions with others does corruption follow. Nonetheless, he largely accepts Hobbes's description of a state of war and the rights states possess to use force. For man in a natural state, "his first law is to attend to

[55] Rousseau, *Discourse on Inequality,* I.5, p. 132.

his own preservation, his first cares are those he owes himself, and . . . he is the sole judge of the means proper to preserve himself."[56] Moreover, prior to the formation of civil society man has "an unlimited right to everything that tempts him and he can reach."[57]

For Rousseau, this state of war in which persons seek to preempt one another follows inevitably. "The constitution of this universe does not allow for all the sentient beings that make it up to concur all at once in their mutual happiness[;] but since one sentient being's well-being makes for the other's evil, each, by the law of nature, gives preference to itself . . . . Finally, once things have reached a point where a being endowed with reason is convinced that his preservation is inconsistent not only with another's well-being but with his very existence, he takes up arms against the other's life and tries to destroy him as eagerly as he tries to preserve himself, and for the same reason."[58]

Rousseau analogizes the individual to the state, which becomes a "moral self" through the social contract[59] and which exists in a (corrupted) state of nature with other states. With an emphasis not present in the earlier theorists, Rousseau asserts that the social contract has allowed individuals to escape one state of war only to enter into another that is even more menacing. "The Bodies Politic thus remaining in the state of Nature among themselves soon experienced the inconveniences that had forced individuals to leave it, and this state became even more fatal among these great Bodies than it had previously been among the individuals who made them up. From it arose the National Wars, Battles, murders, reprisals that make Nature tremble and that shock

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[56] Rousseau, *The Social Contract,* 42.
[57] Ibid., I.VIII.2, 54.
[58] Rousseau, *The State of War,* 42-43, 172-173.
[59] Rousseau, *The Social Contract,* VI.10, 50.

reason . . . . More murders were committed in a single day's fighting . . . than had been committed in the state of nature for centuries together over the entire face of the earth."[60] As with individuals, Rousseau attributes a sort of inevitability to this outcome. States are limitless in their desire for more, whereas natural man can only acquire so much. Moreover, where individuals are prone to rest, a state survives by movement and expansion.[61] Rousseau is finally cynical about the possibility of escaping this state of war among nations.[62]

Rousseau explicitly rejects the claim that persons or nations existing in a state of nature have moral obligations one to another, summed up by the just war tradition in the idea of *sociability* and presented most powerfully for Rousseau by Pufendorf. "It is not a matter of teaching me what justice is; it is a matter of showing me what interest I have in being just. . . . Where is the man who can thus separate from himself and, if care for one's self-preservation is the first precept of nature, can he be forced thus to consider the species in general in order to impose on himself duties whose connection with his own constitution he completely fails to see."[63] In one passage, Rousseau directly criticizes the just war tradition, with its theological heritage: "Let us restore to the Philosopher the examination of a question which the Theologian has never dealt with except to the prejudice of mankind."[64] Like Hobbes, Rousseau denies the possibility of justice claims outside the social contract. Acting justly is only possible in political society because it is

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[60] Rousseau, *Discourse on Inequality,* II.34, 174.
[61] Rousseau, *The State of War,* 26-29, 168-169.
[62] In a 1756 essay, *A Lasting Peace,* Rousseau re-states and criticizes Abbé de Saint Pierre's proposal for international peace, published in the early part of the eighteenth-century. A genre of such writings had emerged, of which Kant's *Toward Perpetual Peace* (1795) would become the most well-known. Rousseau agreed with Saint Pierre that such a peace required a federated Europe, but concluded that only a forceful revolution could bring it about. The end result could never justify the destruction that would follow. Rousseau, *A Lasting Peace,* 112.
[63] Rousseau, *The Geneva Manuscript,* I.II.14, 157.
[64] Ibid., I.2.13.

only under the social contract that self-interest unites with a respect for the rights of others, or the common good. Outside of political society, interest and justice are opposed.[65]

While nearly every philosopher of importance in the past one hundred years took great care to decry the "pernicious" ideas of Hobbes, and Rousseau is no exception, it is remarkable how close many of them remained. Even Kant, as we will see, at the font of liberalism, was in wide agreement with Hobbes as to the moral posture between states.

2. *Kant*

Writing a generation later, Immanuel Kant (1724-1804) accepts Rousseau's conclusion that human corruption is realized in society.[66] The outcome of this corruption is a state of war between individuals that finally spills over into a state of war between nations. Unlike Rousseau, however, Kant sets his account of human corruption within a teleological framework, as part of the means nature uses to progress toward a just order between individuals and among states.[67] This progression is gradual and almost always indiscernible in any given lifetime. Nature, employing the natural antagonism that exists between individuals and states, propels humanity toward a just order.

Kant often refers to this natural antagonism as "unsocial sociability": "that is, [the human] tendency to come together in society, coupled, however, with a continual

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[65] "It is false that in the state of independence, reason, perceiving our self-interest, inclines us to contribute to the common good; far from there being an alliance between particular interest and the general good, they exclude one another in the natural order of things." Rousseau, *The Geneva Manuscript*, I.2.10, 156. Absent an external sanction, an individual (or a state) has no reason to trust that in seeking the good of another individual (or state), it will not be to their loss. "Either give me guarantees against every unjust undertaking, or give up hope of my refraining from them in turn." Ibid. The only justice that has meaning is "reciprocal justice," made possible through the social contract.

[66] In *Religion Within the Boundaries of Mere Reason,* Kant concludes that the evil thoughts and acts of every individual "do not come his way from his own raw nature, so far as he exists in isolation, but rather from the human beings to whom he stands in relation or association . . . . [T]he malignant inclinations . . . assail his nature . . . as soon as he is among human beings." Kant, *Religion,* 6:93, 105.

[67] Kant develops this idea most fully in *Idea for a Universal History with a Cosmopolitan Purpose.*

resistance which constantly threatens to break this society up."[68] Both propensities are rooted in human nature. On the one hand persons are compelled to live in society, both for their own preservation, but also for their perfection. Only with the cooperation of others can a person develop her natural capacities. On the other hand, persons are compelled to live as individuals, since they want to order their existence in accordance with their own ideas. The result is resistance and conflict between persons and finally between the political societies they form. It is this conflict that is the engine of enlightenment. In striving for power and status among each other, humans are pushed to develop their natural abilities and move from barbarism to civilization.

The conflict that exists among nations is one means that nature uses to lead states toward a just international order. Like Rousseau, Kant believes that the present condition, where individuals but not states have left the state of nature, is the worst of all.[69] Unlike Rousseau, however, Kant's outlook is not cynical. The condition of fear and actual hostilities between states will eventually lead states to enter voluntarily a federation of states, governed by law and supported by a credible sanction. "Wars, tense and unremitting military preparations, and the resultant distress which every state must eventually feel within itself, even in the midst of peace—these are the means by which nature drives nations to make initially imperfect attempts, but finally, after many devastations . . . to take the step which reason could have suggested to them . . . of abandoning a lawless state of savagery and entering a federation of peoples in which

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[68] Kant, *Idea for a Universal History*, 44.

[69] "When it is little beyond the half-way mark of its development, human nature has to endure the hardest of evils under the guise of outward prosperity before this final step (i.e., the union of states) is taken; and Rousseau's preference for the state of savagery does not appear so very mistaken if only we leave out of consideration this last stage which our species still has to surmount." Ibid., 49.

every state, even the smallest, could expect to derive its security."[70] Even wars of aggrandizement are a part of this gradual movement.[71] The changes, however, are gradual and Kant is clear that war plays an indispensably positive role in the present. "So long as human culture remains at its present stage, war is therefore an indispensable means of advancing it further; and only when culture has reached its full development—and only God knows when that will be—will perpetual peace become possible and of benefit to us."[72] The result is a complex normative account of war in the present, in which Kant obliges states finally to leave this state of war, but sanctions a permissive account of the use of preemptive force under the present conditions and into the foreseeable future.

Although Kant's vision of a perpetual peace is often held up as a liberal vision of international justice, his account of war under the present conditions is remarkably Hobbesian. In an important footnote in *Religion within the Boundaries of Mere Reason,* he explicitly endorses Hobbes's account of a state of war:

> Hobbes's statement, *status hominum naturalis est bellum omnium in omnes,* has no other fault apart from this: it should say, *est status belli . . . etc.* For, even though one may not concede that actual *hostilities* are the rule between human beings who do not stand under external and public laws, their condition . . . is nonetheless one in which each of them wants to be himself the judge of what is his right vis-à-vis others, without however either having any security from others with respect to this right or offering them any: and this is a condition of war, wherein every man must be constantly armed against everybody else.[73]

Kant gives his most extended description of this international state of war in his discussion of his Doctrine of Right, in the *Metaphysics of Morals.*[74]

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[70] Ibid., 47.
[71] Ibid., 51.
[72] Kant, *Conjectures,* 232.
[73] Kant, *Religion,* 108 (note).
[74] Kant, *Metaphysics of Morals* 6:343-346, 482-484.

In the state of war and absent the assurance of equal restraint that a federation of states would create, power and not right is the rule. While states in this condition have rights, they are only "provisional," since there is no means to adjudicate and enforce them. Hence, this state of war is a state "devoid of justice."[75] Each state follows its own judgment. Kant concludes that judgments about whether or not a state goes to war justly are ruled out.[76] He famously chides Grotius, Pufendorf, and Vattel, who all espoused some notion of a "just war," as "only sorry comforters."[77] Justice demands an external lawgiving and a credible sanction to enforce it, both of which come only with the social contract.

Kant holds that states are compelled by reason to leave this condition of war and enter into a federation of states.[78] By failing to exit the state of nature, each state commits a wrong against another and thereby gives occasion for war.

> It is usually assumed that one may not behave with hostility toward another unless he has actively wronged me; and that is also quite correct if both are in a condition of being under civil laws. For by having entered into such a condition one affords the other the requisite assurance (by means of a superior having power over both).—But a human being (or a nation) in a mere state of nature denies me this assurance and already wrongs me just by being near me in this condition, even if not actively (*facto*) yet by the lawlessness of his condition (*statu iniusto*), by which he constantly threatens me; and I can coerce him either to enter with me into a condition of being under civil laws or to leave my neighborhood.[79]

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[75] Ibid., 6:312, 456.

[76] "War is, after all, only the regrettable expedient for asserting one's right by force in a state of nature (where there is no court that could judge with rightful force); in it neither of the two parties can be declared an unjust enemy (since that already presupposes a judicial decision), but instead the outcome of the war . . . decides on whose side the right is." Kant, *Toward Perpetual Peace,* 8:346-347, 320.

[77] Ibid., 8:355, 326.

[78] Kant endorses this idea in the *Metaphysics of Morals,* but seems to suggest in *Toward Perpetual Peace,* published two years earlier, that while states have a rational duty to leave the state of nature, other states do not have a right to compel by force others to leave this state of nature. The reason he offers is that in the act of the social contract and the creation of a just order within the state, states have "outgrown" such compulsion. Kant, *Toward Perpetual Peace,* 8:355, 327.

[79] Kant, *Toward Perpetual Peace,* 8:349 (note), 322.

The consequence is a broadly permissive account of preemption, in line with Hobbes. This constant wrong that states commit against each other merely by refusing to leave the state of nature is sufficient grounds to use force. "It is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion."[80] As for Gentili and Hobbes, a mere increase in power is enough to justify the use of preemptive force.

> In addition to active violations . . . [the state] may be threatened. This includes another state's being the first to undertake preparations, upon which is based the right of prevention (*ius praeventionis*), or even just the menacing increase in another state's power (by its acquisition of territory) . . . . This is a wrong to the lesser power merely by the condition of the superior power, before any deed on its part, and in the state of nature an attack by the lesser power is indeed legitimate. Accordingly, this is also the basis of the right to a balance of power among all states that are contiguous and could act on one another.[81]

Despite Kant's optimism for a just international order among states, he largely accepts Hobbes's description of the present as a state of war in which states can rightfully use preemptive force against each other on the mere basis of fear. Kant's account of preemptive force represents the triumph of the Hobbesian tradition at the close of the eighteenth century, a tradition that would inform the *jus ad bellum* for international law as it blossomed into a distinct discipline in the nineteenth-century.

III. Preemption and International Law in the Nineteenth-Century

Before turning in Part III to consider what normative cues this historical investigation might yield, it is important to look briefly at two developments in the nineteenth century. First, the nineteenth-century witnessed the solidification of the Hobbesian idea in international law that states possess a nearly unfettered right to go to

[80] Kant, *Metaphysics of Morals,* 6:307, 452.
[81] Ibid., 6:346, 484.

war as an attribute of state sovereignty. Perhaps most representative of this development is the widely popular *Treatise on International Law* authored by Edward P. Hall and first published in 1880.[82] Second, while the Hobbesian tradition held sway during the nineteenth-century, the just war norms on the use of preemptive force were not altogether eclipsed. As already mentioned, the 1837-1842 *Caroline Affair* is often described as the *locus classicus* of the customary law governing the use of preemptive force. Not until more than a century after Webster penned his celebrated norms would they be appropriated and given their contemporary meaning under the Charter system. Nonetheless, the Webster standard marked an important transmission of norms that had developed for centuries within the moral tradition on the just war.

A. *International Law and the Near Unfettered Right to Use Force*

The emergence of the idea in international law that states enjoy a nearly unlimited right to go to war involved several developments. The method adopted by scholars in the emerging field of international law was increasingly that of positivism. As we have seen, this development was already underway in the writings of Vattel, but gained clear ascendancy by the time of Hall's treatise.[83] This commitment marked a significant departure from the natural law theory that held sway in the early modern period. As a positivist, Hall makes a methodological commitment to distinguish *law* and *morality*. While the two spheres may often overlap, morality is not a necessary precondition for legal validity; an account of the moral norms governing the use of force says little about

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[82] Hall, *A Treatise on International Law*.

[83] Hall states his positivism in *A Treatise on International Law*, 1-5. For other representative examples, *see* Woolsey, *Introduction to the Study of International Law*, 1-3; and Oppenheim, *International Law*, Vol. I, 15. Wheaton, *Elements of International Law*, is a good example of the transition, as he seeks to hold together both positivist and natural law approaches.

what counts as law. In contrast, earlier sources, represented by Grotius's *On the Law of War and Peace,* looked to a moral order inscribed in nature to discern the law governing states.

For positivists like Hall, international law obtains its validity only through the consent of states. The measure of consent and the source of binding legal norms is state practice. This means that the task of the international legal scholar is one of interpreting the acts of states on different issues of international importance.[84] Not only did this commitment to a positivist method reflect a growing skepticism that natural law existed, but it also reflected a robust view of state sovereignty that granted states virtually unfettered rights. Even if there was an architectonic morality, it was not binding as law simply on account of its moral nature. International law treatises in the nineteenth-century were near unanimous in their adoption of a largely Hobbesian account of an international state of nature and a robust right of self-preservation, giving states wide latitude in deciding whether to use force.[85]

Hall's account follows along now recognizable lines. He begins with the claim that states are independent moral persons. "It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in

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[84] "The rules by which nations are governed are unexpressed. The evidence of their existence and of their contents must therefore be sought in national acts—in other words, in such international usage as can be looked upon as authoritative." Hall, *A Treatise on International Law,* 5. Hall is particularly dismissive of treaties as "mere evidence of national will" which can only confirm the actual practice of states, but do not provide an independent account of laws under which states have placed themselves. *A Treatise on International Law,* 7-13. It is what states *do,* and not what they *say they will do,* that is authoritative. Behind this conviction for Hall lies a very strong concept of state sovereignty.

[85] Most scholars of international law rejected the concept of a state of nature as a tool for discerning a natural law, but still accepted the concept as a model of inter-state relations. For a helpful overview of international law and state practice as it concerned the use of force during this time period, *see* Brownlie, *International Law,* 19-50; Gardam, *Necessity, Proportionality, and the Use of Force by States,* 1-27. A useful historical account of preemption as an American military strategy is Gaddis, *Surprise,* 7-33.

which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations."[86] Hall posits that states have at least two basic rights: the right of *independence*, and the right of *self-preservation.* He defines the former as "a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community."[87] Likened to the individual moral agent in the state of nature, states have a right to conduct their own internal affairs as they see fit, absent the intervention of other states.

In tension with this right of *independence*, however, is the related right of *self-preservation.*[88] "[S]ince states exist, and are independent beings . . . they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence."[89] Where the right of independence clashes with the right of self-preservation, Hall is clear that the latter prevails. "In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means necessary."[90]

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[86] Ibid., 19. For other examples, *see* Wheaton, *Elements of International Law,* 81; Woolsey, *Introduction to the Study of International Law,* 15, 37, 184.
[87] Hall, *A Treatise on International Law,* 50. *See also* Wheaton, *Elements of International Law,* 82-83.
[88] Other scholars use different terms for the latter right, including an expansive notion of *self-defense, self-help,* and *necessity.* Hall suggests that both of these rights follow from the single right to existence. Ibid., 45. For a more extended account of the different terms scholars use for this right, *see* Brownlie, *International Law,* 41.
[89] Hall, *A Treatise on International Law,* 45. *See also* Wheaton, *Elements of International Law,* 81, 209; Woolsey, *Introduction to the Study of International Law,* 16-18, 43-45; Oppenheim, *International Law,* 177-179.
[90] Hall, *A Treatise on International Law,* Vol. I, 281. "The same right to continued existence which confers the right of self-development confers also the right of self-preservation, and a point exists at which the latter of the two derivative rights takes precedence of the duty to respect the exercise of the former by another state." Ibid., 46.

Hall describes a sweepingly broad account of *self-preservation.* Self-preservation justifies the use of force not only in the case of an actual or imminent attack, but also in the case of a mere threat. "If a country offers an indirect menace through a threatening disposition of its military force . . . if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defense, so that it would be in a position to give effect to its intentions . . . the state or states which find themselves threatened may demand securities . . . and if reasonable satisfaction be not given they may protect themselves by force of arms."[91] Lying behind this statement is the widely held belief that a European balance of power was the cornerstone of security.[92] Hall agrees that states may use preventive force early on to avoid going to war later.[93] Any attempt to offset this balance of power between the major powers is legitimate grounds for the use of preemptive force.

As independent moral persons with no higher authority, states are the first and last judge of their decisions to use force.[94] Hall recognizes a principle of necessity or "last resort" limiting the use of force, but states must make these decisions for themselves and are accountable to no one else. Even if there was a decision-maker that could arbitrate between states, there is no effective way to sanction states that might violate the decision. Hall concludes: "International law has consequently no alternative but to accept war,

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[91] Ibid., 47.

[92] Oppenheim's statement at the turn of the century is representative: "As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. Equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law." Oppenheim, *International Law,* Vol. I, 185.

[93] Hall, *A Treatise on International Law*, 297-298.

[94] *See* Wheaton, *Elements of International Law,* 209, 213; Woolsey, *Introduction to the Study of International Law,* 18, 183; Oppenheim, *International Law,* Vol. I, 56, 179.

independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation."[95]

In the nineteenth century, Hobbes's account of states existing in an international state of nature and bound by few or no restrictions in the decision to use force had triumphed. States were free to use preemptive force, especially where they judged that another state's accrual of power might offset the balance of power. While morality might speak to the decision to use force, the law was largely silent. As Lawrence concludes, the distinctions between *offensive* and *defensive*, *just* and *unjust* wars are the province of morality. "Such matters as these are supremely important; but they belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status."[96]

B. *Webster and the Caroline Standard*

Although the just war norms governing the use of preemptive force were largely eclipsed in international law during the nineteenth-century, it was these norms that Secretary of State Daniel Webster invoked in the *Caroline* affair and which inform the contemporary law of preemption today, as we saw in Chapter Two. Recall the *jus ad bellum* standard announced by Webster and accepted by the British. "It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and "the act, justified, by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[97] Webster's correspondence relating to the *Caroline* episode and other contemporary

[95] Ibid., 64-65.
[96] Lawrence, *Principles,* 333-334.
[97] Webster to Fox (April 24, 1841), 195.

sources give no indication as to how Webster arrived at his standard. Earlier sources, however, indicate that Webster was directly acquainted with the writings of several theorists we have already examined within the just war tradition, and with their accounts of the use of preemptive force in particular. In an early autobiographical fragment, Webster mentions several books he read in 1804 while training as an apprentice in a Boston law office. Included in the list of authors are Vattel and Pufendorf.[98] More important, Webster's extensive legal practice, first in Boston and then in D.C. where he argued dozens of cases before the United States Supreme Court, shows that Webster was well-informed about the international law of his day. In particular, his 1826 argument before the Court in the case of the *Marianna Flora,* an otherwise obscure case, shows Webster addressing some of the same issues that came up in the diplomatic flurry that surrounded the sinking of the *Caroline* more than a decade later. It also shows Webster drawing on some of the key figures in the developing just war tradition on preemption that we have been examining over the last several chapters.

The facts in this earlier case were relatively undisputed.[99] In 1819 Congress passed an act creating enforcement powers against piracy and slave-trafficking. A year later the *U.S.S. Alligator* was launched to patrol the high seas, under the command of Lieutenant Robert F. Stockton. In 1821 and on its second voyage the *Alligator* came upon a ship bearing no flag and seemingly signaling distress. As the American vessel approached the unidentified ship, however, the latter began firing. The volleys continued even after the *Alligator* raised the United States flag. Suspecting that his ship was being

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[98] Webster, *The Papers of Daniel Webster: Correspondence, Vol. 1, 1798-1824,* 17.

[99] The Marianna Flora (D. Mass Feb. 9, 1822), *microformed on* U.S. Supreme Court Appellate Case Files (No. 150-62, micro-copy no. 214), *rev'd,* 16 F. Cas. 736 (Cir. Ct., D. Mass. 1822) (No. 9,080), *aff'd,* 24 U.S. 1 (11 Wheat. 1) (1826). *See also* Wheaton, Wheaton's notes regarding the *Marianna Flora,* 1826.

attacked by pirates, Stockton continued to approach the other vessel and returned fire. Only after a near miss did the other ship hastily raise a Portuguese flag. Although neither vessel had struck the other, the *Alligator* gained the upper hand and seized the Portuguese ship. Lieutenant Stockton bound the crew and sent the ship to Boston for trial in an American court.

The case was eventually appealed to the Supreme Court. In the interim, the United States government had requested that the crew, the vessel and its cargo be released and sent back to Portugal. At issue in the Court was only the question of whether Lieutenant Stockton was liable for damages in sending the *Marianna Flora* to Boston rather than releasing the ship, as the District Court judge had ruled. Arguing on behalf of Stockton, Webster took up the same question that would arise a little more than a decade later in the case of the *Caroline:* when can one party justifiably use force in self-defense against an approaching threat?[100]

In arguing for a standard, Webster and Blake explicitly drew on the writings of Grotius and Pufendorf. "What degree, or what grounds of fear of bodily harm, will justify an act that may result in the destruction of human life, is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable." Quoting both Pufendorf and Grotius in support, they continue: "Before I can actually assault another under colour of my own defence, I must have tokens and arguments amounting to a moral certainty that he entertains a

[100] Webster's interest in the undertakings of the *Alligator* began with the vessel's maiden voyage in April 1821. Supported in part by the American Colonization Society, of which Webster was a member, the *Alligator* sailed to the west coast of Africa where Stockton among others negotiated the purchase of present day Liberia as a place to return American slaves.

grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power."[101] Webster invokes the very tradition on the use of force that we saw develop from Vitoria through Pufendorf. As we will consider later, however, he does so by invoking the standard for individuals and applying it to states acting preemptively in their own defense. The standard includes *clear intent, sufficient means,* and, although he does not use the language, a measure of temporal proximity, that is best described as a requirement of *imminence.* As Secretary of State fifteen years later, Webster again drew on the just war tradition to determine when a state can use preemptive force in the *Caroline* case. For nearly one-hundred years this episode was given only passing attention.[102]

In these four chapters I have sketched the development of a moral tradition on the use of preemptive force, as part of the larger just war tradition extending from Augustine to Daniel Webster. This sketch ends in the nineteenth century, a point at which the tradition was arguably at its nadir, at least in terms of influence. Nevertheless, as we saw in Chapter One enormous changes took place with the establishment of the Charter System, especially broad restrictions on the decision to use force. These developments left the international community looking for new norms to govern the use of preemptive

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[101] Webster and Blake's brief for the Court no longer exists. According to early practice, however, the Supreme Court reporter included a summary and in some cases a partial transcript of the oral arguments presented by both sides. In this case, Wheaton's notes are quite extensive and were published with the opinion issued by Justice Story. 24 U.S. 1, 17-18 (1826).

[102] From 1841 to 1914, the *Caroline Case* was given passing reference primarily in the limited context of justifiable violations of neutrality for the sake of "self-preservation." *See* Gardner, *A Treatise on International,* 202; Phillimore, *Commentaries Upon International Law,* 184-185; Halleck, *International Law,* 555-556; Woolsey, *Introduction to the Study of International Law,* 269; Lawrence, *Principles,* 521-522; Oppenheim, *International Law,* 187.

force. Over time, widespread agreement arose among states that these norms were those classically articulated by Webster in the *Caroline* affair. Although nearly all accounts of these norms start with Webster, I have shown in these chapters that Webster draws upon a longstanding moral tradition. It remains, however, to consider what this historical account might contribute to the contemporary challenge of preemption. It is this task I take up in Part III.

PART III

REVISING THE LAW OF PREEMPTION

Chapter 7

Reclaiming the Moral Tradition

In Part II we traced the evolution of a distinct, moral tradition on the use of preemptive force. The primary purposes of this narrative were to identify this tradition, to begin understanding its conceptual structure, and to reveal its contribution to the international norms governing the use of preemptive force today. In Part III, I bring this moral tradition to bear on the contemporary challenge of preemption. As stated earlier, I accept the conclusion of the revisionists: the threat of global terrorism realized on September 11 requires a limited expansion of the standard governing the use of preemptive force. Revising this standard, I suggest, demands careful attention to the moral tradition and its contribution to evolving international norms.

Looking to the moral tradition is important for two reasons, both of which address the primary failures in U.S. policy identified in Chapter Two. First, understanding the moral tradition is crucial for making the case that a careful expansion of the right to use preemptive force can be consistent with underlying moral commitments that have shaped these norms in the past. As I will suggest, the moral tradition we traced in Part II has much to tell us about how and why the standard in place since the advent of the United Nations Charter, requiring foremost that the threat be *imminent,* might evolve under the new threat of global terrorism. Second, the tradition also provides resources for developing a concrete, well-defined standard for when states can use preemptive force, balancing the twin goals of limiting the use of force and providing states with the security they require. I develop both of these arguments in Chapter Eight.

The task in this chapter, however, is first to reclaim the moral tradition as a source for thinking about the contemporary challenge of preemption. I pursue this task by asking two questions. First, what are the defining marks of the tradition? As the narrative in Part II made clear, the tradition underwent substantial changes from Augustine onwards and we need to identify both the core commitments underlying the tradition as well as the concrete norms regulating the use of preemptive force. A further question returns to the underlying relevance of this project: namely, why should morality matter? One important answer to this question concerns the important role that *moral legitimacy* will play in achieving an expanded right of preemption, as well as the use of such force in particular cases.

I. Defining the Tradition Today

Traditions, by their nature, are creatures of habit and creatures of change. They may retain certain basic forms, underlying meanings and rituals, but they also evolve in relation to changing circumstances. Moral traditions, and particularly the one we have been examining, are certainly no exception. As we have seen, considerable change marked the thread running from Augustine forward. Ideas expanded, gaining nuance from one person to the next. Vitoria extended Aquinas's just war theory to the issue of preemption. His standard for preemptive uses of force focused on *clear intent,* but in the early modern period other theorists considered a whole range of other factors. Some ideas were rejected. The metaphysical teleology of Aquinas was severed from the tradition, and modern natural law theory took its place as a minimalist account of the self and its ends. The line demarcating the borders of the tradition was at times faint, and

arguments made on behalf of the "just war" were sometimes reconfigured and employed in service of the permissive "just fear" tradition. Nonetheless, it is possible to identify in the tradition a set of perduring core commitments that underlie the just war tradition in general, as well as a set of concrete norms on the use of preemptive force.

A. *Core Commitments*

As mentioned earlier, Augustine's most important contribution to the tradition was a set of background claims, or underlying core commitments, which informed the tradition. Although these commitments evolved and took on new meaning with changing circumstances, they nonetheless persisted. The first of these claims concerns *the human capacity for injustice*. The Augustinian account of human nature presented this claim in a particularly stark form: not only do humans have the capacity for injustice, but the self is inclined to injustice. The conflict within a disordered self spills over into conflicts among persons. Augustine's most favored metaphor to describe this existence is that of *war*. While the moral tradition on the just war demands neither the theological sources that Augustine drew upon, nor his acutely pessimistic assessment of the human condition, the tradition has always carried with it a somber account of the human capacity for injustice. Pacifism, in either its theological or secular varieties is rejected as resting upon an optimism about human nature that does not match experience.

A second claim concerns *the good of political community*. For Augustine, government and the political community it makes possible are remedial institutions, gifted by God after the Fall to provide a modicum of order necessary for securing the basic goods that humans need to survive and flourish. Although occasioned by the sinful

perversion of the will, political community in Augustine's view of the world is one of God's greatest gifts. So important is political community that preserving it sometimes justifies killing another person toward the end of collective self-defense. Augustine is mindful that some governments do a better job at realizing justice than others, but government in itself is a basic good, the primary means for establishing *tranquillitas ordinis,* the peace of order.

A third and crucial claim concerns the *internationality of justice.* Not only are individuals under justice claims between themselves within a political community, but political communities are governed by justice claims in their relations with one another. This claim applies especially to the use of force. Augustine expressed this claim by the conviction throughout his political writings that war is always a human act. He employs the same moral framework for assessing war as he does for assessing any human act. Realism, as the idea that states operate outside the moral order in their relations with one another, is ruled out.

Later theorists in the tradition embedded this claim in the concepts of modern political theory: states are subject to certain justice claims outside the social contract, which limit the use of armed force. Central to the rival moral tradition on preemption, the "just fear" tradition, is the idea that justice claims only arise within the social contract. Hobbes expresses it most succinctly: "The Originall of Justice is the making of Covenants."[1] The sovereign state, described in terms of the sovereign self, possesses a near unlimited right of self-preservation. Proponents of the just war tradition employed many of the basic features of modern natural law theory, including its right of self-preservation, but they rejected the idea that this right ever exists unbound by other claims.

[1] Hobbes, *Leviathan,* XV.71, 100.

The tradition preserved a commitment to a separate and finally independent principle of "sociability," which placed limits on when a state could use armed force.

A corollary of this third claim, present in the tradition if not always expressed, is the notion that state sovereignty is never absolute. The language of the state as a moral self in a state of nature, especially as it developed to mean a self enjoying a nearly unmitigated right of self-preservation, was always more at home with the "just fear" tradition than with its rival, the just war tradition. The latter's commitment to the idea that states exist in a moral order meant that states, and the rulers governing them, were not free to use force as they pleased.

In both its medieval and modern forms, the tradition looked to natural law to support the claim that the scope of justice extends to the relations among states, limiting both the occasion and conduct of using force. While natural law performed several functions within the tradition, its principal function was providing a theory of international justice, upon which the criteria limiting the use of force could rest. Grotius's *On the Law of War and Peace* is a good example. Appointing the Greek skeptic Carneades as his representative antagonist, Grotius introduces his fundamental claim in the opening pages of his work:

> Carneades, then, having undertaken to hold a brief against justice, in particular against [the claim that justice is normative between states], was able to muster no argument stronger than this, that, for reasons of expediency, men imposed upon themselves laws . . . ; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice . . . . [This conclusion] must not for one moment be admitted. Man, is to be sure, an animal, but an animal of a superior kind . . . . [A]mong the traits characteristic of man is an impelling desire for society.[2]

[2] Grotius, *On the Law of War and Peace,* 10-11.

Grotius proceeds to present the main lines of his theory of international justice in natural law terms, starting with the claim that nature and reason impel humans to seek and preserve not simply their own good, but the good of others, as well.

While natural law theory has its contemporary proponents,[3] it has never recovered the intellectual standing it possessed in the early modern period.[4] The contemporary misgivings about natural law theory, at least in the early modern form it took in the writings of Grotius and others, begin with its central claim: that there are natural features of human existence, intrinsic and not the products of culture, which generate a set of moral claims accessible to and binding upon all humans and capable of mediating conflict across cultures.[5] Although attempts to construct a theory of international justice have not waned,[6] attempts to do so on the confident grounds that Grotius espoused are difficult to find today.

The historical importance of natural law to the just war tradition raises the question of how indebted the moral tradition finally is to natural law theory. In the early modern period Grotius and Pufendorf could not conceive of an international moral order, placing limits on the use of force by states, apart from the natural law project. As suggested above, however, the tradition employed natural law primarily to provide a theory of international justice, often summed up in the concept of "sociability." On the

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[3] Several contemporary scholars have attempted to present a defensible natural law theory, although not all have described their work in explicit natural law terms. *See* Traina, *Feminist Ethics*; Nussbaum, *Women and Human Development;* Finnis, *Natural Law and Natural Rights;* Grisez, *The Way of the Lord Jesus;* and MacIntyre, *Dependant Rational Animals.*

[4] As we saw in Chapter 6, the turn away from natural law was in part due to the rise of positivism, exemplified in the field of international law by Edward Hall's *Treatise on International Law,* first published in 1880. Perhaps the most important nineteenth century statement against natural law was John Austin's *The Province of Jurisprudence Determined* (1832).

[5] This critique is commonplace and one need not look far for examples. For a collection of several contemporary proposals on achieving a shared morality *see* Outka and Reeder, *Prospects.*

[6] For example, *see* Beitz, *Political Theory;* Rawls, *The Law of Peoples.*

foundation of this theory, proponents of the tradition then went on to describe the concrete norms limiting the occasion and conduct of using force. As we saw, Augustine articulated the three-fold assembly of *jus ad bellum* criteria (*legitimate authority, just cause,* and *right intention*) and later theorists in the tradition nuanced these requirements and applied the tradition to new issues and circumstances, including the issue of preemption.

Natural law, then, served as a vehicle for providing a theory of international justice: a theory about why individuals, and by extension, states, were not simply free to do as they pleased outside the bounds of the social contract. As noted earlier, the tradition demands some theory of international justice; it does not, however, demand a theory along natural law grounds. Part of the appeal of natural law, of course, was its claim to offer a unitary source of moral knowledge accessible to all persons and capable of arbitrating conflicts across cultural divides. Shared agreement today on an underlying theory of justice is well beyond reach. Such theories will vary across cultures, religious and philosophical outlooks, and political borders. It is outside the scope of this project even to begin sketching what a theory might look like today; in fact, there are many conceivable theories. Rather, it is enough that there is the possibility of increasing, ad-hoc agreement around a set of practical norms limiting the occasion and conduct of war, even while disagreements about theories of justice persist.

B. *Concrete Norms*

Building upon these core commitments, the tradition gradually carved out a limited space for using preemptive force, governed by a set of concrete norms that help

determine when such force is justified. These norms fit within a larger moral framework on the use of force in general, the main lines of which Augustine put in place. As we saw in Chapter 3, Augustine's writings suggest that a just war will always carry three marks: legitimate authority, just cause, and right intention. Canonists, theologians, and others contributed to the later development of this framework, but the most important figure in the tradition after Augustine was Aquinas. Aquinas formulated the now recognizable assembly of *jus ad bellum* criteria. More important, he also incorporated the tradition into his carefully worked out theory of moral action. The decision of whether it is just to kill another person must take account of several circumstances relative to the end, or purpose of the action. While *just cause* and *legitimate authority* are two of these circumstances, he also left the way open for several other considerations that theorists after him would develop.

Starting most importantly with Vitoria in the sixteenth-century, writers in the tradition began to apply this moral framework to the issue of the preemptive use of force. Grotius and Pufendorf followed closely along the path first marked out by Vitoria. Several criteria in particular emerged for determining when an individual or political community can use preemptive force: (1) *certainty of intent*; (2) *sufficient means;* (3) *active preparation;* (4) *magnitude of harm;* (5) *probability of harm;* (6) *temporal proximity of harm, as measured by 'imminence'* (although, as we have seen this criterion did not apply in every situation); (7) and *last resort* (also known as the principle of *necessity* or *the exhaustion of reasonable alternatives*). In addition, other norms that developed within the tradition regarding the use of force more generally remained

applicable, such as *legitimate authority* and the requirement of *proportionality* between the overall proposed use of force and the legitimate end in using force.

It is worth recalling how these criteria fit into *jus ad bellum* criteria developed by Augustine and Aquinas. The primary challenge to the moral tradition in the case of preemption is to discern when just cause arises. From its inception the tradition had always looked for some kind of actual harm, an *injury.* By definition, a preemptive attack is launched prior to receiving the harm. In the early modern period theorists began to talk about the possibility of an "incomplete injury." Writers in the tradition beginning with Vitoria developed several criteria for determining when just cause might arise absent an actual attack. These are the first five criteria listed above. In addition, the tradition also included the additional and independent requirements that even where an individual or state has just cause for using force first, doing so only follows after an exhaustion of reasonable alternatives to using force (*necessity*) and a judgment that the overall proposed use of force is proportional to the legitimate end, i.e., self-defense. Although the contemporary law governing the use of preemptive force, at least prior to 9/11, is by no means a simple restatement of the moral tradition on preemption, the law was shaped by and embodies several of its key norms. In particular, the customary law requirements of *necessity* and *proportionality,* and the related requirement that the attack be *imminent,* come directly out of this moral tradition.

II. Why Morality Matters

Before considering what this moral tradition might contribute to the task of revising the contemporary law governing the use of preemptive force, I return briefly to a

fundamental question underlying this investigation: namely, why does morality matter? The most obvious answer is that the use of preemptive force—killing the enemy before he attempts to kill you—is a profound, inescapably moral issue. The question of whether killing another person is ever morally justified has exercised philosophers and theologians for millennia and the added dimension that the potential aggressor has not yet attacked only complexifies the problem. A further reason why morality matters, and the focus of my interest in this section, concerns the importance of what might be called *moral legitimacy.* In this context I use the term *moral legitimacy* to mean a widely-held perception that a particular government policy accords with, or at least not too sharply contradicts, the public's moral sensibilities. I focus on the role of moral legitimacy in relation to the contemporary challenge of preemption. Specifically, I suggest that success in adapting the standards governing the use of preemptive force in an age of global terrorism will depend in part on achieving moral legitimacy. Furthermore, I suggest that achieving moral legitimacy will demand careful attention to the moral tradition that we traced in Part II.

I begin with a few comments about the term *moral legitimacy* as I use it. As a more general term, *legitimacy* means the quality or state of something being in conformity with recognized principles or accepted rules and standards. The "something" we are considering here is a government policy regarding the conditions under which a government would consider using preemptive force. *Moral legitimacy,* a more particular form of legitimacy, carries at least two different meanings. A policy might have moral legitimacy insofar as it is supported by defensible moral argument. A policy might also have moral legitimacy insofar as it conforms to, or at least does not too sharply conflict

with, the public's moral sensibilities. The first meaning assumes a framework for making moral judgments—a set of beliefs about what morality requires. It assesses a particular policy in terms of this framework. The person making the evaluation will often have little interest in what the broader public thinks. Moral legitimacy in this sense pertains to an individual and her moral commitments.

In a second sense, moral legitimacy concerns the degree to which a policy reflects moral commitments represented in the broader public. Of course, members of the public will often diverge in their moral judgments, sometimes strongly so, and so moral legitimacy is always measured in terms of the degree of public support. What matters most, particularly in a democracy, is whether enough people deem a policy morally legitimate, and if so to what degree. The importance of moral legitimacy will depend upon the context, especially the extent to which deeply moral issues are at stake. Moral legitimacy is not simply a matter of the public measuring governmental policies against pre-existing moral commitments. Democratic leaders actively seek to shape the public's moral perceptions. The White House has worked hard to define the moral landscape in the war on terror so as to secure moral legitimacy, appealing to clear-cut and impassioned dualities, such as good vs. evil and freedom vs. suppression.

These two uses of the term *moral legitimacy* are related. A policy deemed morally legitimate in the second sense but not the first is obviously wanting. The question of whether defensible moral argument supports a given policy, however, is different from the question of whether a policy achieves widespread moral support among the public, or at least does not receive strong moral disapprobation. Although I am certainly wanting a policy on the use of preemptive force that is morally legitimate in

the first sense—and the just war tradition, I suggest, is an important resource for crafting such a policy—it is the second sense of *moral legitimacy* that is my primary concern in this section. Success in adapting the standards governing the use of preemptive force in an age of global terrorism will depend in part on achieving moral legitimacy in this second sense, in the United States and abroad.

Perhaps the most important statement on foreign policy and the role of moral legitimacy after 9/11 is Joseph Nye's recent book, *Soft-Power: The Means to Success in World Politics.*[7] Nye defines *power* as the "ability to influence the behavior of others to get the outcomes one wants."[8] One form of power, and the kind that perhaps most readily comes to mind, is *hard power.* This power seeks to achieve certain ends through the "carrot" and the "stick": the use or threat of coercion and the offering of inducements. The American ultimatum to Saddam and the attack on Iraq that followed are the most recent examples of America's use of hard power. The U.S. strategy for dealing with North Korea's nuclear program is a further example. At this point in time, the strategy has focused on creating certain incentives for Pyongyang to halt its program, with only a distant threat of military force. In both instances, however, the incentive for compliance has come from outside.

A second form of power, often overlooked and undervalued, is what Nye calls *soft power.* This form of power exists as the ability to get what one wants on the basis of attraction rather than coercion or payments. Nye explains: "If I am persuaded to go along with your purposes without any explicit threat or exchange taking place—in short, if my behavior is determined by an observable but tangible attraction—soft power is at

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[7] Nye, *Soft Power.* Nye coined the term "soft power" in his earlier book, *Bound to Lead.*
[8] Ibid., 2.

work. Soft power uses a different type of currency (not force, not money) to engender cooperation—an attraction to shared values and the justness and duty of contributing to the achievement of those values."[9] It involves winning peoples hearts and minds rather than bending or breaking their wills.

The sources of soft power are several. Personality is one source. An elected official who exhibits an attractive persona may more readily gain acceptance for her policies than a leader who does not possess charm and charisma. Culture is another source. The United States receives vastly more foreign students studying in its colleges and universities than any other country. Many return to their countries, some making their way into leadership positions, with an overall positive experience of American culture. The benefit these outside impressions reap for America and its position in the world are of great value. The impressions that others have of American political values and institutions is a further source. More states have emulated the United States' constitutional system of government than any other country in the world. Again, the contribution this attraction makes to the success of American policies is easily overlooked but exceedingly important.

A final source of soft power, and the focus of my interest in Nye's work, is what he calls "moral authority" or "moral respect," and what I refer to as *moral legitimacy*. He sums up: "Soft power is a staple of daily democratic politics. The ability to establish preferences tends to be associated with intangible assets such as an attractive personality, culture, political values and institutions, and policies that are seen as legitimate or having moral authority. If a leader represents values that others want to follow, it will cost less

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[9] Ibid., 7.

to lead."[10] Moral legitimacy is especially important within democratic states, where coercion plays less of a role than it does in authoritarian states. A sufficient portion of the citizenry must believe or come to believe that a leader's policy on any important issue is in agreement with, or at least does not too strongly oppose, its own moral commitments. A state's decision to use force is no exception. "In addition to nuclear and communications technology, social changes inside the large democracies also raised the costs of using military power. Postindustrial democracies are focused on welfare rather than glory, and they dislike high casualties. . . . The absence of a prevailing warrior ethic in modern democracies means that the use of force requires an elaborate moral justification to ensure popular support."[11] In this sense, the success of hard power is often dependent upon the realization of soft power, and especially the degree to which the public—both citizens and other states—deem the particular use of force morally legitimate. In the Vietnam War America possessed unrivaled hard power, but lost the war in part because of eroding moral support. As Nye concludes, "morality can be a power reality,"[12] an idea echoed by Walzer in his notion that "justice has become a military necessity."[13] American success in reformulating the standard governing the use of preemptive force in an age of global terrorism will depend in part on this power reality.

Moral legitimacy then is an important, even if often overlooked, source of power. My claim, however, goes further: not only is moral legitimacy crucial for successfully revising the standard governing the use of preemptive force, but particular attention to the

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[10] Ibid., 6.
[11] Ibid., 19.
[12] Ibid., 28.
[13] Walzer, "The Triumph of Just War Theory," 931.

moral tradition on the just war is important for achieving this legitimacy. This is so for two reasons. First, it is important because the tradition deeply informed the contemporary norms that have governed the use of preemptive force since World War II. As we saw in Part II, the customary international law norms regulating the use of preemptive force did not appear *ex nihilo* in the middle of the twentieth century, nor did they first appear in the *Caroline Affair*; rather they were informed by the evolving just war tradition. As Chapter One suggested, a consensus emerged among nearly all states, both western and non-western, that the principles announced by Webster were the governing norms, a part of customary international law.[14] At the heart of this standard was the principle of necessity accompanied by the claim that preemptive force is only valid against an *imminent* threat. We saw the moral genesis of this concept in Part II and will return to this theme again in Chapter Eight. Revising this standard, which has governed the use of preemptive force for at least half a century, will require a careful showing of how a revised standard is consistent with the underlying moral commitments that have shaped and reinforced the law of preemptive force in the past. Simply pointing to changed circumstances is insufficient; the revisionist will have to show why these new circumstances require a change and how the new standard preserves key moral notions about when killing is justifiable.

Attention to the moral tradition is also important because the practical norms that developed within the tradition are broadly diffused in American society and arguably

[14] This is not to say that its practical norms are readily accommodated across all particular cultures and religions; there are some strands of Islam, for example, that would depart from the tradition in significant ways. *See* Kelsay, *Islam and War.* Nonetheless, international law norms on the use of force represent a moral consensus among governments representing very different cultures. Although the just war tradition I have examined emerged in the West, non-western cultures and religions possess traditions of restraint, as well, that support such a consensus. *See,* for example, James Turner Johnson's discussion of the Islamic Hanfi jurist al-Shayboni (d. 804-805) and the prohibitions he placed on killing certain classes of people in war. *Morality and Contemporary Warfare,* 180-186.

represent the predominant understanding of when and by what means the government can justifiably use force. Most Americans, admittedly, will know nothing about a longstanding moral tradition on the just war. Its imprint, however, is everywhere. In one sense the general belief that the use of force is sometimes just represents the tradition's primary claim, setting it apart from the alternatives of pacifism and *raison d'etat* accounts. These alternatives are present in American society, but only as small minorities. Beyond this general belief that the use of force is subject to moral scrutiny and is sometimes morally defensible, more specific concepts that developed within the tradition pepper water-fountain discussions about war. Concepts like *self-defense* and *aggression; war as a combat between combatants* and *non-combatant immunity;* the need for *proportionality;* and demands that force always follow from some *just cause* and only as a *last resort* are now commonplace intuitions that owe something to the moral tradition on the just war.

The contemporary intellectual revival of the just war tradition began in theological circles in the mid-twentieth century with the writings of John Courtney Murray and Paul Ramsey. Murray's 1959 essay, "Remarks on the Problem of War" reawakened interest among Catholics in the tradition.[15] Although Murray did not pursue the task in his essay, he set the agenda for intellectual work in the coming decades by noting in conclusion the need to rethink the tradition in the context of the Cold War. In the 1960s Ramsey published two books that vigorously pursued this agenda.[16] Writers

[15] Murray, "Remarks on the Moral Problem of War," 40-61.
[16] Ramsey, *War and the Christian Conscience; The Just War.*

trained in the theological sources that shaped the tradition continue to be at the intellectual forefront of just war scholarship.[17]

The tradition, however, was also taken up by proponents working entirely outside theological circles. Michael Walzer's contemporary classic, *Just and Unjust Wars,* is perhaps the best example. Published in 1977, Walzer's book played a crucial role both in registering the degree to which the tradition was already present in the language of contemporary culture, and spreading its concepts further.[18] The context for his work was the crisis of moral legitimacy that surrounded the Vietnam War. Walzer begins by stating that his task is to offer a nuanced account of moral intuitions widely represented in American society.

> I want to account for the ways in which men and women . . . argue about war, and to expound the terms we commonly use. I am concerned precisely with the present structure of the moral world. My starting point is the fact that we do argue, often to different purposes, to be sure, but in a mutually comprehensible fashion . . . . We justify our conduct; we judge the conduct of others. Though these justifications and judgments cannot be studied like the records of a criminal court, they are nevertheless a legitimate subject of study. Upon examination they reveal, I believe, a comprehensive view of war as a human activity and a more or less systematic moral doctrine.[19]

Walzer structures his book around the *jus ad bellum,* what he calls a "theory of aggression," and the *jus in bello,* what he calls the "war convention." Looking back at the more than twenty-five years that have elapsed since publication of *Just and Unjust Wars,* Walzer concludes in an article entitled "The Triumph of Just War Theory" that the

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[17] Ramsey's student, James Turner Johnson, is a good example. Although Ramsey focused almost exclusively on the *jus in bello,* Johnson has devoted considerable attention to the *jus ad bellum,* as well. His book, *Morality and Contemporary Warfare,* brought the tradition to bear on the changing nature of warfare that marked the 1990s, after the end of the Cold War. Jean Bethke Elshtain is another example. Her *Just War Against Terror* employed the tradition to think about the changing circumstances brought by the September 11th terrorist attacks.

[18] Originally published in 1977, the third edition was released in 2000. Walzer's more recent essays on the subject, taking into account 9/11, Iraq, and the challenge of terrorism, are collected in *Arguing About War.*

[19] Walzer, *Just and Unjust Wars,* xix.

tradition has largely won the day. Pointing to the Vietnam War as the turning point, Walzer finds that the tradition moved out of "religious departments, theological seminaries, and a few Catholic universities" into the mainstream of public discussion.[20]

Several examples highlight the imprint of just war theory on American society. Although my attention has been on the *jus ad bellum,* the just war tradition has also shaped the rules governing conduct in war and is an integral component of U.S. military training.[21] The military academies have been an important source of contemporary just war reflection and classes on the theory are prevalent in American universities, as well.[22] Outside the military and the academy, just war language and concepts inform the language of Presidents and protestors, alike. Former President Clinton echoed the tradition in making the case that armed intervention in Kosovo was a "last resort."[23] President George W. Bush invoked just war language in making the case for military action against Afghanistan, as well, saying repeatedly that the United States has "just

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[20] Walzer, "The Triumph of Just War Theory," 928.

[21] One of the early sources of international humanitarian law was the Lieber Code, prepared during the American Civil War by Francis Lieber, a professor at Columbia College, and issued with some revisions by President Lincoln. Although the Code was only binding on U.S. forces, it shaped the further development of laws regulating the conduct of war. For a discussion of the Lieber Code and the influence of the just war tradition *see* Childress, "Francis Lieber's Interpretation of the Laws of War," 95-164. Several contemporary military field manuals directly incorporate just war restrictions on the conduct of war. Perhaps the best example is U.S. Army Field Manual FM27-10, *The Law of Land Warfare,* first issued in 1955, which addresses the principles of proportionality and discrimination that emerged in the moral tradition. For further discussions of the moral tradition's influence on U.S. military regulations governing the conduct of war *see* O'Brien, *The Conduct of Just and Limited War;* and Cook, "Applied Just War Theory," 199-219.

[22] For example, the Joint Services Conference on Professional Ethics is an organization of military academics and professionals that discuss ethical issues relevant to the military. The Conference meets annually to present and discuss academic papers. For past papers, many of which deal with just war theory and its contemporary applications, *see* http://www.usafa.af.mil/jscope.

[23] For example, *see* President Clinton's speech at the start of the 1999 air strikes in Kosovo, "Conflict in the Balkans," *New York Times,* March 25, 1999. *See also* Prime Minister Tony Blair's remarks on the same, arguing that the situation in Kosovo created just cause for using armed force, "A Military Alliance, and More," *New York Times,* April 24, 1999.

cause" to respond to the terrorist attacks of 9/11.[24] Protestors, likewise, who demand "No blood for oil!" invoke the requirement that a state using force have *right intention.* In the two years after the terrorist attacks of 9/11, myriad books and articles in major print sources made extensive use of just war theory in assessing U.S. actions in Afghanistan and Iraq.[25]

The prevalence of just war norms in American culture and elsewhere does not, of course, mean widespread agreement on the use of force in particular cases. Witness the debate that raged between, on one side, Michael Novak and George Weigel who explicitly employed the tradition in support of the 2003 Iraq War, and on the other side, Rowan Williams, the Archbishop of Canterbury, and former President Jimmy Carter who invoked the same in opposition.[26] Several reasons explain such disagreement regarding the application of a set of shared norms governing the use of force. In many cases general principles are indeterminate when applied to a specific set of facts. Moreover, a different interpretation of the facts can lead to different conclusions, as well.

Nonetheless, this debate took place within a shared moral framework. Nothing will ensure shared conclusions. It is significant, however, as Walzer observed, that debates regarding the use of force so often assume shared norms about when the use of

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[24] *See, e.g.,* "President Outlines War Effort," Remarks by the President at the California Business Association Breakfast, Sacramento, Calif., October 17, 2001. Although, as I suggested in Chapter Two, the Administration has neglected the tradition as a source for revising the law on the preemptive use of force.

[25] I list only a few representative examples, taken from a literature review I prepared for Professor Stephen Carter, Spring 2004. Anderson, "What Kind of War Is It?"; Bennett, *Why We Fight;* J. Bottum, "You Say You Want a Just War?" *The Weekly Standard,* April 21, 2003; Elshtain, *Just War Against Terror;* Falk, *The Great Terror War;* Galston, "Perils of Preemptive War"; Robert P. George, "A Just War in Iraq," *Wall Street Journal,* December 6, 2002; Hauerwas, "No, This War Would Not be Moral"; John Kelsay, "'Just War': The Details," *Chicago Tribune,* November 10, 2002; Joe Loconte, "Rumsfeld's Just War," *The Weekly Standard,* December 24, 2001; Peter Steinfels, "The Just-War Tradition, It's Last-Resort Criterion and the Debate on an Invasion of Iraq," *New York Times,* March 1, 2003; and Michael Walzer, "What a Little War in Iraq Could Do," *New York Times,* March 7, 2003.

[26] Novak, "Michael Novak's Speech to the Vatican"; Weigel, "Moral Clarity in a Time of War"; Williams, "Just War Revisited"; and Jimmy Carter, "Just War—Or a Just War?" *New York Times* (March 9, 2003).

force is justified, even if the application of those norms leads to different judgments. No moral argument for revising the standard governing the use of preemptive force will ensure broad public support. Nonetheless, an argument that employs the language and concepts of the moral tradition on the just war—a tradition that I have suggested shaped contemporary international norms and is arguably the predominant framework in the American conscience for thinking about moral issues related to war—and shows how a new standard upholds past moral commitments would seem to be crucial toward the end of securing moral legitimacy.

Chapter 8

Toward a Revised Standard

Revising the law of anticipatory self-defense requires a careful rethinking of the concept of *imminence* as well as the development of new criteria for determining when the use of preemptive force is justified. As Part II suggested, the requirement that the threat be *imminent* as a measure of temporal proximity is only one criterion among many in the moral tradition. Nevertheless, for reasons that we will turn to shortly the concept of imminence has come to hold a position of primary importance in the contemporary legal doctrine. Preemptive force is only legitimate against an imminent threat of attack. It is this requirement of imminence, however, that the contemporary threat of global terrorism most challenges. Post-9/11, the revisionist holds, a standard that categorically prohibits states from acting until the threat is imminent will fail to provide states with the security they require. Although the 2002 *National Security Strategy* says the United States must "adapt" the concept of imminence to this new security environment, the document clearly envisions replacing it with something else.[1] As we will see, once the requirement of imminence is no longer the principal criterion for determining when a state may use force first, multiple points of assessment must take its place. Toward both of these ends—rethinking the concept of *imminence* and developing a new standard—the moral tradition on the just war has much to contribute.

[1] Deputy Secretary of Defense, Paul Wolfowitz, was more accurate when he said, "We must be prepared to act. We cannot wait until the threat is imminent. The notion that we can wait to prepare assumes that we will know when the threat is imminent." Paul Wolfowitz, Remarks before the International Institute for Strategic Studies.

Before taking up these two tasks and then applying the revised standard I propose to a few cases, I briefly return to a theme raised throughout this work and offer a few comments about the process of law revision that I employ. Changes in the international law of force often occur after momentous events that challenge the status quo. The terrorist attack of 9/11 is one such event. States may decide that some part of this assembly of expectations no longer serves the end it was meant to secure. Powerful states often initiate the process, as the United States did with release of the *National Security Strategy*. Other powerful states or coalitions of smaller states may object to the change. A dynamic of back and forth, shaped by public statements, formal discussion, actual practice, and various other means will often push toward a more settled expectation.

The principal actors in this process are states, but scholarly contributions can play a part in shaping public opinion and influencing policymakers. The sources that scholars employ in making their arguments are several. Those I have employed are sources that approach the subject from a *moral* perspective and together constitute a longstanding moral tradition on the use of force. Attention to this moral tradition in facing the contemporary challenge of preemption is important for several reasons explored in the previous chapter. Of course, moral sources are not the only ones, but they are an important source and the focus of my contribution. Moral norms, moreover, are not the same as legal norms. While it is a mistake to identify them, it is also a mistake simply to separate them. As Part II suggests, the moral norms governing the use of force that developed within the just war tradition have significantly shaped the international legal norms we have today. My aim in this chapter is to facilitate a process that has continued

in varying degrees since the modern emergence of international law: looking to the moral tradition as a resource for an evolving legal standard on the use of preemptive force.

I. Imminence in Context

Rethinking the concept of imminence requires attention to two relationships in which this concept stands: (1) the relationship between *imminence* and the type of entity threatened, namely whether it is a case of individual or collective defense, and in the case of the former whether it takes place inside or outside the protections of a political community; and (2) the relationship between *imminence* and the principle of *necessity.* Prior to Webster, it is clear that the requirement of an imminent threat only applied to cases of *individual* self-defense, and then only within the context of a functioning government. Recall that Vitoria, the most important early theorist in the tradition to extend the just war norms to the question of preemption, never mentioned this criterion concerning the temporal proximity of the attack. His requirement that the person considering the use of such force "knows with scientific certitude" that the aggressor will in fact attack only implied the requirements of *certainty of intent* and *sufficient means.*

With Grotius came not only conceptual clarity, distinguishing between cases of individual and collective self-defense, but also the introduction of the requirement that the threat be *imminent.* Speaking first of individual self-defense, and presumably in the context of a political community, Grotius states: "War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed. The danger, again, must be immediate and imminent in point of time. . . . [I]f the assailant

seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled."[2] The mere drawing up of plans and other preparations for an attack are insufficient; the attacker must initiate the actual movement that will result in the victim's harm. Turning to the use of preemptive force by the state, however, Grotius makes this qualification. "What has been said by us up to this point . . . applies chiefly, of course, to private war; yet it may be made applicable also to public war, *if the differences in conditions be taken into account.*"[3] He is explicit that a state need not wait until the threat is imminent, in the stringent sense described in the case of individual self-defense. Rather, a state can "forestall an act of violence which is not immediate."[4]

Like Grotius, Pufendorf requires that individuals under a functioning government only use preemptive force against a threat that is imminent. He emphasizes that this criterion requires that in addition to the clear intent to harm and means to do so, the aggressor must also be near in space and time, having begun the action that will result in the victim's harm. The example he provides is an attacker charging with weapon drawn, though still at some distance. Pufendorf chides Grotius, however, for not making clear a further distinction between individual self-defense in the context of the political community and the same in the state of nature.[5] The standard he describes for states and individuals outside the protections of political community are nearly identical.[6] The

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[2] Grotius, *On the Laws of War and Peace,* II.I.5, 173.
[3] Ibid., II.I.16, 184 (emphasis added).
[4] Ibid. He explains this difference in terms of punishment. While individuals have a right to use force for self-defense, only states have a right to use force toward the two additional ends of restoring goods taken and punishment. The use of preemptive force against a threat that is not imminent is a form of the latter. Through this classification Grotius achieves a tidy explanation for why states and not individuals have greater leeway to act preemptively. He also points to the deterrent purposes of preemption, deterrence being the primary end that punishment achieves for Grotius. Later proponents accept that any legitimate use of preemptive force is a form of self-defense, and suggest reasons why states and not individuals have this broader right.
[5] Pufendorf, *On the Law of Nature,* II.V.3, 27; II.V.7, 275-276.
[6] For the former, *see* VIII.VI.4-5, 1295-1296; for the latter *see* Ibid., II.V.6, 273-274.

criteria of *certain intent, sufficient means,* and *active preparation* are all included, but *imminence* is noticeably absent.

Imminence is a requirement for the use of preemptive force by individuals under the protections of a functioning government, but not a requirement for states or individuals outside such protections, on account of the presence of a higher source of authority in the case of the former to which an individual can appeal for protection. Where such appeal is possible, individuals can only use force first under the most stringent requirement: that the threat be imminent, in the sense that failure to act now will afford the victim no other means to prevent the harm. Another reason sometimes suggested as to why states possess a broader right is simply the fact that more is at stake in the case of a political community than an individual, in the sense of the sheer number of persons potentially affected by an unchallenged attack.

Without any explanation for his departure from the tradition to which he appeals, Webster applied the standard for individuals within a political community to states. In his 1826 oral argument to the Supreme Court in the case of the *Marianna Flora,* Webster references both Grotius and Pufendorf in describing the standard that states must meet for preemptive action. "By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable. . . . Before I can actually assault another under colour of my own defence, I must have tokens and arguments amounting to a moral certainty . . . so that unless I prevent him, I shall immediately feel his stroke."[7] Webster's description of imminence is

[7] 24 U.S. 1, 17-18 (1826).

even more stringent in his letter to the British: "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[8]

In his argument before the Court in *Marianna Flora,* Webster makes explicit reference to "the rules of the common law." The standard he articulates is similar to that found in Blackstone, whose *Commentaries on the Laws of England* were enormously influential in the new republic. Blackstone treats the subject of anticipatory self-defense in his chapter, "Of Homicide." He distinguishes three common law categories of homicide: justifiable, excusable, and felonious. Anticipatory self-defense falls within the second category. His account expresses a stringent understanding of *imminence.*

> [T]he self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault . . . . This right of natural defence does not imply a right of attacking: for, instead of attacking one another of injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant."[9]

Although Blackstone does not use the term *imminence,* his standard is the same.

Blackstone's rationale for this stringent standard is the same found in Grotius and Pufendorf: individuals within a state and faced with a threat usually "have recourse to the proper tribunals of justice." Therefore, a "preventive" attack against an "impending" threat is typically ruled out; in these cases a civil remedy is available. Rather, the threat must be "certain and immediate." Although Blackstone's subject is English common law, he mentions in the next paragraph that the same standard does not govern between

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[8] Webster to Fox (April 24, 1841), 195.
[9] Blackstone, *Commentaries,* 183.

independent nations.[10] Webster, however, obscures this distinction. This easy transference of the standard for preemptive action in the case of individual self-defense to the same in the case of collective self-defense might not be nearly as questionable if, in fact, the tradition up to that time and the very writers Webster cites had not made such a clear distinction between the governing standards in these two different contexts.

Why did Webster substitute one standard for the other? It is important to remember that Webster is not making any sweeping generalizations about when states can use preemptive force. (And, as we saw in Chapter Six, states in the nineteenth-century were not bound by any broad prohibitions in deciding to use force.) Webster's cases were quite particular: in the first, a case of perceived piracy; and in the second, a case of using force by one state against another under a bi-lateral neutrality agreement. It was only later in the mid-twentieth century appropriation of Webster's language that the standard was applied more broadly. Moreover, it is important to remember that Webster was a lawyer trying to make the strongest case he could on behalf of his clients, even if it required a creative departure from his sources. In both the case of the *Marianna Flora* and the *Caroline,* Webster's purpose was well-served by an especially stringent standard for preemptive action, a standard that included the primary requirement that the threat be *imminent.* The architects of international law after the Second World War, eager to place strong limits on when one state could use force against another, found in Webster's language historical precedent for a stringent standard.

In addition to examining the relationship between the criterion of imminence and individual versus collective self-defence, we also need to consider the relationship between imminence and the principle of necessity. Recall that the tradition consistently

[10] Ibid., 184.

required that even where an individual or a state has just cause for preemptive action, the same must also meet the independent requirement of *necessity.* In other words, the individual or state must exhaust all reasonable alternatives short of using force, which is always a last resort. The narrative in Part II suggests a special relationship between the requirement of *imminence*, where it applies, and the principle of *necessity,* an independent criterion that applies in all cases of preemptive action and is applied after a determination of just cause. In particular, it is clear that the requirement of an *imminent* threat served as a proxy for the more fundamental requirement that the use of preemptive force be *necessary.*[11]

Although Grotius requires an imminent threat as a general constraint on individuals using preemptive force under the protection of a political community, recall that he does so with a qualification. The passage is important and I restate it here. "[I]f a man is not planning an immediate attack . . . I maintain that he cannot lawfully be killed, *either if* the danger can in any other way be avoided, or *if* it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences."[12] Read closely, this passage allows an individual to use preemptive force where the threat is something less than imminent if there is no other way to avoid certain harm.[13]

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[11] In describing the criterion of *imminence* as a proxy for necessity, I recognize that under some circumstances the presence of an imminent threat is demanded by the requirement of *necessity.*

[12] Grotius, *On the Law of War and Peace,* II.I.5, 173-175 (emphasis added).

[13] This passage might be read to preclude anticipatory self-defense short of an *imminent* attack, since the possibility of "accidental occurrences" would never allow a person certainty that she could not otherwise avoid the threatened attack. As a generalization this might be true, but Grotius does not conclude that it is always the case. Elsewhere he draws on Aristotle to nuance his use of the term *certain* in the context of moral reasoning. "[T]he degree of certainty required is that which is accepted in morals." Ibid., II.XXI.5,

The reason, this passage suggests, concerns the relationship between *imminence* and necessity: namely, that *necessity* is the underlying moral requirement, requiring that the potential victim have no other means to avoid what is otherwise certain to happen. The requirement of imminence, then, functions as a useful proxy for necessity: an attack is imminent where it is so near in space and time that the potential victim lacks any other means to escape taking the first blow except by using force first. In the context of a functioning government, this proxy makes sense, since generally individuals can appeal to the state for protection. Grotius makes an exception, however, in some cases where the threat is not imminent but the person subject to attack lacks any other effective means to defend herself against a harm that is certain to come. This exception is not problematic, however, insofar as *imminence* is only a proxy for *necessity,* and does not require anything finally independent of the latter. It does not escape Grotius's notice that making such a judgment is difficult, especially since the time between the present and when the attack is imminent can give rise to "many accidental occurrences" that might allow a person to protect herself without using preemptive force. Nonetheless, Grotius recognizes that in a very limited set of cases waiting for the threat to be imminent will effectively preclude a sufficient defense. Although Grotius, like everyone else in the tradition after him, requires that states only use force as a last resort (*necessity*), he does not limit such uses of force to *imminent* threats. Lacking the protections of a higher authority, states may in some limited cases need to use preemptive force. A general requirement of *imminence* would fail to capture the differences in this context.

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549. This certainty is always something less than the kind of certainty one has in mathematics, taking account of the knowledge a person can reasonably be expected to have at a given point in time.

Pufendorf's writings reflect the same close relationship between the requirements of *imminence* and *necessity*. He explicitly defines *imminence* in terms of necessity. Addressing the standard for preemptive action by an individual in civil society, Pufendorf writes: "It seems possible to lay down the general rule that the beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space being also reckoned *as that which is necessary,* if I wish to attack him rather than to be attacked by him."[14] In other words, an *imminent* attack is an attack so near in space and time that the potential victim has no other alternatives but to attack first, if she is not to take the first blow. In the case of individual self-defense in civil society, imminence functions as a proxy for necessity. By not requiring an imminent threat for states or individuals outside civil society, Pufendorf implicitly acknowledges that there are some cases where a state, lacking a higher authority, may have no other reasonable alternative short of using force to defend itself against a threat that, at the time, is less than imminent. Again, *necessity* is the fundamental moral measure.

Webster's standard, although applying the imminence standard to states, follows along the same lines. As for Grotius and Pufendorf, *imminence* and *necessity* bear a close relationship to each other. The first half of Webster's standard—"a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation"—explicitly defines *necessity* in terms of *imminence*. Using force is necessary because the threat is "instant," so near in time that the victim has "no choice of means" to defend herself; she can only strike first with force. Interpreted outside of the

[14] Pufendorf, *On the Law of Nature,* II.V.8, 276.

larger tradition of which it is a part, however, it is hard to discern in Webster the nuanced relationship between these two requirements as they developed in the tradition. Webster's language suggests a near identity between the two requirements, with no clear reason to think that *necessity* is more fundamental. Moreover, since Webster applies the requirement of an imminent threat in both the individual and collective contexts, there is less perspective to discern the relationship between the two.

A few observations follow from this analysis of the relationship between *imminence* and *necessity* in the tradition. First, in those cases where the tradition did predicate preemptive action on the presence of an imminent threat, this requirement had the effect of dampening the importance of the other criteria as independent points of moral assessment. The requirement of an *imminent* threat effectively subsumed most of the other requirements. In addition to standing as a proxy for *last resort,* an imminent threat was assumed to satisfy the criteria of *certain intent, sufficient means, active preparation,* and *probability of harm.* The only criterion in the tradition that it did not assume, perhaps, was that of *magnitude of harm,* applied in the context of states. This result in part explains the near exclusive focus in the contemporary legal doctrine on *imminence* as the relevant norm. If *imminence* can no longer fulfill the role that it once did, as I am suggesting it cannot, then these other criteria will demand renewed attention.

Second, as already suggested, where the threat was truly imminent, the tradition assumed that the requirement of necessity (also, *last resort* or the *exhaustion of reasonable alternatives*) was also satisfied. In this relationship, *imminence* served as a test for the more fundamental requirement of *last resort,* and did not in itself measure any

morally relevant qualities independent of what *necessity* measured.[15] The suggestion by some contemporary scholars that *imminence* and *necessity* are two separate and independent standards, both of which must be satisfied, is misguided.[16] This stringent requirement made sense, insofar as individuals can almost always find protection from the state, and only in very rare cases would they need to strike first to avoid taking the first blow.

At the same time, the tradition did not understand the presence of an *imminent* threat as a necessary condition for satisfying the more fundamental requirement of *last resort* (the principle of necessity). As Grotius's treatment of this issue suggests, some theorists made an explicit exception for individuals in civil society to use preemptive force absent an imminent threat, where the criteria of *certain intent, sufficient means,* and *active preparation* were satisfied and the person had no other reasonable alternative for defending herself. Moreover, all theorists prior to Webster affirmed that states are not under the requirement of showing an *imminent* threat, even though they must always show that preemptive action is a last resort.

In conclusion, the moral tradition on preemptive action provides two reasons for revising the law of preemptive force in a way that does not give the requirement of an *imminent* threat the central and near exclusive importance that it has had under the Charter, at least prior to 9/11. Until Webster and the retrieval of Webster's standard during and after the formation of the Charter system, the tradition near universally

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[15] As *imminence* in some interpretations has come to mean something less than the stringent requirement laid down in the tradition, an effect brought about in part by the application of this criterion to the more complex situations of states, it becomes less clear whether *imminence* serves as a proxy for *necessity.* For an example of a less stringent use of *imminence,* see McDougal, "The Soviet-Cuban Quarantine," 598.

[16] For example, Michael Schmitt concludes: "International law requires that any use of armed force in self-defense, preemptive or otherwise, comply with three basic criteria—necessity, proportionality, and imminency. These requirements derive historically from the *Caroline* case." Schmitt, "Preemptive Strategies," 529. *See also* Yoo, "Using Force," 776.

rejected the requirement that states can resort to preemptive action only in the face of an imminent threat. While the Webster standard as appropriated under the Charter system was an attempt to limit the overall use of force, it was from its inception a notable departure from the tradition. Of course, Webster's move to apply the imminence criterion to states was not an attempt to apply restraint where others refused to do so. The tradition had developed a nuanced account, taking into consideration the differences between states and individuals and developing several factors previously mentioned to decide when a state could take preemptive action. While the requirement of an *imminent* attack as applied to states seems to have served the international system well in the years since 1945, the new threat of global terrorism has altered the circumstances in such a way that this standard can no longer provide states with the security they require. The moral tradition on the just war provides both the historical and moral warrant, as well as the resources, for revising the law in this new security environment.

Even more important, the tradition suggests that the principle of necessity must govern the criterion of imminence. In Chapter 2, I suggested that post-9/11 we find ourselves in a situation where it is plausible to think that the requirements of *imminence* and *necessity* might in some cases clash at a fundamental level. That is to say, we can now imagine a situation where a state has exhausted all reasonable alternatives outside the use of force to secure the legitimate end of self-defense, but the threat is not *imminent*, as traditionally conceived. Our narrative in Part II and the preceding analysis gives us the resources to sort out this conflict. The tradition has always understood *imminence* to stand as a proxy for the more fundamental requirement of *last resort.* Where *necessity* was satisfied but the threat was not imminent, the tradition is clear that

necessity must govern. An *imminent* threat almost always makes the use of force *necessary* if a state is to defend itself, but in the absence of an imminent threat the use of force might still be necessary—and *just,* as well.

II. Redrawing the Boundaries

Earlier I observed that the emergence of *imminence* as the predominant criterion in assessing uses of preemptive force had the effect of obscuring other points of moral assessment developed within the tradition. These other criteria were, to some degree, preconditions of an imminent threat. Where the threat was imminent, there was no pressing reason to consider these other factors. If the criterion of imminence can no longer assume the position of predominance in international legal doctrine that it did from 1945 to 9/11, as I conclude, than these other criteria in the moral tradition on the just war may serve as a rich resource for developing a new standard—one that is continuous with the underlying norms that have informed the doctrine, but takes into account the realities of today's security environment. Drawing on the tradition, I begin to sketch an outline of a revised standard.

The standard for the preemptive use of force that I will describe includes the now recognizable criteria that developed within the moral tradition on the just war: *certainty of intent; sufficient means; active preparation; magnitude of harm; probability of harm; last resort (*or, *necessity);* and *proportionality (of ends).* A rule that rests primarily on the requirement of *imminence* (and the customary law requirements of *necessity* and *proportionality,* as well) carries the virtue of simplicity. Admittedly, including these other criteria makes the standard more complex, but this complexity only points to the

intricacy of the issues involved. Although the standard will quickly rule out some proposed uses of preemptive force, in some limited cases it will not. Most of the measures admit of degrees, requiring a judgment of practical reason. A situation which overwhelmingly fulfills one of the measures may tip the outcome even if another factor is to some degree less than fully satisfied. As Webster noted when articulating his standard for the preemptive use of force, "this right is a question to be judged of by the circumstances of each particular case."[17]

A. *Certainty of Intent*

Certainty of intent was the first criterion to emerge in the tradition, which began with Vitoria's extension of just war theory to the issue of preemption. As Part II suggested, it was this requirement more than any other that separated the just war from the "just fear" tradition. From Vitoria to Vattel, the major proponents of the tradition all accepted the conclusion that mere power (i.e., *sufficient means*) alone did not justify preemptive action. Rather, the target state must also ascertain intent. Applying this assessment today, however, at once raises several questions.

For example, what is the object of intent that the state considering the use of preemptive force must discern? In other words, "intent" to do what? Of course, under the Charter system the use of force toward the end of self-defense is only legitimate against an "armed attack." Although most commentators conclude that under the current customary law any armed attack is sufficient to warrant a defensive use of force, in the case of preemptive action where a state is responding to a use of force that has not yet

[17] Webster to Fox (April 24, 1841), 1133.

occurred, the state will need to know something more definite about the kind of attack intended, such as the magnitude of harm.[18] We will return to this question shortly.

This limitation immediately raises the further question as to how specific the knowledge of the aggressor's intent must be. Is it sufficient that the certainty of intent concerns knowledge of only a general will to attack? Must this knowledge concern a more specific threat of attack, including some knowledge of the time, place, and/or method of the coming attack? It is important that this standard not be so stringent that it measures something more than certain intent. Requiring extensive knowledge of the time, place, and method of attack would often have this effect. Although such detailed intelligence will often bolster the case for a preemptive use of force, and in some cases may be necessary to fulfill other criteria in the standard such as *magnitude of harm,* to make this blanket requirement is to demand something more than this criterion requires. An actual attack always carries an address. It is inscribed in space and time. It is not knowledge of this particular address, however, that warrants the use of defensive force once the attack is in progress, but rather the mere fact that the political community is being attacked. Specific intelligence as to the time, place, and method may often be very difficult to ascertain, as the events leading up to 9/11 show. More important, even if these details are known, they do not make the anticipated action more or less an "armed attack," against which states have a right not to take the first blow. Knowledge of

[18] William H. Taft IV, Legal Adviser to the U.S. Department of State, rejects the suggestion of the International Court of Justice in its 2003 *Oil Platforms Case* that a lawful use of defensive force requires a finding of "specific intent" on the part of the aggressor to harm a particular state, rather than a more general will to harm that results in a harm to a particular state. Taft, "Reflections on the ICJ's *Oil Platforms* Decision," 302-303. The facts that Taft is responding to, however, concern the United States' response to an actual armed attack, not a case of preemptive action. The special characteristics of the latter, namely the fact that the actual harm has not yet occurred, distinguish such situations and provide good reason to require that states considering the use of preemptive action know something more about the aggressor's intent than simply a general will to do harm.

another's intent to attack is all that this criterion requires, since it is the attack that justifies a defensive response.

The assumption, of course, is that in some cases a state might be sufficiently certain of another's intent to attack, without knowing extensive details about the time, place, and method of the attack. Clear statements by the supposed aggressor toward this end, certain actions, or a history of such acts might all provide sufficient certainty absent knowledge of these details. Requiring knowledge of the time, place, and method of attack might help distinguish lofty claims of intent unmatched by action from those that are actively pursued, but this is to ask too much of *clear intent*. The separate requirement of *active preparation* sorts out mere aspirational claims from those actively pursued. Distributing the workload among the criteria in this way recognizes that there might be some limited set of cases where a target state can justifiably use preemptive force against an aggressor that expresses the clear intent to commit an armed attack against the target state and evidences undeniable preparation for making the attack, yet the target state lacks knowledge of the time, place and/or the method of the attack. Although incorporating these requirements into the criterion of *certainty of intent* would have the advantage of raising the bar to uses of preemptive force, as we will see when we turn later to the events of 9/11 it would do so at the cost of denying states the possibility of an effective defense in some cases.

Furthermore, what does it mean that the responding state must be *certain* of the aggressor's intent? Mere conjecture is not sufficient; rather, the state considering the use of preemptive action must have verifiable proof that the potential aggressor intends to attack. This proof must convey a strong assurance of the aggressor's intent—something

close to the requirement of "beyond a reasonable doubt" in domestic criminal law (although here applied to the aggressor's *intent,* and not the aggressor's actual actions). Subsequent to the use of preemptive force, although before if the nature of the threat allows, the target state will have to make the case that the potential aggressor intended to attack.

Finally, what are the means for registering intent? Actual testimony of one's intent would of course be one form of proof. In some cases this form of evidence is available, through intercepted communications, other forms of intelligence gathering, and even publicized statements to this end. Actions, however, can also be a reliable sign of intent. For example, detailed satellite images of persons in terrorist training camps undertaking exercises that have no purpose other than wanton destruction, and perhaps backed up by on-the-ground intelligence, might be included in making the case for *intent,* although such actions would have to be connected to other evidence that shows that the state considering a preemptive use of force is the intended target. The gathering of intelligence about the actions of terrorists might fulfill the requirements of *certain intent* and *active preparation* at the same time.

In a small number of cases, the mere possession of certain weapons of mass destruction might be enough to satisfy the requirement of clear intent. Strong evidence that private actors possess a nuclear bomb or a vial of the smallpox virus would not require recorded testimony of plans to use such weapons, since they possess no legitimate purpose in the hands of a non-state actor.[19] At least one purpose in requiring clear intent

[19] The situation is more complex in the case of state actors, particularly in the case of nuclear weapons. The Treaty on the Non-Proliferation of Nuclear Weapons blesses a limited nuclear club. Moreover, many states have generally tolerated the acquisition of nuclear weapons by Israel, India and Pakistan, all who refused to sign the treaty.

is the tradition's concern to distinguish less threatening accumulations of power, such as accompanies a state that increases its economic strength, from those directed toward an actual armed attack. Where the means of power has no benign use, such as a terrorist's possession of a nuclear weapon, possession is a sufficient indicator of intent.

B. *Sufficient Means*

The moral tradition on the just war has also consistently required that the state considering preemptive action ensure that the potential aggressor has *sufficient means* to carry out the intended armed attack. Obviously, a threat of harm absent the actual means to carry it out will not justify preemptive action. 9/11, however, altered our sense of what counts as "sufficient means." Before the multiple attacks of September 11 (and to a large extent, after, as well), attention was focused on conventional arms and especially WMD. Civilian aircraft, employed in the service of terror, however, carried out the destruction of 9/11. One forward-looking lesson of that day was to consider unsuspecting means as possible vehicles for an attack. The enlarged imagination of contemporary terrorists has the effect of lowering the standard for what counts as *sufficient means.*

Moreover, the question is also raised as to whether the potential aggressor has actually to possess the means, or whether in some cases the near proximity of attaining the means might suffice. The answer to this question will depend on a holistic assessment of the situation, taking into account all of the criteria. For example, if the aggressor's intent is certain, the probability of attaining the means is high, the potential harm that would result is severe, and a narrow window of opportunity in which

effectively to forestall the harm makes it likely that acting now would be an act of last resort, then this situation might justify preemptive action.

C. *Active Preparation*

A further prerequisite for the use of preemptive action is evidence of *active preparation* on the part of the aggressor to carry out the intended armed attack. This assessment points to some activity on the part of the aggressor in preparation for the intended harm, but not necessarily the action that puts the armed attack into actual motion. In other words, *active preparation* is activity short of that which marks an *imminent* attack. In some cases this assessment will take place in the course of discerning *certain intent,* especially where the measure of intent is actions taken by the party intending harm. In other cases, the target state may ascertain intent and establish that the potential aggressor has sufficient means to carry out his intended plans, but evidence no active preparation toward that end. In such cases the criterion is unmet and preemptive action is not legitimate.

Returning to our discussion of *certainty of intent,* it is also important to note that the effect of requiring knowledge of the aggressor's intent to conduct an "armed attack," and not necessarily the time, place, and method of attack, is that states considering preemptive action need not know every detail about how certain preparations fit into a planned attack. It is sufficient that certain activities are taking place clearly in preparation for terrorist attacks, and not plausibly some other legitimate end. For example, certain knowledge of a terrorist training camp for preparing fresh recruits could

satisfy this criterion, even if the particulars of the trainees' missions are not fully known.[20]

D. *Magnitude of Harm*

A revised standard must also look to the *magnitude of harm* that would result from an armed attack. An assessment of this kind is generally thought *not* to apply in cases of an actual armed attack, under the customary law.[21] Rather, the "inherent right of self-defense" applies in the case of any armed attack (though of course states are limited in their response by the customary law requirement of *proportionality*). Again, however, the differences between using defensive force against an actual attack and the same as a preemptive action justify a more stringent standard. The possibility of interpretive misjudgment and intervening circumstances to prevent or forestall an attack push in the direction of raising the barriers in the case of preemption, and one of the measures that the tradition oftentimes required in the context of preemptive action is assessing the magnitude of the potential harm.

As mentioned earlier, sometimes this assessment will require a measure of knowledge about the time, place and/or method of the coming attack. In other cases, however, states considering preemptive uses of force can reach reliable judgments about the magnitude of harm by knowledge of both the means possessed by the terrorist group, its intentions, and possibly its record of terrorist activities. A state need not know that a

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[20] In the case of 9/11, several of the terrorists that conducted the operation did not know their assigned mission until the very end.

[21] Although, the International Court of Justice's 2003 *Oil Platforms* case suggests otherwise. In finding that the actions of Iran did not constitute an "armed attack" against the United States, the Court said that it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms." International Court of Justice, *Oil Platforms,* para. 51 (quoting *Nicaragua Case,* 101).

foreign terrorist cell present in the target state plans to release nerve gas at this place and at this time; it is sufficient to know that the cell possesses such a potent agent and is seeking an opportunity to use it.

Like the next measure, *probability of harm,* the *magnitude of harm* is especially assessed in relation to the other criteria. There is no single level of harm, the exceeding of which warrants the use of preemptive force. Some forms of attack, such as the detonation of a large dirty bomb in a dense urban area, the release of a highly lethal pathogen, or the blowing up of a chlorine tank, would almost certainly satisfy this criterion. In fact, forms of attack such as these that hold the potential for such wide scale destruction may tip the balance in favor of preemptive action, where perhaps other measures are not quite as strong. In other cases, however, the magnitude of harm will not point toward the use of preemptive force, but again will have to be assessed in relation to the other measures.

E. *Probability of Harm*

A state weighing the use of preemptive action will also need to consider the probability of the anticipated attack. Again, it is difficult to draw any line beyond which the use of preemptive force is justified. In reaching judgments about the probability of the harm, the state considering the use of preemptive force will need to consider several factors. The past record of the state or terrorist organization will certainly inform this judgment. Other criteria already mentioned are applicable, as well. For instance the availability of *means* to carry out the attack as well as the level of *preparation* for the attack will all play some role. The costs of preemptive action to the state that conducts

it—economic, legal, strategic, moral and otherwise—can be exceedingly great. At some point the risk of an attack is no longer a risk worth taking, but part of determining when that point is reached requires a measurement of the likeliness of a successful attack. Together, these five points of assessment—*certainty of intent; sufficient means; active preparation; magnitude of harm;* and *probability of harm*—determine whether there is due cause for using preemptive force. Having arrived at this judgment, two additional tests are necessary for determining the legitimacy of the action, under the revised legal standard I am proposing.

F. *Last Resort*

The first of these tests is the now customary law requirement of *necessity,* often called *last resort* in the moral tradition, which requires that the state considering preemptive action first exhaust all reasonable alternatives to using force. Taken to its extreme, this requirement might preclude all but the most imminent of attacks. Only at the last moment before the blow can a person say that using force is a last resort. This reading of the requirement would simply equate *necessity* with *imminence,* but as we have seen neither the moral nor the legal traditions accept this reading of last resort. The requirement is that the state considering preemptive action exhausts all *reasonable* alternatives. The assumption of this requirement is that states possess an "inherent" right of self-defense and in some cases are justified in using force to secure this end. At some point other alternatives become unreasonable insofar as they seriously jeopardize achieving the end of self-defense. Simply because an alternative might obviate the use of force does not make it reasonable. Deciding on reasonableness involves taking account

of several factors, including the probability of success and the costs involved with the alternative.

In the case of preemptive action, the principle of necessity has special importance. As we saw in Chapter One, most commentators conclude as a matter of international law that the presence of an actual armed attack always satisfies this customary law requirement. In these cases, the customary requirement does less work under the Charter system. In the case of anticipatory self-defense, however, the principle of necessity plays a special role. Since the attack has not yet occurred, the crucial question is whether force is necessary to secure the end of self-defense against a threatened armed attack.

As I concluded earlier, in a clash between *necessity* and *imminence, necessity* governs as the underlying principle. The radically altered security environment post-9/11 no longer allows us to hold tightly to the *imminence* standard as a proxy for last resort. Although it may often be the case that the requirement of last resort is only satisfied at the point when an attack is *imminent,* holding on to a hard and fast rule that requires as much is misguided. On the one hand, states may rightly refuse to defend themselves until such a point is reached in some limited situations, faced with overwhelming security threats. On the other hand, and more important, the failure to develop an explicit and concrete alternative standard invites abuses of a standard that is deemed already compromised and fails to provide a set of shared expectations among state and non-state actors—one of the principal purposes of international law.

We have already examined several criteria independent from the requirement of last resort, criteria often obscured in the past century with the centrality attributed to *imminence* in the customary law. If the principle of necessity no longer means in all

cases that the attack be *imminent,* however, what does it mean to exhaust reasonable alternatives today in cases where the threat is less than imminent? General alternatives include traditional state-to-state diplomacy, public diplomacy, the restriction of financial resources, and law enforcement actions. Of course, each situation will be different, but I mention three alternatives in particular that will apply in many cases.

A first alternative, applicable where the threat is a non-state actor, is to demand a police action on the part of the state in whose territory the terrorists are located. Although some respondents called for a police action in Afghanistan and elsewhere after 9/11, the vast majority of legal commentators agreed that the United States acted under its Article 51 right of self-defense and the doctrine of state responsibility in invading Afghanistan. One of the defining marks of that situation was the fact that the United States had already been subject to an "armed attack." In the case of a terrorist threat that is not yet imminent, however, using military force only as a last resort will often require that the target state demand that the host state neutralize the threat. Even when a host state knowingly provides sanctuary to the terrorists or is directly supplying them, demand for a police action will often be a reasonable alternative. This demand might function both to create a credible threat and bring international attention to the issue. In some cases, the target state may rightly conclude that the host state is simply too weak to provide an effective remedy. For example, perhaps the part of the host state's territory where the terrorists are located is effectively out of the government's control.

Another alternative that will often exist is appeal to global political organizations, such as the United Nations and NATO, in hopes that international pressure short of using force might mitigate the threat. Of course, in some cases such an appeal might not be

reasonable. Where a state reasonably concludes that the act of disclosure involved in an appeal might initiate an attack by the potential aggressor, such an appeal is not reasonable. Moreover, an appeal to global political organizations has a much greater chance of being effective against state rather than non-state actors, since the latter has little or no accountability to such organizations.

Particularly in the case of state actors, the well-worn strategies of deterrence and containment are often real alternatives to the use of force, capable of limiting a threat to an acceptable level. Although understated, the *2002 National Security Strategy*, which made the first extended case for expanding the right of preemption, recognizes that these strategies play an important role.[22] Despite strong rhetoric against North Korea and Iran as members of the "axis of evil," the United States and its allies continue to employ these strategies in dealing with these states.[23] The challenges to these strategies as reasonable alternatives are at least two. First, it is clear that terrorists are much less amenable to them, given their lack of a defined territorial location, membership in world organizations and processes, and the fact that they are not accountable to a people, as are rulers of states.[24] Moreover, although states are under these constraints, they can work with terrorists in a way that abets detection, perhaps projecting an appearance of being managed by these strategies, while secretly supplying terrorists to perform their works independent of the state.

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[22] *See also* Condoleezza Rice, Remarks on the President's National Security Strategy; G.W. Bush, Remarks by the President on Iraq.

[23] *See* Freedman, *Deterrence*.

[24] This is not to say that other forms of deterrence, outside of the traditional uses employed in the context of the Cold War, are not at work. Granting a limited right to preemptive action short of an imminent attack itself is a means of deterrence, since terrorists are put on notice that mere spatio-temporal distance between the preparation and execution of an armed attack is not an automatic form of protection from a military response.

In some cases, then, a state might use preemptive force against a less than imminent threat, having exhausted these or other reasonable alternatives to doing so. Although the number of such cases is likely to be very few, it is more likely that a state would use preemptive force against the threat of non-state rather than state actors, if only because the latter can more readily evade detection. In some cases where the first five criteria are satisfied, the opening of a narrow "window of opportunity" to use force against a terrorist threat might in fact be a state's last resort effectively to remove or diminish the threat.

G. *Proportionality of Ends*

Finally, the state considering preemptive action will have to satisfy the *jus ad bellum* requirement of proportionality, a norm appearing in both the moral tradition and the customary law of force. Sometimes called "proportionality of ends," this criterion measures the proposed use of force against the legitimate end in using preemptive force, namely *self-defense*. It might be the case that the end of a particular use of preemptive force, judged overall, is disproportional to what is required by self-defense. As Chapter One concluded, proportionality does not measure, as sometimes suggested, the proposed use of force against the actual attack, or in the case of preemption the anticipated attack. Using the same measure of force as the aggressor may not allow a state sufficiently to defend itself. Rather, using Webster's language, "the act, justified, by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[25] The key question is clear: Is this particular proposed use of preemptive force necessary for self-defense?

[25] Webster to Fox (April 24, 1841), 195.

The aforementioned criteria are employed to decide whether or not a preemptive attack of any kind is legitimate, but this criterion considers the type and level of response overall. Although proportionality shows up in the *jus in bello* as one of the principal norms in both the moral tradition and the customary law, proportionality of ends is part of the initial decision of whether or not to use force. A particular preemptive campaign may overall be illegitimate because it clearly exceeds what self-defense requires.[26] As noted in Chapter One, a primary question concerning the 2003 Iraq War is whether the invasion and its stated goal of "regime change," insofar as it was justified as a preemptive attack, was a proportional response necessary for the defense of the United States and its coalition partners.

Together, these seven criteria form a standard for deciding when preemptive action is justifiable. Before applying this standard to a few scenarios, a further issue remains. While this standard is useful for determining whether or not preemptive action is legitimate, a separate question exists as to *who* should use force. The moral tradition labeled this issue the question of *legitimate authority.* From the beginning the tradition ruled out private war, allowing only the sovereign to use lethal force (with a narrow exception for individual self-defense). Over time, the tradition recognized the state as the basic unit of international society. Any use of preemptive force toward the end of self-defense, satisfying the seven criteria above, is a right reserved for the state and does not

[26] Arguing against an expansion of the right of anticipatory self-defense, Mary Ellen O'Connell concludes that judgments of proportionality in this context are hopelessly subjective. "Today states measure proportionality against attacks that have occurred or are planned. What measure can assess proportionality against a possible attack? The state acting preemptively is making a subjective determination about future events and will need to make a subjective determination about how much force is needed for preemption." O'Connell, *The Myth of Preemptive Self-Defense,* 19. Although O'Connell rightly concludes that such an assessment is more difficult in the case of a preemptive attack than in the case of responding to an actual attack, the same difficulties face assessments under the other criteria and point to the weighty demands placed upon intelligence-gathering in an era of global terrorism.

require United Nations approval. Following the interpretation outlined in Chapter One, customary law has developed to allow a limited use of preemptive force under the Charter in cases of self-defense.

In some cases, however, there are prudential reasons to ask the United Nations, or a larger security organization or coalition of states, to conduct or at least sanction preemptive action. In cases where the threat is imminent, there is usually no other choice but for the state to act. In cases where the state has exhausted all reasonable alternatives but the threat is less than imminent, however, there may be good prudential reasons for a state to ask the Security Council, or if such fails, regional security organizations, to act, if such request does not itself reasonably preclude effective defensive action. In many cases, however, states will have good reasons for not making this wider appeal. The list of Security Council actions under Chapter VII is slim, and states often wield their veto power on the basis of unrelated political issues. The amount of time needed to make such an appeal or the act of public disclosure involved in making it may both be reason enough not to make the wider appeal.

III. Applying the Standard

Finally, I examine this standard, and its ability to balance the twin goals of limiting the use of force and at the same time providing states with the security they require in an age of global terrorism, by considering what these criteria might say in three different cases. My aim in each case is not to conduct a thorough assessment, but only offer several comments under the most relevant points of assessment.

A. *The 2003 Iraq War*

The United States government provided multiple justifications for the invasion of Iraq. One justification found warrant in a string of United Nations resolutions dating back to the First Gulf War. The claim was that Iraq was in violation of one or more of these resolutions, and that together they authorized the use of force in case of breach. In starting the war, the administration relied upon this justification more than any other. As we saw in Chapter One, the war was also justified as an act of preemption. The Bush Administration issued the *2002 National Security Strategy* in the context of making the case for war. The claim was that Iraq both possessed and was actively seeking to develop further a stockpile of WMD. Moreover, not only did Iraq possess them, but Saddam Hussein was able and willing to supply terrorists who might harm the United States, its citizens and interests.

Setting aside the first, and most relied-upon argument, was the invasion justified solely as an act of preemptive force, based upon the revised standard described above? Answering this question requires analysis along two lines. First, was there due cause for preemptive action? Although the first five criteria are relevant, I focus only a few of them. Two post-conflict reports are important sources for making these judgments, the first issued by the Iraq Survey Group (ISG)[27] concerning whether in fact Iraq had weapons of mass destruction and the second issued by the Committee on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (*hereafter,* CIC),[28] which examined and assessed the relationship between pre-war intelligence reports and the findings of the Iraq Survey Group.

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[27] U.S. Central Intelligence Agency, *Comprehensive Report on Iraq's Weapons of Mass Destruction.*
[28] U.S. Commission on Intelligence Capabilities, *Report to the President.*

Perhaps the most difficult point of assessment is whether Saddam Hussein evidenced *clear intent* to abet terrorists who would harm the U.S. The link between Iraq and terrorism figured importantly in the argument for preemptive action as an act of self-defense. With a few initial claims now discredited, however, no strong evidence has surfaced that Hussein intended to supply terrorists. Action can be a proxy for *intent,* as mentioned earlier. While Hussein's track record is abysmal, it is doubtful whether there was evidence sufficiently strong to conclude that Hussein possessed certain intent to supply terrorists with WMD or aid in their activities.

Questions of intent aside, much more attention has centered on the question of whether Iraq had *sufficient means,* namely whether it possessed or was sufficiently close to possessing WMD. The United States government claimed that Hussein had biological weapons and mobile production facilities, had stored and was continuing to produce chemical weapons, and had reconstituted its nuclear weapons program. The 2003 release of portions of the 2002 National Intelligence Estimate, *Iraq's Continuing Program for Weapons of Mass Destruction,*[29] made this charge public. After more than a year of investigation on the ground in Iraq, the ISG concluded that "Saddam wanted to recreate Iraq's WMD capability" and that the regime possessed and was seeking to produce missiles that exceeded the 150km range allowed under United Nations Security Council Resolution 687. On the central claims concerning WMD, however, the report found no credible evidence to support these claims:

> (1) Nuclear weapons: "Although Saddam clearly assigned a high value to the nuclear progress and talent that had been developed up to the 1991 war, the program ended and the intellectual capital decayed in the succeeding years."

[29] U.S. Central Intelligence Agency, *Iraq's Continuing Program for Weapons of Mass Destruction.*

(2) Chemical weapons: "While a small number of old, abandoned chemical munitions have been discovered, ISG judges that Iraq unilaterally destroyed its undeclared chemical weapons stockpile in 1991."

(3) Biological weapons: "ISG found no direct evidence that Iraq, after 1996, had plans for a new BW program or was conducting BW-specific work for military purposes. . . . ISJ judges that in 1991 and 1992, Iraq appears to have destroyed its undeclared stocks of BW weapons [sic] and probably destroyed remaining holdings of bulk BW agent."[30]

Neither report discussed the issue of how policymakers used the intelligence information made available to them, an area also subject to much commentary. And of course, policymakers can only make judgments based on the best information made available to them. Nonetheless, the chasm between pre- and post-war assessments of Iraq's WMD capability raises significant questions about whether Iraq had sufficient means to abet terrorists, even if Hussein clearly intended to do so.

Second, even if there was due cause, did the Second Iraq War follow as a last resort? Remember, the standard is all "reasonable" alternatives; certainly one can imagine other alternatives that the U.S.-led coalition might have taken, but are they reasonable, especially in light of Hussein's belligerence since the First Gulf War? Few people believed that Hussein posed a threat that would satisfy the customary law requirement prior to 9/11 of *imminence*. The Bush Administration's claim to a broader right of preemption than the pre-9/11 customary law recognized suggests that the administration had reached this same conclusion. Admittedly, arriving at a firm conclusion is difficult insofar as the decisionmaking process—what evidence of a threat was present at the time; how strong the evidence was; whether dissenting voices were

[30] U.S. Central Intelligence Agency, *Comprehensive Report on Iraq's Weapons of Mass Destruction*. *See* "Key Findings."

given ear, etc.—was and remains largely opaque to all but those directly involved in the decision.

Nonetheless, it seems that here, too, the conclusion that the United States had no other reasonable alternatives short of full-scale invasion was unfounded. The United States, along with the British, were already using force in Iraq and had been doing so for some time to enforce the U.N. sanctioned no-fly zones in northern and southern Iraq.[31] The U.S. government too quickly dismissed the possibility, however, that there might be some use of force able to provide the United States and other states with the security they required, yet short of a full-scale invasion. In a *New York Times* op-ed just days before the invasion began, Michael Walzer argued along these same lines offering four practical steps:

> (1) place the entire country under a no-fly zone;
>
> (2) impose the "smart sanctions" that the Administration described prior to 9/11, and insist that other states comply;
>
> (3) step-up the inspection regimes by sending in more monitors, backing them up with armed soldiers, and sending surveillance planes in without 48-hours notice; and
>
> (4) demand that the European nations balking at war join in this vigorous response.[32]

There are good reasons, then, to conclude that the 2003 Iraq War is not the poster-child for even a revised, admittedly broader right of preemptive action. Letting go of *imminence* is not a careless loss of restraint; rather, the moral tradition on the just war which has informed the development of the legal doctrine has the resources for providing

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[31] For example, on April 20, 2001 the U.S. and U.K. attacked early warning radar in response to increasing Iraqi attacks against coalition aircraft in the in the southern no-fly zone. Operation Desert Fox, December 6-19, 1998, followed Iraq's refusal to cooperate with U.N. weapons inspectors and its threat to end all monitors by the International Atomic Energy Agency.

[32] Michael Walzer, "What a Little War in Iraq Could Do," *The New York Times* (March 7, 2003).

real limits on the use of force, while at the same time addressing the realities of global terrorism. Again, it might be the case that the 2003 Iraq War was legally justified under previous Security Council Resolutions, a justification that the U.S. government insisted on the most; it seems, however, that is was not justified as an act of preemption, at least under the revised standard I have proposed.

B. *The Terrorist Attacks of 9/11*

It was the experience of 9/11, and the new security situation that Americans woke up to that morning, that prompted the United States government to challenge the longstanding *imminence* requirement for uses of preemptive force. It is arguable that 9/11 is not the best case to apply the revised standard I have proposed. We now know, for example, that al Qaeda was linked to several earlier attacks on U.S. interests. Was not the U.S. already at "war" with al Qaeda, making discussions of anticipatory self-defence irrelevant? Perhaps, but much of what we now know about al Qaeda's actions against the United States in the 1990s was unknown or unverified in the days leading up to 9/11. Assuming for our purposes that the U.S. was not already at "war" with al Qaeda (and setting aside the question of whether a state can enter a state of war with a non-state actor), it is useful to consider whether the U.S. might have been justified in using preemptive force to prevent the attacks of 9/11.

It is difficult to identify when the coming threat of that day posed an *imminent* danger. It is even more difficult to believe that preemptive force at that point in time would have allowed the United States to act effectively toward the legitimate end of self-defense. Certainly when the highjackers wrested control of the planes and veered toward

their targets, the attack was imminent. Waiting for this point, however, would already have committed the target state to take the first blow: the very act of using preemptive force, if time even allowed, would have meant the certain death of several hundred Americans on board the planes, and as a result of American firepower. Moreover, the nature of terrorist threats makes detection very difficult, as discussed in Chapter One. As the standard is traditionally conceived—in the words of Webster, where the threat is "instant, overwhelming, leaving no choice of means, and no moment for deliberation," or even a standard somewhat less stringent—it becomes difficult to conclude that the attack was imminent in the months of flight training, surveillance, and other logistical preparations that took place in the United States and abroad during 2000 and 2001. The question, then, is whether the standard for preemptive uses of force I have described above—absent other reasonable alternatives such as a police action—might have sanctioned a use of force earlier that could have sufficiently disrupted the chain of events leading up to 9/11, or looking forward might disrupt future attacks, without granting such license that *fear* becomes the governing norm.

To answer this question, we must consider the events leading up to the September 11th attacks in light of the criteria developed above. Deciding if and when circumstances might have justified a preemptive use of force by the United States against al Qaeda is difficult on account of the lack of intelligence that Bin Ladin and al Qaeda were preparing for the attacks of 9/11 and by the lack of determinative evidence that the same were involved in or directly responsible for previous terrorist attacks against the American military and diplomatic presence outside the United States from 1992 onwards. The *9/11 Report,* issued by a presidential-appointed committee in 2004, describes a

complex narrative of events leading up to 9/11.[33] Applying the revised standard to the attacks of 9/11 must take into account these multiple events that took place prior to 9/11.

The first consideration called for by the revised standard is a determination of *clear intent* on the part of the aggressor to carry out an armed attack against the target state. Usama Bin Ladin openly expressed his intent to kill Americans in two separate fatwas, issued in 1996 and again in 1998. In both cases, Bin Ladin explicitly called for *jihad* against Americans on account of the U.S. military presence in Saudi Arabia, the site of Islam's two most holy sites. Bin Ladin signed a 1998 statement declaring: "The ruling to kill the Americans and their allies—civilian and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it."[34] In a December 1998 interview, Bin Ladin confirmed his aim to retaliate for the August 20, 1998 missile attack by the United States on several sites in Afghanistan in response to earlier attacks on two U.S. embassies in Africa, stressing that an effective response would take time.[35]

In addition to these open statements, Bin Ladin's clear intent to attack American interests was also confirmed by intelligence gathered in the late 1990s showing that al Qaeda had a military committee that was planning numerous operations against U.S. interests worldwide, that the terrorist organization was seeking nuclear material, and that al Qaeda had extensive terrorist training camps within Afghanistan.[36] Firm evidence about Bin Ladin's direct role in the August 7, 1998 attacks on the U.S. embassies, as well

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[33] The select narrative of events in this section is based on the *9/11 Report.* The U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Report.* The report is also available *at* http://www.9-11commission.gov/report/index.htm.

[34] "Jihad against Jews and Crusaders (February 23, 1998)," in Rubin and Rubin, *Anti-American Terrorism,* 150.

[35] "Interview with Usama bin Ladin (December 1998)," in Rubin and Rubin, *Anti-American Terrorism,* 153.

[36] U.S. National Commission on Terrorist Attacks, *9/11 Report,* 109.

as his indirect role in several previous attacks, confirmed the clear intent of Bin Ladin and al Qaeda to continue attacking American interests.[37] In addition, the success of these attacks, intelligence pointing to attempts by al Qaeda to obtain nuclear materials, and the wide network of financing, all suggested that al Qaeda had *sufficient means* to carry out its terrorist campaign.

The third criterion looks to *active preparation* on the part of the aggressor. The terrorists who organized and implemented the events of September 11 did not operate without leaving footprints. In the *9/11 Report*, the commission charged with investigating the attacks identified at least two missed opportunities that might have directly informed government officials of the direct preparations underway in the United States and abroad.[38] Nonetheless, as the *Report* confirms, the United States government had no specific knowledge of preparations by al Qaeda for what became the September 11 attacks. As defined earlier, however, the requirements of *clear intent* and *active preparation* do not require specific knowledge of the time, place, and/or method of an attack; rather, strong evidence that the potential aggressor clearly intends to attack the United States or its official presence abroad, and that the aggressor is actively preparing toward this end, is sufficient.

In the months leading up to September 11, the government had sufficient evidence that al Qaeda was preparing to attack the United States. During the summer of 2001, especially in the months of June and July, United States intelligence officials registered a tremendous spike in reports of a large and near-term attack against the United States, with most signals pointing toward an attack against United States interests abroad.

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[37] Ibid., 115.
[38] Ibid., 181-182, 266-276.

Although the terrorists eventually moved the target date back to early September, the intercepted communications related to what would become 9/11.[39] Admittedly, intelligence reports are rarely tidy and come in varying degrees of reliability, but the United States was aware that al Qaeda was actively training terrorists in camps throughout Afghanistan at least since the late 1990s. Various forms of intelligence gathering and Usama Bin Ladin's own testimony attested to this fact.[40]

A fourth criterion concerns the *magnitude of the harm*. Of course, any intelligence pointing to the devastation that would follow from the attacks of 9/11 would have satisfied this measure. Under the revised standard I have developed, however, the government would not need direct intelligence about the specific attack. Provided al Qaeda's stated aims against the United States and the organization's desire to reap maximum casualties, the important question was not whether al Qaeda desired to carry out such an attack, but whether they were able to (that is, whether they had *sufficient means* to do so and whether there was a sufficient *probability of harm*). The 1993 attack on the World Trade Centers, organized by Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks under the direction of Bin Ladin, attested to this fact. Other attacks that directly implicated al Qaeda did as well, including the 1998 orchestrated attacks on U.S. embassies in Africa that killed 224 people and injured another 5,000, including several Americans.

Another measure concerns the *probability of the harm*. Lacking any direct evidence of the preparations underway for the events of September 11, the intelligence community could not make any specific judgments. In the few months leading up to the

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[39] Ibid., 256-260.

[40] For Usama Bin Ladin's own statement, *see* "Interview with Usama bin Ladin (December 1998)," in Rubin and Rubin, *Anti-American Terrorism,* 155.

attacks, however, intelligence from multiple sources affirmed the likelihood of a near-term attack against the United States. As the Commission reported, "A terrorist threat advisory distributed in late June indicated a high probability of near-term 'spectacular' terrorist attacks resulting in numerous casualties. Other reports' titles warned, 'Bin Ladin Attacks May be Imminent' and 'Bin Ladin and Associates Making Near-Term Threats.'"[41]

Although we must avoid projecting insights easily formed in the present into the past, it seems clear that at least some high-level officials had already concluded that an attack against the United States was highly probable. As already suggested, the events of 9/11 did not happen in a vacuum. The intelligence community and the principals in charge of protecting the United States did not wake up that morning to learn of a group called al Qaeda. Bin Ladin's terrorist organization was indirectly linked to multiple attacks against U.S. interests from 1992 through 1996, a conclusion that the CIA was able to draw as early as 1997.[42] Starting with the August 7, 1998 attacks on the U.S. embassies in Africa, Bin Ladin was directly involved in attacking the United States and its presence abroad. Although it was not until after 9/11 that the United States was able to affirm Bin Ladin's personal involvement in the October 12, 2000 attack on the U.S.S. *Cole,* by mid-November of that year it was clear that al Qaeda had carried out the attack.[43] The repeated success of al Qaeda terrorist operations against the United States, joined with Bin Ladin's overt aspirations to attack the American homeland, suggested that such an attack was highly probable.

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[41] U.S. National Commission on Terrorist Attacks, *9/11 Report*, 257.
[42] Ibid., 109.
[43] Ibid., 193.

If an opportunity had arisen in which the use of preemptive force might have sufficiently thwarted the September 11 attacks, the United States would still have to meet the essential requirement of showing that a use of armed force was a *last resort*. As the *9/11 Report* shows, the government considered using preemptive force against Bin Ladin at several times prior to September 11, although other, largely prudential, considerations prevented it from doing so. The August 1998 missile strike on various sites in Afghanistan, from which Bin Ladin escaped unscathed, was a direct response to the coordinated bombings of the U.S. embassies in Africa earlier that month.

Even given that most of the primary government officials responsible for decisionmaking in this area did not sufficiently grasp the gravity of the threat posed by al Qaeda, several attempts on various fronts sought to reduce the risk. Beginning in 1998 the government sought to freeze the assets of both al Qaeda and the Taliban, which provided Bin Ladin sanctuary in Afghanistan. The government also seriously pursued diplomatic efforts. In 1998 the State Department issued a formal warning to the Taliban and the Sudan that the United States would hold them directly responsible for any terrorist attacks on Americans, as long as they continued to provide al Qaeda sanctuary. The United States successfully pushed for multiple Security Council resolutions against Afghanistan, including economic and trade sanctions, as well as an arms embargo against the Taliban. In 2000 a high-level effort sought to persuade Pakistan to use its influence with the Taliban to expel Bin Ladin. Exactly a week before the 9/11 attacks, key policymakers approved a draft presidential directive calling for a multi-year effort to "'eliminate the al Qida [sic] network of terrorist groups as a threat to the U.S.'"[44] The plan included stepped-up diplomatic, economic, and law enforcement efforts, and if

[44] Ibid., 204-205.

necessary the use of armed force. The point of this exercise is not to identify a specific point in time when the United States should have used preemptive force against Bin Ladin and the al Qaeda network. Rather, it is to suggest that the revised standard described above could have justified such a use of force, prior to the point at which the threat was imminent.

C. *India and Pakistan*

Many preservationists—those who reject any expansion of the right to use preemptive force beyond the current imminence-centered standard—argue that an expanded right would have perilous consequences for many longstanding conflicts. Richard Gardner concludes: "If [the Bush Doctrine] is intended to assert a new legal principle of general application, its implications are so ominous as to justify universal condemnation. For such a doctrine would legitimize preemptive attacks by Arab countries against Israel, by China against Taiwan, by India against Pakistan, and by North Korea against South Korea, to give some obvious examples."[45] To consider this charge more closely, I close with a few comments about the continuing conflict between India and Pakistan.

Both states gained independence from Britain in 1947, the former with a predominant Hindu majority and the latter with a predominant Muslim majority. Hostilities between the two countries have largely centered on the disputed Muslim region of Kashmir. Shortly after independence, Kashmir's king signed an accession pact to join India. In 1948 and again in 1965, India and Pakistan went to war over the region, both wars ending with an agreement to withdraw behind a ceasefire line, the Line of

[45] Gardner, "Neither Bush nor the 'Jurisprudes," 585, 588.

Control. The conflict, however, has continued into the present, with India accusing Pakistan of sponsoring militant, cross-border excursions by terrorists and Pakistan accusing India of human rights abuses against the Muslim majority in their quest for independence. As many as 75,000 people have died in the decades-old conflict.

Heightening the tension was the public announcement in 1998, by way of underground tests, that the two countries possessed nuclear weapons. Fears of a nuclear exchange were nearly realized in spring of 2002 when hundreds of thousands of Indian and Pakistani troops faced each other across their common border. The causes of the stand-off were several, but the most immediate was an attack by several unidentified men on the Indian parliament in New Delhi in December 2001, which India quickly tied to a Pakistan-sponsored terrorist group operating in Kashmir.[46] Pakistan denied any connection to the attack. A spate of international diplomatic efforts helped to ease the tensions, and the troops eventually withdrew, but only after the world tasted the very real possibility of war between nuclear rivals.

Would the revised standard I have proposed, shorn of *imminence* as its central criterion, offer broad sanction for the use of preemptive force in this case or similar flash points in recent history? It is difficult to see how this would be so, even in the flare-up of early 2002. If India had gone to war after the incident, it would likely have justified its actions on similar grounds to that claimed by the U.S. in using force against Afghanistan, a parallel that India openly suggested. The justification would not have been anticipatory self-defense. We might ask, however, whether India would have been justified in using force to prevent the attack, prior to the point imminence. The Indian government would

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[46] Celia W. Dugger, "Group in Pakistan is Blamed by India for Suicide Raid," *New York Times,* Dec. 15, 2001.

have to satisfy the demanding tests outlined earlier. This would include substantiating *active preparation* on the part of the assailants to perform an attack, requiring sophisticated intelligence gathering. Most important, the Indian government would have to show that the use of preemptive force against the potential aggressors was a *last resort.* This criterion would likely require, among other things, that the Indian government employ all of its diplomatic resources to demand that the Pakistani government perform a police action against the suspected terrorists.

From the perspective of Pakistan, which quickly denounced any connection to the December 14th attacks, the deployment of hundreds of thousands of Indian troops on its border might have seemed ripe for the use of preemptive force—perhaps even under the pre-9/11 standard requiring that the threat be *imminent.* The international community had refused to condemn Israel's first use of armed force in the 1967 Israeli-Arab War, when Egyptian and Israeli forces faced-off on the Sinai border. Of course, other pressures were at work in the more recent stand-off: both leaders were making prudential calculations about the probability and costs of nuclear war, and the international community, especially the United States, was increasingly willing to conclude that Pakistan was involved in the New Delhi attacks.[47] Nonetheless, even if Pakistan had no connections to the incident, and even though the colossal build up of troops might have satisfied the requirements of *clear intent, sufficient means, active preparation,* and *magnitude of harm,* Pakistan would still have to show that using force first to preempt a coming attack was *necessary,* a measure of last resort.

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[47] David Sanger and Kurt Eichenwald, "Reacting to Attack in India, U.S. Aims at Pakistan Group's Assets," *New York Times,* Dec. 21, 2001.

Throughout the episode, however, diplomatic efforts remained a clear and reasonable alternative to the use of force. India threatened a military response from the beginning, but repeatedly made clear, even as both sides deployed troops to the international border, that it would do so only after the failure to achieve a diplomatic solution.[48] Working behind the scenes, the United States pressed Pakistani President Musharraf to crack down on militant groups inside Pakistan, particularly against two groups that India blamed for the attack. India repeatedly stated that it would not respond with armed force if Musharraf would take this step. A Pakistani decision to use force first, in the face of a mounting international consensus that a militant Pakistani group operating openly in Pakistan for years was directly responsible for the attack, would fail to satisfy the customary law requirement of *necessity*. Even the most tense conflicts between states are usually amenable to a diplomatic solution, which is why an expanded right of preemption is most applicable to terrorist groups operating outside the reach of government.

Together, these case studies suggest how this revised standard, drawing on the resources of the moral tradition, might balance the twin goals of restraining the recourse to force, while at the same time giving states a possibly effective response to an unacceptable threat. The decision to use preemptive force, even under the carefully expanded right of preemption I have proposed, is always a last step, after a state has exhausted every other reasonable alternative. Although the credible threat of preemptive force is itself an effective tool in the fight against global terrorism, actual uses of

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[48] Celia W. Dugger, "India Seeks International Support to Force Pakistan to Crack Down on Militants," *New York Times,* Dec. 20, 2001.

preemptive force under this standard will be exceedingly rare. By and large, the success in the war against terrorism will depend on increased intelligence capacity, refined international coordination, the normal tools of law enforcement, interruptions to the financial streams that support terrorism, and other means that do not involve the use of armed force. Nevertheless, after the events of 9/11 it is now possible to imagine a situation where a state has exhausted all reasonable alternatives outside the use of force to secure the legitimate end of self-defense, against a threat that is not yet *imminent.* The revised standard I have proposed is one way to reconcile the demands of morality with the practical demands of a changed world.

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