

This article was downloaded by: [University at Buffalo, the State University of New York (SUNY)]

On: 16 December 2010

Access details: Access Details: [subscription number 784375718]

Publisher Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Journal of Military Ethics

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title~content=t713690728>

Preventive War and the Epistemological Dimension of the Morality of War

Randall R. Dipert^a

^a Department of Philosophy, University at Buffalo, Buffalo, USA

To cite this Article Dipert, Randall R.(2006) 'Preventive War and the Epistemological Dimension of the Morality of War', Journal of Military Ethics, 5: 1, 32 – 54

To link to this Article: DOI: 10.1080/15027570500465728

URL: <http://dx.doi.org/10.1080/15027570500465728>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.informaworld.com/terms-and-conditions-of-access.pdf>

This article may be used for research, teaching and private study purposes. Any substantial or systematic reproduction, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

Preventive War and the Epistemological Dimension of the Morality of War

RANDALL R. DIPERT

Department of Philosophy, University at Buffalo, Buffalo, NY 14063, USA. rdipert@buffalo.edu

ABSTRACT *This essay makes three claims about preventive war, which is demarcated from preemptive war and is part of a broader class of 'anticipatory' wars. Anticipatory wars, but especially preventive war, are 'hard cases' for traditional Just War theory; other puzzles for this tradition include nuclear deterrence, humanitarian intervention, and provability a priori of the success of Tit-for-Tat. First, and despite strong assertions to the contrary, it is far from clear that preventive war is absolutely prohibited in traditional Just War Theory, and it is also dubious that it is in all cases 'clearly illegal'. Second, the morality of both preemptive and preventive wars is shown to turn on epistemological considerations: on what degree and kind of justification the primary metaphysical facts of threat can be reasonably believed. Third, an argument is made that whatever epistemic threshold is held to be necessary, some preventive wars will exceed it, and that this is more likely with advancing technologies of information acquisition. Finally, the common argument that allowing all nations to follow policies of preventive war would result in more wars than barring such policies is shown to be mistaken by simulations in game theory. Suggestions are made about the derivation of traditional Just War criteria from more basic moral principles, and about their subtle failures as jointly necessary conditions for the morality of war.*

KEY WORDS: Just war, preventive war, preemptive war, game theory

Background

Preemptive and especially preventive war are in a class of hard cases for the traditional philosophy of war, usually called Just War Theory.¹ Both appear to violate one or more of the Just War criteria, such as Last Resort or Just Cause. Another hard case for traditional theory is the deterrent strategy of massive nuclear retaliation, which appears to violate Chance of Success and Proportionality—and yet arguably has been successful. Humanitarian Intervention appears to violate Just Cause, especially insofar as issues of sovereignty are salient. Within mathematical game theory, Tit-for-Tat, which sometimes will violate Chance of Success and possibly other criteria, has been proven to be one of the most successful and stable strategies of prolonged

Correspondence Address: Randall R. Dipert, C.S. Peirce Professor of American Philosophy, Department of Philosophy, University at Buffalo, Buffalo, NY 14063, USA. Email: rdipert@buffalo.edu

conflict in situations strongly resembling the actual world (Axelrod 1984, 1997). While Humanitarian Intervention has received a great deal of attention in the philosophical literature, the literature on preemptive and preventive war was minute before the Iraq War of 2003.² No theory, so far as I am aware, has attempted to address all of these hard cases within a comprehensive theory.

My goal in this paper is to identify the relatively rare cases of preventive war that might be justified. I argue that when one considers preventive war, in either consequentialist or minimal non-consequentialist terms, then it is clear that there are some instances of a moral preventive war. I diagnose these cases as resting on epistemological considerations, and argue that these are also the source for most intuitions against allowing preventive wars.

Before I give arguments for the morality of some preventive wars, I want to summarize the background in terms of the legal status of preventive war and its status within traditional Just War Theory. By a 'preventive war' I mean an attack on a nation that has not itself attacked, but is reasonably believed that it will do so sometime in the indefinite or non-immediate future. Preemptive war is a case of initiating an attack in response to the reasonable perception of an imminent attack. I will use Walzer's term 'anticipatory war' to cover cases of both preemption and prevention. It has been widely claimed that the Iraq War, and indeed all preventive and even preemptive wars, are illegal or 'clearly illegal' (McMahon 2004; Singer 2004) according to international law. This is debatable, and thus not so 'clear', and in any case the moral status of breaking such international laws is itself not straightforward. I will consider the illegality of preventive war more fully in a later section. For now, I set aside the legal question as having, in isolation, no clear and immediate moral implications.

It has likewise been widely asserted that traditional Just War Theory prohibits all preventive and possibly even preemptive war. Part of the difficulty with this claim is that there are relatively few remarks in the writings of major figures that address the issue clearly. What has been written since 2003 has arisen in the heated and partisan atmosphere surrounding specific details of the Iraq War. If we understand this claim as asserting that no preventive war has ever been permitted by any major Just War theorist, this is simply false. Hugo Grotius, in his influential *Laws of War and Peace* (1625), which is both the last major and fullest exposition of Just War Theory, permits preventive war in some rare cases (namely, where there is 'moral certainty' of an enemy's future attack and not merely fear of such an attack). A still stronger endorsement is by Emmerich de Vattel (1757), discussed in Tuck (1999). Perhaps most conspicuously, Kant, although he is not strictly in the Just War tradition, permitted preemptive and preventive wars. Richard Tuck surveys those political theorists who do not, and the many who do, permit preventive wars (Tuck 1999).³ The most extensive contemporary discussion before 2003 of what he calls 'anticipatory wars', by the leading American philosopher of war, Michael Walzer, likewise stated criteria that would permit preemptive and some preventive wars. He himself argued his

criteria did not permit the Iraq War at the time (Fall, 2002) but would do so if Iraq did not yield to further economic and diplomatic pressure (Walzer 2004: 146–168). Likewise, John Rawls, in one of his last major essays, *The Law of Peoples* (Rawls 1999), makes careful remarks that avoid requiring actual enemy attack for morally permissible war.⁴ Within both the Just War tradition and in more recent philosophies of war, there have been numerous defenses of the morality of preventive war.

However, even if Just War criteria did more clearly prohibit preventive or even preemptive war, there still remains the only real philosophical question: why do they do so? What moral principles are the ground for this judgment? Just War theory summarizes and captures in relatively succinct form a great deal of thinking over centuries (indeed, millennia) in the West about the morality of war. It also largely coincides with current intuitions about when war is, and is not, immoral. However, it is exactly in what I called the ‘hard cases’ (including preventive war) where there is some doubt about whether it gives a correct answer; it cannot be cited as a moral justification in the hard cases merely because it works so well in other, less-hard cases. It is also possible that Just War Theory has some special status as a custom or convention of when war may be waged, such that (i) defectors from the convention (in the language of game theory) can be punished and such that (ii) everyone’s following this convention generally makes wars fewer or less destructive than they would be if no convention is followed. This itself would then be a consequentialist moral justification for following the convention. However, this does not solve the hard cases like preventive war either, for there could be other, more detailed or different conventions that largely conform with intuitions and that satisfy these two conditions better. The possibility that everyone’s following a policy that permitted preventive wars has generally been dismissed out of hand as entailing that there would be ‘anarchy’ or more destruction with universally policies of preventive war.⁵ I argue that it can be proven that this need not be so, using results from the Iterated Prisoner’s Dilemma.

We cannot hope to solve all of these issues here. In this paper I am going to make the following points. (I) First, and contrary to some pronouncements, there is a great deal of support for the claim that some anticipatory wars, even in the absence of an imminent attack from an enemy, are morally justified. (II) Second, a neglected element in the philosophy of war is what I call the *epistemological dimension*: the extent to which a criterion can be reasonably known to be fulfilled. Considering this epistemological dimension both makes preventive war morally justified in some comparatively rare cases and grounds a special condition that is usually attached to any anticipatory war by those who consider it justified, namely what I will call an Urgency Condition. (It also grounds a weak ‘internationalist’ condition for moral anticipatory war, a rather surprising result.) (III) Finally, I will argue that preventive war involves epistemic thresholds that can be calculated by considerations related to views of Kant and R.M. Hare. This consideration, which governs when one morally may or prudentially should engage in preventive war, also grounds the Nuclear Deterrence and Tit-for-Tat, as well

as some instances of Humanitarian Intervention. It requires that one's policy for engaging in preventive war be such that its practice by every nation, in light of *a priori* facts of game theory, and by better established empirical facts of human history and human nature, is conducive to fewer wars and less loss of human life than is a world in which they are not universally practiced.

The Epistemological Dimension of the Moral Conditions for War

My main claim in this essay is that there has been a neglected element in the philosophy of war that I call the *epistemological dimension*: the extent to which a metaphysical criterion of fact can be reasonably known to be fulfilled. Just War criteria, for example, exclusively concern matters of fact. Considering this additional, epistemological dimension both makes preventive war morally justified in some comparatively rare cases and grounds a special condition that is usually attached to anticipatory war by those who consider it justified, namely what I will call an Urgency Condition. (It also grounds a weak 'internationalist' condition for moral anticipatory war, a rather surprising result.)

In this paper, I will argue that some preventive wars are morally justified in which there is no known danger of imminent attack. I will assume the traditional view that going to war against a nation is not 'punishment' of that nation, its soldiers, or civilians for misdeeds. In the modern conception of the morality of war, our military action is exclusively justified by the threat another nation poses to our citizens in the future, and a return to the previous status quo, insofar as it can be attained.⁶ We can see evidence of this since: (a) This condition of threat guides *jus in bello* moral constraints once war starts, e.g., the fact that those who do not pose a threat may not themselves be intentionally harmed, such as civilians and disarmed soldiers. (b) If the nation should withdraw and no longer constitute a threat, such as when there is a sudden, permanent change of government or the military ceases to obey its regime, then our continued attack would be unjustified. And (c) a conception of the attacking enemy's motive in attacking us is inessential in the articulation of our right to counterattack.⁷ A conception of motive is always necessary for the more usual moral assessment of an action and for punishment.

As is well-known, there are three forms of threat that another nation may pose, and that have been variously argued morally to justify military action as a Just Cause:

1. An actual large-scale attack, such as 'armed attack' in the sense of Article 51 of the UN Charter, which allows self-defense before Security Council action. Observe however that it is the *future* enemy attacks that pose the threat and justify military actions; the past attack, I would claim, is simply strong evidence for the imminent (further) danger to our civilians.⁸ At least as regards loss of life, there is no repairing through counter-attack the damage from the first attack.

2. The threat of enemy's *imminent* large-scale attack, that is of a first-strike or surprise attack. Wars launched with such a justification have traditionally been called 'preemptive'.
3. A threat of (a) distant future, or (b) indefinite, but all-but-certain large-scale attack. These two separate subclasses of cases have been called 'preventive' or (non-preemptive) 'anticipatory' wars, and have not usually been distinguished.

The primary moral considerations in all of these scenarios are just two factors, namely the *extent of the threat* (the 'Threat Condition') and the degree to which this *threat can be known or reasonably appraised* (the 'Knowledge Condition'). A third factor, the 'Urgency Condition', giving a reason to attack now rather than waiting, has frequently been added, such as in (Walzer 1992: 81) as a third condition for legitimate first-strikes, but I will argue shortly that the Urgency Condition is morally derivative from the second, Knowledge Condition. In order to focus on the most interesting cases of prevention, I will assume that all reasonable nonmilitary options have been exhausted but that threat remains,⁹ and that Proportionality, Success, Proper Authority, etc., are not an issue.

I argue now that there clearly are cases in which preventive war is morally justified. My main argument is that the widespread presumption against anticipatory and especially preventive war arises because we have ignored what I will call the *epistemological dimensions* of the criteria for a morally permissible war. I will argue that almost all previous discussions of the moral justification of war have discussed solely what I would call *metaphysical* (or factual) dimensions of conditions for war, that is, *what is the case and what is not case*, as opposed to what can be known, is reasonable to believe, and so on. Once epistemological dimensions are introduced, it becomes obvious, I will argue, that some preventive wars are justified, if any wars are justified at all.

There are two other issues involved in the discussion of anticipatory war that I would also like to disentangle. First, there is widespread agreement, at least among those who are not absolute pacifists, that something like the traditional Just War conditions are *sufficient* to justify the moral permissibility of war. However, there is scant literature, few or no intuitions, and no widely accepted moral foundations that strongly support the claim that any or all of the Just War conditions are *necessary* for the moral permissibility of war. There is a general problem with intuitions about necessary moral conditions for anything. Namely, in order reasonably to claim to have them, such that they are strong and truly necessary, we would have to have evaluated all possible, morally relevant classes of situations in which the condition does not hold. Part of the widespread moral presumption against the morality of preventive war without imminence arises because of a confusion of intuitions for sufficient as opposed to necessary conditions for the moral permissibility of war.¹⁰ Those who even *consider* that humanitarian intervention might be permissible are admitting the lack of argument that Just War conditions are necessary criteria.

Adding to the confusion are the connotations of the English words ‘just’ and ‘justice’. There is no sense in which an enemy in war *deserves* to be attacked. It is not an issue of justice as we ordinarily consider it. Rather, the only usual source for the moral permissibility of war lies in a nation’s right to exist (or more precisely, in its citizens’ rights to existence and in a politico-economic order of their choosing), and in a threat to that existence, not in any theory of international ‘punishment’ that applies a model of rules of law, order, and justice to the order among nations. Even if the misleading model of intra-national policing and justice were to be applied to the order among nations, then it would quite clearly support, not go against, some sort of preemptive or preventive war—as we will see.

Thought Experiments and Intuitions

Rather than using ‘intuitions’ that Last Resort in its usual sense is a necessary condition for a moral war, we need to contemplate cases where preventive war might be justified. Suppose a nation cannot determine in advance when a devastating and unjust attack will occur, but knows that it will occur sometime. Is it morally doomed first to absorb the attack before it may do anything in its own defense? If a nation and its people have any right to peaceful existence, and this right places highly in an order of rights,¹¹ a strict moral prohibition against preventive war seems unlikely. Consequently, I would argue that there is clearly some moral right to preemptive attack. An opponent of this view might argue that we can in fact never be in the position that we know an attack will come but not know, or be able to find out, when. This criticism is far-fetched, although the justifiability of preventive war turns on the fairly rare cases where we would be strongly justified in believing that a distant threat obtains.

Presumably a preventive attack is justified if all of these conditions are met: (1) the threat posed to the existence of the nation about to launch a preventive attack is substantial, (2) there will eventually be an attack, (3) the attack, when it comes, is unjustified, (4) there is seriously increased risk to the nation, or its military forces, by waiting to launch an attack after an enemy’s first-strike, and (5–5.4) believes that conditions (1)–(4) hold are each strongly (and objectively, not subjectively) justified. Conditions (1)–(4) are metaphysical conditions on facts, and are components of what was earlier called the Threat Condition—quantity, timing, moral status, and so on. Conditions (5.1)–(5.4) are epistemological conditions on their justification to the central authority.¹² From the point of view of actual decision-making, (5.1)–(5.4) are sufficient conditions for the moral rightness of a *decision* to engage in anticipatory war; the moral justifiability of the *action* requires all of (1)–(4) and (5.1)–(5.4). We must remember that these describe the bare moral permissibility of preemptive or preventive war, or the decision to go to war, and not the wisdom, other prudential desirability, or obligation to go to war.

I will first offer an analogous case from an individual person’s right to self-defense. Imagine an implacably belligerent neighbor, who has attacked you, your family and property on prior occasions. He has sworn to do so again.¹³

For whatever reason, no third party (such as police) are likely to aid in your defense or even punish the neighbor and thus deter the neighbor.¹⁴ You have knowledge, say from conversations with the UPS delivery man, that your neighbor has received a devastating weapon—such as a mortar or RPG—that is certainly intended for an attack on you, for which you have no available countermeasures, and is such that once this attack begins, you and your family will certainly be immediately destroyed. You do not know when this attack will come—tomorrow, next week, next month. Because of the neighbor's own defenses, there is no way to remove or disable this weapon without using deadly force that is likely to kill the neighbor. I would argue that you do have the right to attack your neighbor first, although this right hinges on the extent of justification for your belief in the threat.¹⁵ Some might argue that the usual Last Resort condition is met, starting at the point when the neighbor might attack you. However, this is less relevant than it perhaps seems. Suppose that, for whatever reasons, your own ability to launch an attack is rapidly decreasing, and will tomorrow be largely ineffective. Your enemy will obtain his weapon in one week's time, and this is known. Your right to existence then requires you to launch an attack now, even though it is not the last moment before you are in danger.

In a different case, let us imagine that while traveling you come into contact with individuals whom you have overwhelming evidence to believe are terrorists intent on killing hundreds or thousands of individuals. You do not know when they will launch their plot and the terrorists are not now breaking the law or doing anything immoral (say, the boxcutters they are carrying are not forbidden). We can imagine separate cases in which you are a law enforcement agent, and in which you are simply a civilian. Once the terrorists begin to execute their plot, it will be too late; instead, you must act now. Furthermore, let us suppose that the only way you can stop them is by using deadly force. I would argue that if you are civilian, you are permitted to interfere in the terrorists' plan, and if you are a law enforcement agent, you may be obligated to do so. Obviously again the degree of required evidence of the facts for this moral permission or obligation is very high. This discussion raises a question of whether policing agencies should be in the business of apprehending criminals after the fact or, in some cases, of preventing the commission of a crime in the first place; it also raises questions about the legitimacy and desirability of conspiracy and 'intent' laws.¹⁶ These issues in turn raise difficult questions about whether mandates and statutes can be crafted such that they justify the prior restraining only of (future) guilty parties.

My question, however, is strictly the moral one of whether, once you *know* certain facts with whatever degree of reasonableness and certainty is required, you may use force on an individual who, ignoring mental states and verbal indications thereof, has not yet done anything wrong. I think it is obvious that there exist such cases, even though the standards for knowledge are very high and thus such cases are very rare.

Even more telling would be a case in which a nation knew, with a certainty that is usually only accorded mathematical proofs or even God's

foreknowledge, that another nation was preparing to attack in, say, two years.¹⁷ Loss of life and property would be considerably lessened if we attacked now, rather than waiting two years or even one. There exists no other way to avoid the enemy's attack. From this God's-eye perspective, especially if there is increasing and unjust harm by delaying action, anticipatory action in advance of a 'clear and present' danger would not only be permissible but likely obligatory. If the *clarity* of the danger is sufficiently great, then whether or not it is 'present' (imminent), is irrelevant.¹⁸

I am specifically arguing that one class of cases where preventive war is justified is where these conditions are met:

- 1a. Nation A is about to acquire weapon system W, and B knows (K1) this.
- 2a. Weapon system W is highly destructive and will destroy nation B with massive loss of life to B (LB1) if A launches a surprise attack on B and with losses to A (LA1). B knows this (K2).
- 3a. Once W is acquired by A, it will eventually be used unjustly on B in a surprise attack if no action is taken by B. B knows this (K3).
- 4a. There is no way for B to know when W is acquired by A, or once acquired, when it will be used. B knows it cannot acquire information about the time of this attack (K4).
- 5a. Nation B can prevent the weapon from being used by launching a surprise attack on A. In that case there is small loss of life to B (LB2) and small loss of life to A (LA2). B knows this (K5).
- 6a. The window of opportunity for possible use of W by A in a surprise attack begins tomorrow. B knows this (K6).

Conclusion:

Nation B morally may launch a surprise attack on nation A at a time of its choosing.

In consequentialist terms, it is rather easy to see that there are some values we might assign to the degree of knowledge K1–K5 and the quantity of losses or harms L1a, L1b, L2a, and L2b such that Nation B's choice of preventive war is morally preferable to waiting. In nonconsequentialist terms, it is also easy to see that if Nation B and its citizens have a minimal right to existence, and specifically that this right is more highly valued than other rights and that Nation A's attack is (or will be) illegitimate, then again Nation B's choice of preventive war is morally preferable to waiting. This judgment still depends on the degrees of knowledge (K1–K5) but possibly not on the quantity of losses, L1a, L1b, L2a, and L2b.

A variant case can also be constructed, replacing the like-numbered conditions above with their 'b' versions:

- 2b. Weapon system W is highly destructive and will destroy nation B with large loss of life to B, LBb1_{lower bound}, if A launches a surprise attack

- on B at time T1 and increases to $LBB1_{\text{upper bound}}$ at time T2. B knows this (K2b).
- 4b. B knows that weapons system W will be used by A in a surprise attack on B at time T2 (K4b).

The conclusion to the b-variant argument is:

Nation B morally may launch a surprise attack on nation A at a time of its choosing, no matter how far T2 is in the future.

In the first scenario, there is a sense in which the Last Resort condition passes just before the beginning of the window of opportunity for A to launch a surprise attack on B. In another sense, it is likely that one could continue with diplomatic means well into this window. In scenario b, with its continuum of increasing damages (or equally problematically, in increasing the probability that attack will come, say, within 24 hours if it has not already occurred), it is going to be still more difficult to determine a reasonable time when the Last Resort condition is met. Another and clearer way of looking at these cases is simply to ask whether Last Resort is indeed a necessary condition of a just war.

Human beings typically lack extensive, justified knowledge about the future. As we wait to act, new information can arrive or old information can be revised; we can even make new inferences from the information we had, or discover the fallaciousness of our old inferences. This is ultimately the source of the Urgency Condition and the desirability of ‘present [immediate]’ condition in the phrase ‘clear and present [danger]’: our fallibility almost always decreases with time, we have more rather than less information, and can make more leisurely and careful inferences. Our human fallibility entails that the threshold for preventive attack increases with the amount of time in advance of the expected aggression against us, since the risk of wrong assessment of such calculations as Just Cause and Chance of Success is typically proportional to the amount of time we have to gather more information or correct earlier factual or judgment errors. We should realize, however, that requirements of ‘imminence’ or ‘clear and present danger’ are wise rules of thumb, but are themselves grounded in more detailed epistemological considerations (Walzer 2004: 147).

In establishing the moral justifiability of going to war in a consequentialist framework, the only factor that diminishes this effect of time-increased fallibility is the amount of harm that will befall us if we wait. Observe however that Urgency is ultimately not a separate condition, but a factor that is dependent on the epistemological status of our beliefs, combined with the general likelihood of generally decreasing fallibility. Very high levels of objective certainty of a future attack on us would require only small amounts of harm in waiting (for God, no harm to waiting is necessary), in order to justify an anticipatory attack by us, while small objective uncertainty in our judgments of future attack would require comparatively greater amounts of harm in waiting to attack in order to justify a preventive attack. In the calculus of justified war, there may be other interactions as well: the likelihood of our total destruction in an enemy first-strike would require

slightly less objective certainty than would the likelihood of at worst losing a city.¹⁹ Very roughly, the justifiability in going to war, J , is positively proportion to the probability of harm of an enemy surprise attack, P , the amount of this harm, H , and the danger in waiting, W , crudely, $J \propto P \times H \times W$ —although to be ‘minimally reasonably justifiable’ each of P , H , and W must be above a certain threshold.

Historical Examples

One particular subset of cases is I think of interest: cases in which the development of technology greatly increases the applicability of the conditions for justified anticipatory war listed earlier: (1) Substantial Threat, (4) Increased Risk in Waiting, and also (5.1)–(5.4), the degree of justification of each of (1)–(4), or what we might describe altogether as ‘intelligence’. Roughly, the implacable belligerence was already present, but the other nation is about to develop or deploy a first-strike weapon. While they all marked incredible advance in weapons, and changed the nature of warfare, such developments as firearms, artillery, automatic weapons, armored sea and land vehicles, and poisonous gases were all initially of limited effectiveness, were mainly of use only on front lines (rather than devastating or threatening the whole military or economic infrastructure of a nation), and countermeasures were rapidly developed and these weapons were quickly replied to in kind. Furthermore, few if any major nations in the history of warfare have possessed the military or technological means effectively to stop the development or deployment of such weapons by a preventive war, or possessed reliable information about the enemy’s development of them or about these weapons’ effectiveness in advance of their use. So meeting the necessary conditions for the moral justification of preventive war have been extremely rare. The possession of, effort to develop, or ability and likelihood of keeping secret nuclear weapons and a long-distance method of delivery (by missile or smuggling into the country), with undeterrable motives (e.g., ideological or religious), and in the absence of countermeasures, together with sufficient evidence, almost certainly does meet these conditions, at least under some circumstances.

As for condition (5), the epistemic threshold in justifiably believing (1)–(4), observe how technology massive changed.²⁰ While human intelligence is as variable as ever, electronic surveillance of communications, and visual/aerial, overhead radar, infrared, magnetic and motion sensors are all new technologies. Despite mistakes, they surely *add* to available evidence. We can surmise that in many cases of war before modern communication, the belief by a nation’s central, war-authorizing command that the nation *had been attacked* at a distant locale was often comparatively unjustified. It was a hand-carried but counterfeitable message on paper, word of mouth across several people, terse semaphoric or telegraphic messages, and so on. In some cases, we will today be justified in believing that a nation *will* attack us in the future with greater epistemic justification than nations of the past had to believe that they *had already* been attacked. Consequently, if defensive wars

of the past were morally justified despite a lack of complete certainty that they had been attacked, then present-day wars are justified in which we have a comparable degree of evidence that an enemy will attack us in the future.

There are three relevant historical cases that are readily apparent and a fourth that is less likely to come to mind. Each evokes an intuition that is widely shared. The three more readily apparent cases are (1) the Soviet acquisition of nuclear weapons in 1948, (2) the Soviet acquisition of thermonuclear ('hydrogen') weapons in 1953, and (3) the Israeli destruction in 1981 by F-15s and F-16s of a plutonium-producing nuclear reactor in Iraq. An attack in 1948 was not seriously considered. An attack on the Soviet Union was quickly rejected by Eisenhower in 1953—although the main obstacle seems to have been the feasibility of removing permanently the threat in one attack i.e., in Just War Theory the 'Probability of Success' condition was not met. Eisenhower himself stood almost alone against his civilian and military advisors in believing what has in fact proven to be the case, namely that the Soviets were not implacably belligerent and were deterrable; he was also of the general opinion, in WW II and during his Presidency (in Korea, Indochina, Lebanon, or in removing a Soviet atomic threat) that air power alone could not achieve strategic objectives—and that land wars against substantial foes were too costly for all but the worst evils (i.e., in violating Proportionality).²¹

The limited Israeli attack on Iraq has seemed to most observers to be justified (e.g., Walzer 1992)—although the US and UN at the time formally condemned the attack and the Israeli policy.²² By my own criteria of moral permissibility, this would depend on the likelihood, given reliable intelligence estimates, of an eventual unjust nuclear attack by Iraq on Israel. It would also depend on the state of development of the reactor—such as how many civilians were at what level of risk from such an attack earlier as opposed to later—and on a reasonable estimation of further escalation.

The fourth and most interesting case, which might not immediately come to mind as a case of preventive war, is the Cuban Missile Crisis of 1962.²³ The general history is well-known, but what is worthwhile to point out here is that the Soviet missiles in Cuba by no means posed an imminent threat (indeed, we thought they had not even been fitted with nuclear warheads), but at most a growing threat. Intelligence was excellent, in constituting sufficient evidence of e.g., (1) Substantial Threat, and in the intelligence's reliability.²⁴ However, the US committed what are universally regarded as 'acts of war' (that are typically taken morally to justify counterattack or even war), namely a blockade, interception of foreign freighters on the high seas, and threatening to fire upon, and indeed actually shooting canon 'over the bow' of, an unarmed foreign ship. To the extent one believes that the Kennedy administration was justified—and most apparently do—then this is an acknowledgement of the justification of preventive 'acts of' war where the threat is not imminent. I myself am not sure whether the US blockade was morally justified, since the Soviets were otherwise rationally deterrable—even if Castro, in much later conversation with McNamara, indicated he was not. Furthermore, diplomatic possibilities had not been exhausted, such as the

later offer to withdraw similar middle-distance missiles from Turkey.²⁵ Within its larger historical context, it is possible that principles such as the Monroe Doctrine have moral status because they tend to diminish the frequency and severity of certain kinds of war.²⁶ Furthermore, it is also possible that Kennedy and his civilian administration were justified since the US military at that point (notoriously Curtis LeMay) would not have settled for anything less than some use of force, and this was the least force the US military would abide. (What this shows is I believe the intermittent fragility of civilian control of the military, even in the US and which even Eisenhower himself as President decried.)

The Epistemic Threshold for Anticipatory Attacks

We have seen a number of reasons why some preventive wars are morally justified. Nevertheless, this justification hinges on what I have called an epistemic threshold. This threshold is the minimum amount of ‘objective certainty’ about the enemy’s intentions, bellicosity, and present and future military resources necessary to justify preemptive or preventive war. It is not merely a subjective certainty in feeling strongly about the extent of evidence for these factors. To be morally justified, one must have, and appreciate, extensive evidence for these factors and the other usual criteria for Just War except Just Cause; one must lack substantial evidence that goes against one of these factors, after a reasonable effort to acquire such evidence. A ‘second order’ objective certainty is also necessary: one must be justified in believing that one’s past record of judging intentions, resources and so on, from the information sources one is now using (e.g., satellite imagery), has usually been correct.

It may be instructive here to reflect on the 2003 Iraq War.²⁷ The fact that Iraq turned out not to have weapons of mass destruction, and did not even have quickly constructable facilities to produce them, shows that the Bush administration did not have *knowledge* of the weapons or facilities. It does not, however, alone entail that it was not objectively certain to the extent required by the epistemic threshold criterion for preventive war. In fact I believe that it was highly rational to believe, and in Grotius’ words was ‘morally certain’, that Iraq had chemical weapons despite what would prove to be its falsehood. (This is a consequence of permitting defeasible or non-absolutely-certain justification or warrant for knowledge that is now almost universally accepted by epistemologists.) This is debatable, to be sure. However, I am not totally convinced that having chemical weapons of the kind Iraq was reasonably believed to possess alone posed a sufficient threat to justify preventive war. The case for morally justifying preventive war with regard to biological or nuclear weapons almost certainly did not meet the epistemic threshold. This is not to suggest that there were not other morally sufficient reasons, or that there might be some accumulative effect of arguments that are separately, in various respects, weak. Grotius, for one, diminishes the importance of intent, and allows one to change intents in mid-war, while retaining its morally justified character.

Especially in the recent 2003 Iraq War, there was a constant refrain about the need to acquire international moral approval of the coalition efforts.²⁸ Intuitively, some international assent, especially by sympathetic nations if not the Security Council of the UN, is desirable. Yet it is very difficult to see how this fits into the moral theory of the permissibility of war. However, this reasoning, contrary to our intuitions, seems to leave no place at all for ‘internationalism’ in the moral justification of war (at least as regards its moral permissibility). I would propose that considering the epistemological dimension of morally justified war does give a proper place to our internationalistic inclinations. As is now all too well known, political discussions of the conditions of just war are prone to being blinded by already firm geopolitical worldviews, as well as by past political rhetoric that tend to chain politicians to certain views for the sake of ‘consistency’. The facts of the case, such as intelligence on WMDs, are likewise prone to a certain institutional conformist tendencies—and this tendency was well-known long before the supposed influences of neoconservatives on the US, and apparently also on foreign intelligence services. For example, when critical policy decisions rest on intelligence, the legendary Sherman Kent,²⁹ proposes that we critically examine existing intelligence, and apply in my terminology ‘second order’ principles, explicitly attaching the probability that various truths are mistaken, based on past incidents of the type of information from such sources.

International approval, plays a role in the moral justification of war primarily in this epistemological dimension. I do not think approval of the oddly chosen UN Security Council³⁰ is necessary for a morally justified war, even if it is desirable and should often be sought (for various prudential reasons). The moral criteria must be independent of the Security Council, since they have to reason by some principles and presumably these are the pure moral principles—they cannot appeal to a still higher authority. But now suppose that these pure moral principles that the Security Council should use, applied to a single nation’s situation, permits it to go to war. However, the Security Council does not agree to this (perhaps because of a veto) or even prohibits the nation’s action. Rather, the underlying principle is something like this: a failure to persuade numerous like-minded nations of both the relevant facts (e.g., the existence of WMDs), when these nations preferably have some independent intelligence capability, or failure to persuade them of the relevant moral principle embodied in a policy (e.g., that if a nation is as chronically belligerent as Iraq, and has such a WMD capacity, then it can be attacked in advance of its attack), is strong evidence against one’s having met the epistemological threshold for anticipatory war. In the recent situation, the opposition of Russia and France, especially Germany and Mexico, and the unenthusiastic acquiescence of China gave *prima facie* evidence against having met this threshold; the support of the UK, Italy, Spain, and Poland were, however, probably sufficient to meet my condition. In any case, it is in this epistemological dimension of the philosophy of war, and not anywhere else, that international or international-organization approval plays a role in moral justification.³¹

It might appear difficult to say much about what precisely this epistemic threshold is. It need not be ‘warrant’ as it is used by epistemologists when discussing conditions for *knowledge*.³² Roughly, I think that the evidence at hand both for bellicosity and for the enemy’s possession of military resources constituting, or soon to constitute, a threat (and of their probable offensive nature) must be overwhelming and ‘all but certain’. I do not think that ‘manifest preparations’ for an attack (in Walzer’s terms) are necessary, whatever this means.³³ Additionally, our second-order assessment of this evidence must be such that we have good reason to believe that it constitutes good evidence: this source has not misled us in the past, etc. A second-order assessment is our reasonable estimate of the probability of evidence for our first-order assessment of harm, bellicosity, etc., being correct. The military resources must be such that they are likely, if used in a first-strike, to endanger our nation itself or to pose a severe threat of incapacitating our own military resources. It seems to me—although I have not studied this matter at all thoroughly—that chemical and biological weapons are indeed terrifying, but are unlikely to be serious in this precise sense. Their dispersal problems as well as the existence of countermeasures tend to lessen their military danger. Nuclear weapons, including dirty bombs, are almost certainly in the ‘severe threat’ category.

Several factors raise and lower this threshold. One is the seriousness of the threat. Another is the amount of time until these military resources pose this threat. Still another is a kind of proportionality: minimizing civilian and even military deaths. The epistemic threshold never gets so low that, for example, one may launch a preventive war based on evidence of a nation’s bellicosity or resources that is ‘somewhat likely’.

The Legality of Anticipatory wars

The legal status of both preemptive and preventive wars is problematic. Somewhat surprising is the extent to which this status has played a role in discussion among philosophers about the morality of such wars. At least *prima facie*, it would seem that no body of judges and no legal procedure can make an act of war *immoral* that is not so by other, strictly moral criteria, and likewise no judges or procedure can make an action *morally permissible* when it is not. Part of the root difficulty is ontological, since a state is not the sort of entity properly to be considered a moral agent, to be culpable, to be punished in any usual, ordinary sense; Grotius, Walzer, Luban, and others have proposed a ‘legalistic framework’ that seems to propose we consider a state as if it were a moral agent. Another problem is that such positive laws as we know them appear to have at most the status of promises, namely, treaties. While Kant famously believed we ought always to keep all promises, few other moral theories grant promises this lofty status. Absent from the scene of this treaty-promise is any moral or legal superior authority, that arbitrates or enforces the promise between these two parties—in some cases, between the state and the superstate. For an argument that that there is no moral

obligation to comply with international law, see Goldsmith and Posner (2005: 185–204).

Few would agree that *whatever* the Security Council decides wholly determines what is moral and immoral in war. If asked what considerations the members of the Security Council (or some other international court) itself should use in its deliberations, I would hope that we would say: the moral principles governing *jus ad bellum*.³⁴ The fact of a nation's membership in the United Nations, and its agreement to follow its Charter, present certain difficulties for those who would say that this entails certain legal or even moral obligations to member nations. One puzzling factor is the language of the Charter, which is little like the language of most written laws. For example, Article 2 (section 4) states that all members 'shall refrain from the threat or use of force against...any state, or [!] in any manner inconsistent with the Purposes of the United Nations'. This would seem to prohibit conditions required by Roman and Just War theories, namely issuance of an ultimatum or Last Resort. It would also seem to block preemptive³⁵ and even defensive wars.

The Charter does not provide for the collection of evidence, procedures, a trial mechanism, or punishments for the enforcement of these exhortations. This is quite different from both the procedures and laws associated with special tribunals or the International Criminal Court, for example. Thus there is no clear mechanism for judging or punishing states for aggressive wars, as opposed to the crimes of individual leaders or soldiers—unless one resorts to *ad hoc* multinational tribunals like the Nuremberg Trials.³⁶ It is perhaps interesting that the Annex to the Hague IV Treaty (of 1907) does provide for fines and reparations from violating states themselves, but without a mechanism, and in a way that was discredited by the harsh actions of the Allies after WW I.

The peculiarly broad strokes of Article 2 are partly withdrawn by an explicit permission given by the famous Article 51, namely the declaration, seemingly contrary to Article 2, Sections 3–4, and which begins, 'Nothing in the present Charter shall impair the inherent right of self-defense if an armed attack occurs...'. My interpretation of this document is that Article 2 broadly forbids members from the use of force. Article 51 creates an exception, or a permission in special cases to use force, namely in immediate self defense. The broad purpose appears to be to require referral to the Security Council for authorized use of force in all but these cases of immediate and necessary state self-defense. Observe also that there is mention of a Hobbesian 'inherent right' of self-defense that is not further described and that this 'inherent' nature apparently extends only so long as the Security Council needs to consider the issue.

What is striking about Article 51, as an explicit exception- or permission-clause, is that neither it nor other articles answers the simple question: if there are exceptions to the prohibitions in Article 2, namely, those stated in Article 51, are there *any other* exceptions that allow the use of force—such as to allow preemptive or even preventive war? The Charter could have clearly eliminated this problem by acknowledging the exceptions of Article 51

already in Article 2—‘refrain from force. . .except as provided by Article 51’. It could also have had an explicit clause that the Article 51 exception is the only one. The language of the Charter, as well as the history of the intense and complicated diplomacy that led to it (Russell 1958: 465–466, 599, 696), betray a desire to maintain deliberate ambiguities about what was permissible. Silence about what else might be permitted (e.g., preventive war) in this somewhat contorted document is thus by no means a clear declaration of what is illegal just because it is not explicitly permitted.³⁷ Another peculiarity, more deeply buried in the whole document and UN organizational structure, is that there is surely a sense in which no veto-bearing permanent member would allow the Security Council, the only relevant adjudicating body, to be used to judge and punish that member state. Consequently, if one views, somewhat creatively, the Security Council as the court for these determinations of international law governing *jus ad bellum*, then five powerful nations cannot be convicted of launching illegal wars, while smaller nations can be. This views the document in its totality. It is of course no powerful defense of the legality of the US policy of anticipatory war, but it shows how suspect casual legal criticism of US policy has sometimes been. At the same time as we reach these conclusions, we must also point out that international law—whatever it is, and whatever it entails—does not make preventive (or even preemptive) war ‘clearly legal’.³⁸

Conclusion

The ability to give arguments that there exists an epistemic threshold for preventive war, but the initial inability even to speculate how one might calculate what this threshold value might be, is a problem for a moral defense of preemptive and preventive war. Yet we are not so clueless as it might at first seem. First, we can examine the evidence that war-making authorities had available, in those strictly defensive wars of the past that we overall hold to be moral. We can isolate, perhaps from other historical records, how likely it was that such evidence was correct. We may assess this evidence in both its qualitative and quantitative aspects, for example, in how likely hand-carried or telegraphic messages were to be accurate. This is then as likely to be an epistemic guide to determining a moral response to the threat of future attack as it was of a past attack. In this way, we filter out our various morally irrelevant doubts about mere time preference (being a past or a future event).

A second method of calculating the threshold also tells us more about other aspects of preventive war. Recall that there is a widely stated presumption that policies of preventive war, if widely adopted, lead to more wars and destruction than if there are moral or legal prohibitions on preventive war. Similar intuitions about retaliation and deterrence have been proven, as an *a priori* matter, to be false by the mathematics of game theory. In a series of computer simulations of the so-called Iterated (Two-player) Prisoner’s Dilemma (IPD), I have taken standard models of conflict, more or less borrowed from (Axelrod 1984), and applied them to preventive war. These programs allow two players to employ a wide variety of probabilistic

strategies, including ones where one player or both are using ‘preventive war’ strategies.³⁹ The baseline probabilistic Tit-for-Tat strategy was one in which war was probabilistically initiated 1–15% of the time (termed ‘noise’), returned to non-attack mode (‘unilateral cease-fire’) after its own attack on the last move 5–15% of the time, and otherwise applied Tit-for-Tat. The baseline preventive war strategy was one in which an attack was initiated 10–90% of the time if the opponent’s next move (or two moves in the future) was an attack; however, this also included 1–20% of ‘false’ preventive attacks—i.e. preventive attacks where the opponent was in fact not attacking. Otherwise, the strategy was as in the baseline Tit-for-Tat strategy. One must remember that there is no single best strategy for IPD *simpliciter*, particularly if both relative advantage and absolute measures of destruction are applied. That is, one strategy may outperform another strategy, but the absolute destruction even to the winning player might be relatively high.

The results of applying tournaments to dozens of these strategies, each for thousands of iterations, are described as follows. Preventive war strategies often outperformed baseline Tit-for-Tat strategies—roughly by blunting the effects of the enemy’s attack or forcing them into ceasefires.⁴⁰ The total destruction to both parties was, with certain values for preventive strategies, less than with any other similar retaliatory strategy. The preventive war strategies displayed a significant ‘threshold effect’, namely if mistaken prevention was much higher than 10% of the cases, then the total destruction to both players increased even if one player retained a relative advantage. This threshold value of approximately a maximum of 10% mistaken preventive wars was highly sensitive to the values in the payoff matrix and to the other probabilistic values in the strategy.

Given the idealizations inherent in almost any game-theoretic description of a real-world conflict, this does not prove conclusively that some policy of preventive war is morally workable in actuality. However, it does strongly suggest that the intuition or presumption against preventive war is, like the intuition against deterrent and retaliatory strategies, misguided. Perhaps more to the point of this paper, there is reason to suspect that these game-theoretic threshold effects (e.g., of sharply increasing total destruction for some values of mistaken preventive war) are deeply related to what would be a reasonable value for what I have termed epistemic thresholds. Our ability to determine these values by computationally intensive means indicates possible *a priori* constraints on epistemic thresholds, and thus that some universally adopted policies of preventive war are not only morally permissible but are actually desirable.⁴¹

One final but crucial consideration in preventive war is the general application of my proposed ‘metaprinciple’, and not just to the calculation of the epistemic threshold of being approximately 90% accurate. The sufficient conditions for the *permissibility* of preventive attack have already been discussed. I see no strong argument to suppose that even these, together with more usual Just War criteria, exhaust all the sets of sufficient conditions. However, it remains to be considered when one *should* launch a preventive war. That is, when is it prudentially or morally wise to do so? At this second

stage of consideration I propose this. Sketch in general terms the circumstances in which your nation finds itself, with respect to a potential belligerent—both in terms of strength of evidence, amount of threat, urgency, and so on. Suppose now that every nation were always to launch preventive wars in those circumstances. How much conflict would likely result, including a diminution or increase of war-provoking conflicts over the long term?

One might think that this principle would give little guidance in recommending anticipatory wars. However, let us suppose that John Rawls, following Raymond Aron and others, is correct in claiming that democratic states ('liberal constitutional democracies') have very few except legitimate reasons to go to war, and consequently rarely do go to war for 'bad' reasons (Rawls 1999: 47).⁴² Some wars might still occur because of epistemic mistakes or from (legitimate) mutual fear and distrust—something Rawls seems not to consider. Let us further suppose that this general level of warfare in a region or in the world gradually decreases in those places where there exist nothing but constitutional democracies. Let us further suppose that democracy can be imposed, or the conditions for democracy can be created, by the correct application of military force. Then there *are* circumstances in which, if the conditions for the permissibility of preventive of war are met, then preventive war is further *recommended* by this second principle.

There is an interesting question here, beyond philosophical considerations, about whether a nation should formulate and *announce* policies of exactly what conditions will, and what conditions will not, trigger preventive war.⁴³ But there is another and telling side of this coin: what if we should have and announce a policy of never engaging in any preemptive or preventive war? Here I think we are encouraging a hostile enemy to prepare an offensive, including weapons development, right up an actual attack. If there do exist, or can possibly exist, truly devastating weapons, this is to invite their development and one's own annihilation. Even a small nuclear power with ballistic missiles (perhaps positioning missiles on ocean freighters on the high seas) would be free to inflict devastating attacks. While large, stable countries such as China and the former USSR, have historically been deterred by the policy of massive nuclear retaliation, it is unlikely that all nuclear nations with ballistic missiles (including terrorist organizations), will remain deterrable. I believe that such a policy of banning or forswearing preventive war would almost certainly result in more, rather than fewer, wars and deaths, because it would embolden more state-like entities to believe that they could succeed in an unjust war, especially in ideological wars whose 'success' consists simply in inflicting harm on its enemy at all costs.⁴⁴

To announce a policy of rejecting any preemptive or preventive war is thus almost certainly mistaken and violates my second principle insofar as it increases possible threats. The rare and careful use of restricted preemptive and preventive war, under unspecified conditions, in the world we are likely to have for centuries—without, for example, militarily dominant international organizations willing to punish with force the illegitimate use of force—is actually likely to make the world more safe. This is not a conclusion that I am especially happy with.⁴⁵

Notes

- ¹ As a *locus classicus* for Just War Theory I use (Grotius 1625) as described in (Christopher 1998). These conditions are Just Cause, Proportionality, Reasonable Chance of Success, Publicly Declared, Legitimate Authority, and Last Resort. 'Right Intention' and 'Fought Justly' are dropped.
- ² Especially before the US National Security Strategy of September 2002 and the Iraqi War of spring 2003. An exhaustive search in *Philosopher's Index* in early 2003 for substantive references to 'preemptive' or 'preventive' war, as well as other variants, brought just two articles—plus Walzer's *Just and Unjust Wars*, which I knew of but was not referenced. *Philosopher's Index* is an index of all major and many minor philosophical journals in English, as well as major journals in foreign languages, 1940–2003. The American Philosophical Association in a resolution passed overwhelmingly in spring of 2003 stated: 'Members of the Eastern Division of the American Philosophical Association express our serious doubts about the morality, legality and prudence of a war against Iraq led by the United States. Both just war theory and international law say that states may resort to war only in self-defense' (Eastern Division: 1,202 in favor, 263 opposed; Pacific Division 283 in favor, 78 opposed). This was a peculiarly definitive position for professional philosophers to take, given the lack of literature (and apparently, lack of extensive and recent thought about the issue), and also given that figures as well known as Grotius and Walzer have permitted preemptive war. In Nardin (1996), for example, there is no sustained discussion of preemptive war, and although author David Mapel approves permitting preemptive and even preventive war (59–60), his defense is from a Realistic perspective that rejects a role for moral thinking in the philosophy of war (60). Jeff McMahan permits both in rare cases (85) but gives what I later call an epistemological presumption against it, 'a state's ability to understand the intentions and predict the future behavior of its adversaries is notoriously weak'. This treats epistemological criteria in a piecemeal way and it is difficult to see why states' knowledge of (i) *adversaries'* (ii) *intentions* is a special case, or why this fallibilist constraint does not also apply to other factors in the Just War criteria themselves.
- ³ Although he perhaps could be accused of running together a Hobbesian tradition, which generally permitted all manner of aggressive war as anticipatory defense, together with Just War tradition, this work extensively documented philosophers of war from ancient (Cicero) through Late Modern times (Kant) who permitted preventive wars. See especially (Tuck 1999: 18–31). I have seen a draft of a paper by Gregory Reichberg, 'Preventive War in Classical Just War Theory', that examines the primary sources with more care with regard to preventive wars than have previous authors.
- ⁴ 'Well ordered peoples. . . [initiate war] only when they sincerely and reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw states' (90–91). 'Well-ordered peoples do not go to war against each other, but only against non-well-ordered states whose expansionist aims threaten the security and free institutions of well-ordered regimes. . . .' (94). While these passages do not precisely offer sufficient conditions for the morality of preemptive wars, they put all their emphasis on the reasonably known 'policies' and 'aims', rather than actual deeds.
- ⁵ 'I fear that giving a green light to preventive war would make wars frequent and too routine' (in Luban 2004).
- ⁶ Or at the very least, the Future Threat aspect of permitted war can be separated from Punishment for past deeds and from morally and emotionally neutral Tit-for-Tat (or other forms of rational deterrence). There may be other justifications for military action, such as humanitarian intervention, in which a nation by action or inaction poses a threat to its own citizens. The counterattacking nation does not constitute a legitimate and acknowledged legal authority for the administration of justice, and its military and defense institutions do not have that 'purpose', a point made by Vattel (Tuck 1999: 194), Kant, and others.
- ⁷ This has interestingly been disputed in (McMahan 2004) developed from ideas in (McMahan 1994) but the usually granted right of national self-defense is absolute.
- ⁸ A threat to the defenders of those citizens (such as to military forces), rather than directly to the citizens, is a variant of this.
- ⁹ This might be considered a species of Last Resort. I will later argue that Last Resort in any of its usual forms should be abandoned.
- ¹⁰ There is also frequently a blatant fallacy *ad ignoratum*, namely that since there is no or little literature justifying preemptive war, therefore preemptive war is morally *un*justified. (Observe that the premise that there is little literature defending preemptive war is mistaken.) Cf. the APA condemnation of the

Iraq War in December 2002. There is a shred of rationality in this maneuver, however, since the onus is on justifying war: one cannot simply retort to a critic of a war, 'Why *not* go to war?' Observe that even if a set of jointly sufficient conditions for moral are met, this is not sufficient to make going to war wise or morally obligatory.

- ¹¹ A right to existence, and to a stable political order or to what Rawls calls a 'well-ordered' people, and more precisely a 'decent' people' (Rawls 1999: 4f), is after all necessary for exercising almost any other rights.
- ¹² I require that the central authority have justifying evidence in hand, not that it be justifiable, or later turns out to be justifiable. This is partly because I intend these conditions both as describing moral truths and as *moral guidance* for agents, a distinction not widely enough noted.
- ¹³ It is not necessary to stipulate how you know the neighbor will attack, or that he has attacked before.
- ¹⁴ Or you know that your neighbor, because of psychological or religious factors, is undeterrable by any future punishment, no matter how severe or likely.
- ¹⁵ Legally excused or justified by an assertion of necessity, although that is not the issue here.
- ¹⁶ While state of mind (usually, intent), *mens rea*, is required for many crimes, it is contrary to metalegal traditions and intuitions to make *mens rea* sufficient for the crime.
- ¹⁷ *The Catechism of the [Roman] Catholic Church* requires as one necessary condition for war that 'the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain (#2309) PART THREE: LIFE IN CHRIST /SECTION TWO: THE TEN COMMANDMENTS /CHAPTER TWO: 'YOU SHALL LOVE YOUR NEIGHBOR AS YOURSELF' /ARTICLE 5: THE FIFTH COMMANDMENT /III. Safeguarding Peace/Avoiding War' and does not literally require that the damage be actual or past.
- ¹⁸ Observed by US Secretary of Defense Donald Rumsfeld as quoted in the *Washington Post* January 30, 2003.
- ¹⁹ Even if the single most recent example of overestimating such prowess, in the 2003 Iraq war, is disastrously obvious.
- ²⁰ Ambrose (1990: 369). The first Soviet thermonuclear ('hydrogen') bomb was tested 12 August 1953. A curiously related opinion was an earlier suggestion by Bertrand Russell to prevent by military means the Soviet Union from developing atomic weapons. This is discussed in Perkins (2002); see also Blitz (2002). These are two of the very few articles dealing marginally with the morality of preventive war before 2003.
- ²¹ United Nations Security Council resolution 487 (1981) of 19 June 1981; General Assembly Resolution 39/14 (16 November 1984).
- ²² The Cuban Missile Crisis, the War of Spanish Succession, and a number of examples and European Union representatives that support the legitimacy of preventive war are discussed in Boot (2004).
- ²³ Holbrooke (2004): 'In 1962, unlike 2003, American intelligence and analysis was excellent. High-altitude photographs found and identified the missiles before they were deployed'. Evidence of belligerency was more lacking, and while intelligence about the missiles was good to excellent, intelligence about the status of their possibly nuclear warheads was dangerously in error.
- ²⁴ Holbrooke (2004) dismisses this, 'By the time they were installed in early 1962 they were already obsolete; President Dwight D. Eisenhower said they should have been dumped at sea rather than sent to Turkey, and American nuclear submarines made them superfluous'. What Eisenhower thought is, however, not relevant, but rather what was important was the Soviet's perception of their threat.
- ²⁵ Here I allude to what I believe is an extension of the conditions justifying war (i.e. sufficient conditions that are alternatives to the traditional ones). Namely, principles or conditions for going to war which, in the long run and with near certainty diminish the overall quantity of destruction through war over history when applied by all parties, are themselves morally justified sets of sufficient conditions for a just war. The *conclusions* of employing my metaprinciple have similarities with views in the use of force between nations that are sometimes called (geopolitical) 'realism'. However, my justification for these endpoints is ultimately philosophical and moral, rather than claiming that moral reasoning does not apply.
- ²⁶ Walzer's position is less helpful than one might think. He did not to my knowledge point out clearly that, presuming the possession of WMD's, Iraq in 2002–2003 fulfilled the criteria for anticipatory war in *Just and Unjust Wars*. His position in the *New Republic*, various discussions that were transcribed, and later in *Arguing about War* seems to have been that a Last Resort condition was not met. Although there is a great deal of policy and popular literature on the US National Strategy, and later on the

wisdom of attacking Iraq, most of it both pro- and con- has a partisan, Internationalist, canonical Just War (i.e. the position of the Roman Catholic Church), is narrowly legal, or has Realistic flavor of eschewing morality altogether.

- ²⁷ See for example Ignatieff (2004: 162–167). While this is a subtle and careful discussion, Ignatieff does not seem aware of the possibility that I am advocating, namely, that international approval is not a fundamental, moral condition for morally justified war. Rather, its logical position is in support of the epistemic threshold, and it is this condition that is fundamental; even here it is also more limited than many, including Ignatieff, propose.
- ²⁸ See *New York Times*, 11 July 2004 discussing Kent's lecture notes and articles by his aides. Interestingly, recent history suggests more that CIA and other US intelligence services have tended to *underestimate* military potential of rogue nations (Cuban missiles, Libya, North Korea) than to *overestimate* them. Iraq seems to be a fluke. And while a lack of human intelligence was a notable failure, depending instead on the analysis of aerial and satellite surveillance, various figures high in Hussein's regime, including division commanders, believed that Iraq indeed had chemical WMDs; we could have had many such high-placed human intelligence sources and still been mistaken.
- ²⁹ Namely, in its representation of veto-bearing members that is wildly undemocratic, but also in the ulterior economic and geopolitical motives that seem to more often than not play an unhelpful role. The role of the Security Council in this epistemological dimension would have been greater if had not avoided its possible role in crises such as Kosovo and Rwanda, and more generally shunned the use of force in enforcing mandates such as disarmament.
- ³⁰ This does not speak to prudential and legal issues, and does not address the moral issue in complying with international agreements, such as the UN Charter. Article 51 clearly avoids stating that self-defense is permitted, without Security Council sanction, *only* in response to armed attack. See Anthony C. Arend, 'The War that Changed Everything', *New Statesman*, 15 March 2004, for a discussion of the legal issues. I believe preventive and maybe even preemptive (imminent) war is indeed contrary to the spirit or 'implicit' text of the UN Charter and thus probably intended to discourage it. If one looks to legislative history for evidence of intent, it is clear that for major powers ca. 1945, this ambiguity was intentional.
- ³¹ The quantity and nature of evidence for any such actionable threshold differs with the domain of the subject and the associated risks of being mistaken in acting or of inaction. Epistemic appraisal almost certainly has more dimensions and gradations than simply being knowledge or 'mere belief' once it is regarded with respect to its impact on actions. The recent history of epistemology and its intuitions about what constitutes one sort of 'true knowledge' smacks of a lack of sophistication with regard to the uses and functional nature of beliefs in all of cognition.
- ³² Observe that with 'manifest', Walzer is tacitly introducing an unexplained epistemic condition.
- ³³ We could start with the traditional moral principles, carefully researched.
- ³⁴ Peter Singer asserts, 'Under current international law, preemptive strikes are not permitted unless they are in defense against an imminent attack' (Singer 2004: 180). Contradicting this statement, he later notes (Singer 2004: 181) correctly that the UN Charter gives states the right to defend themselves "if an armed attack occurs"—thereby suggesting that the provisions of the charter do "impair" any possible "right of self-defense" when no armed attack has [!] occurred'. Observe the very weak 'suggesting'.
- ³⁵ I refer here to the first part (a) of the indictment, Article 6, cited in (Marrus 1997: 52), 'Crimes against Peace', i.e. *jus ad bellum* crimes of wars of aggression. International tribunals since 1946 have typically not addressed *jus ad bellum* crimes. This part of the Nuremberg indictment hinged delicately on Just War traditions and the Kellogg-Briand Treaty (1928), abandoned by almost all nations by the time Germany started its aggression. Violations of *jus in bello* and crimes against humanity were indictments (b) and (c). I assume that the Kellogg-Briand Treaty, which far more clearly than the UN Charter would condemn preventive wars, is no longer considered applicable ca. 2003.
- ³⁶ As can be seen in (Russell 1958), there was the widespread assumption of a right of self-defense that seemed to many representatives not even to require language like Article 51. Efforts in Mexico City, Dumbarton Oaks, and then finally in San Francisco to define 'aggression', as well as stating what actions would automatically trigger Security Council condemnation and action, were soundly rejected. It was believed the permissible and impermissible such actions could not be clearly defined in advance. Even an effort proposed by China to list examples of aggressive acts that violated the Charter was rejected. The United States pointed out (at Dumbarton Oaks), to no opposition, that the concept of armed aggression (later 'armed attack') covered 'preparations therefore, as well as threats to and

breaches of the peace'. Far more discussion at the conferences, and later in the US Senate, was devoted to preserving the peacekeeping and defense role of 'regional arrangements' (Articles 52–4), which were broadly understood to include arrangements with nations outside of the region.

- ³⁷ Even if the Charter had more clearly legally banned preventive war, there would still be enormous doubt about whether it would constitute law under the present US Constitution—and thus whether US soldiers would be obligated to disobey an illegal order to engage in preventive war. The Constitution gives the President, with Senate approval, the right to enter treaties; the Constitution and other resolutions generally make following these treaties legally obligatory. However, a UN ban on preventive war would conflict with the widely understood, near absolute Constitutional right for the President to initiate military action as commander-in-chief. Even the War Powers Act does not restrict this in the short run. Both by common sense and by legal precedents, no treaty could override the Constitution.
- ³⁸ They were written in the computer language Prolog over 2003–2005. Each strategy was tested for runs of 500–1000 iterations (compared with Axelrod's original 400) and then these runs were repeated up to ten times and averaged so as to eliminate artifacts of the random-number generator. Strategies were compared not just for relative advantage over other strategies, but also for total net destruction to both parties, a rough measure of the Just War criterion of Proportionality.
- ³⁹ This does not take into account the phenomenon in which a nation about to launch an unjustified first-strike, but was attacked, would often know that this attack was preemptive or preventive in nature, and so would know it need not continue to 'retaliate' with the usual probability.
- ⁴⁰ This argument does not consider or need any exceptionalism: the theory that preventive war should only be a policy for all those in certain historical, moral, or military situations.
- ⁴¹ There is some empirical evidence that Rawls is incorrect. See Bennett and Stam (2004: 117–118 and 128–131)
- ⁴² This is an invitation to a bellicose enemy to arm itself just up to the point where their resources would trigger preemptive war by this policy, or to conceal exactly those assets or plans that are likely to trigger preemption. Announcing preemption policies in detail thus increases dangers to a nation.
- ⁴³ Ceumans (2002: 282) argues that there are different conditions for the use of preventive war against states, compared with non-states.
- ⁴⁴ If all nations that constitute a substantial threat are deterrable, and means of deterrence such as mutually assured destruction are available, then announcing and following a policy of never initiating preemptive war is advisable. It reduces the perceived threat to other nations by the nation that has announced such policies, assuming some modicum of believability and of observable weapons development and deployments consistent with those policies. I assume, however, that we have entered a new world in which not all nations and organizations that constitute a substantial threat are deterrable.
- ⁴⁵ I thank Stephen Kershner, David Hershnenov, Peter Sinden, Kenneth Shockley, James Hurtgen, and Alan W. Dipert for comments on earlier versions of this paper. An older debt of gratitude is owed to my former mentors at the US Military Academy, Paul Christopher, Anthony Hartle and Peter Stromberg.

References

- Ambrose, S. (1990, originally 1983–4) *Eisenhower: Soldier and President* (New York: Simon & Schuster).
- Axelrod, R. (1984) *The Evolution of Cooperation* (New York: Basic Books).
- Axelrod, R. (1997) *The Complexity of Cooperation* (Princeton, NJ: Princeton University Press).
- Bennett, D. & Stam, A. (2004) *The Behavioral Origins of War* (Ann Arbor, MI: University of Michigan Press).
- Blitz, D. (2002) Did Russell advocate preventive atomic war against the USSR?, *Russell: The Journal of the Bertrand Russell Archives*, 22(1), pp. 5–45.
- Boot, M. (2004) The Bush doctrine lives, *The Weekly Standard* (16 February 2004).
- Ceulemans, C. (2002) The military response of the U.S.-led attacks to the September 11 Attacks, in: B. Cippieters & N. Fotion (Eds), *Moral Constraints on War* (Lanham, MD: Lexington Books).
- Christopher, P. (2004) *The Ethics of War and Peace: An Introduction to the Legal and Moral Issues* (Upper Saddle River, NJ: Pearson/Prentice Hall).
- Goldsmith, J. & Posner, E. (2005) *The Limits of International Law* (New York: Oxford University Press).

- Holbrooke, R. (2004) review of Max Frankel's *High Noon in the Cold War* (2004), NY Times, 15 October 2004.
- Ignatieff, M. (2004) *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press).
- Luban, D. (2004) Preventive War, *Philosophy and Public Affairs*, 32(3), pp. 207–248.
- Marrus, M. (1997) *The Nuremberg War Crimes Trial 1945–46: A Documentary History* (Boston: St. Martin's).
- McMahan, J. (1994) Self-defense and the problem of the innocent attacker, *Ethics*, 104(2), pp. 252–290.
- McMahan, J. (2004) War as self-defense, *Ethics and International Affairs*, 18(1), pp. 75–80.
- McMahan, J. (2004) The moral case against the Iraq War, posted at http://leiterreports.typepad.com/blog/2004/09/the_moral_case_.html and authorship acknowledged in correspondence.
- Nardin, T. (1996) *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NJ: Princeton University Press).
- Perkins, R. (2002) Russell and preventive war, in: A. Schwerin (Ed.), *Bertrand Russell on Nuclear War, Peace, and Language: Critical and Historical Essays*, pp. 3–13 (Westport: Praeger).
- Rawls, J. (1999) *The Law of Peoples* (Cambridge, MA: Harvard University Press).
- Russell, R. (1958) *A History of the United Nations Charter* (Washington, DC: Brookings Institution).
- Singer, P. (2004) *The President of Good & Evil: Questioning the Ethics of George W. Bush* (New York: Plume/Penguin Group).
- Tuck, R. (1999) *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press).
- Walzer, M. (1992) *Just and Unjust Wars* (New York: Basic Books).
- Walzer, M. (2004) *Arguing about War* (New Haven, CT: Yale University Press).
- Wester, F. (2004) Preemption and just war: considering the case of Iraq, *Parameters*, 43(4), pp. 20–39.

Biography

Randall R. Dipert has previously taught at SUNY College at Fredonia and the US Military Academy at West Point. He has published articles and books on logic, the metaphysics of artifacts, political philosophy, and American Pragmatism.