

## FORCIBLE PREVENTIVE DISARMAMENT IN TRADITIONAL JUST WAR THEORY

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Spurred in large measure by the 2003 Iraq invasion, and more recently by debates on the possibility of an Israeli (and American) attack on Iran's alleged nuclear weapons program, quite a few studies on the ethics and legality of preventive war have appeared over the last few years. While most authors recognize that preventive military action has long been a topic for normative inquiry, sharply different assessments have been proffered regarding its status within traditional just war theory.<sup>1</sup> Some maintain that "a blanket prohibition on preventive action" has been the dominant view among just war theorists.<sup>2</sup> This appears to be the position staked out in the Compendium of the Social Doctrine of the Church.<sup>3</sup> Others, by contrast, hold that considerable support can be found within the just war tradition in favor of the moral justifiability of at least some preventive wars.<sup>4</sup> Assessing which

\* In my summary presentation at the PASS conference 2012, I will apply the conclusions of this paper to claims made about the justifiability of a preventive attack on Iran as a strategy of forcible nuclear disarmament.

<sup>1</sup> The term "traditional just war theory" is here used to designate developments in the tradition from its inception in medieval canon law (with Gratian ca. 1140) to the middle of the 18<sup>th</sup> century (Vattel), when the tradition entered a period of sharp decline. Excluded from consideration are developments in the latter part of the twentieth century (beginning with Ramsey and then Walzer) wherein a renewal of interest has, in reaction to contemporary trends, moved the tradition in novel directions.

<sup>2</sup> Alan Buchanan and Robert O. Keohane, "Preventive Use of Force: A Cosmopolitan Institutional Proposal", *Ethics & International Affairs* 18/1 (2004): pp. 1-22, on p. 2.

<sup>3</sup> "[E]ngaging in a preventive war without clear proof that an attack is imminent cannot fail to raise serious moral and juridical questions" (italized in the text) (Pontifical Council for Justice and Peace [London: Burns and Oats, 2004], §501, p. 251).

<sup>4</sup> See, for example, Randall R. Dipert, "Preemptive War and the Epistemological Dimension of the Morality of War", *Journal of Military Ethics* 5/1 (2006): 32-54, who writes (p. 32, Abstract) that "it is far from clear that preventive war is absolutely prohibited in traditional Just War Theory". Cf. Stephen C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005), who maintains that prevention was central to the idea of defensive war in the classical just war tradition: "Defensive war – or preventive war as it might alternatively be called – was designed to prevent an attack from being launched in the first place. As a result, this preventive feature meant that defensive

of these claims best characterizes the main thrust of the just war tradition constitutes the primary purpose of the article.<sup>5</sup>

As can be expected, the approach to this question will depend, in large measure, on how one draws the contours of the just war tradition, namely which authors are included within its fold and which are excluded.<sup>6</sup> Also decisive will be the way in which one characterizes the very idea of prevention. In the recent literature prevention is usually contrasted to preemption.<sup>7</sup> While both sorts of action are anticipatory (they aim at countering attacks that have not yet occurred), the latter is most often taken to designate an armed defense against an offensive that, by demonstrable signs, is imminent, while the former presupposes a longer time frame. Prevention thus seeks to counter an adversary who either is preparing to mount an attack at a still undetermined point in the future, or, still more remotely, has acquired a military capability which, if exercised, would have devastating consequences for the defender. As indicated by the title, this article will focus most especially on the problem of prevention. It will be useful, however, to begin by considering some medieval (12<sup>th</sup>-13<sup>th</sup> century) texts on preemption, since this was the context in which the early just war thinkers first came to discuss the ethics of anticipatory military action. Only much later, in the 16<sup>th</sup>-18<sup>th</sup> centuries, do we find authors mounting arguments for and against prevention, probably as a result of reading Thucydides, who famously asserts in his history of the Peloponnesian War

wars, notwithstanding the label, were essentially offensive in nature..." (p. 127). Based mainly on a reading of Gentili and Grotius, Neff's treatment papers over the very significant differences which (as we shall see) exist between these two authors on the issue of prevention.

<sup>5</sup> This represents an updated version of my article "Preventive War in Classical Just War Theory", *Journal of the History of International Law* 9/1 (2007): 5-33. Preemption/prevention has not been much discussed in the historical literature on just war. A few treatments do nevertheless exist. See for example: Karl-Ernst Jeismann, *Das Problem des Präventivkrieges im Europäischen Staatensystem mit besonderem Blick auf die Bismarckzeit* (Freiburg/München, 1957), where an introductory chapter (pp. 1-31) outlines a variety of positions on this theme (by, *inter alia*, Machiavelli, Clausewitz, Vitoria, Grotius, Montesquieu, Kant, Luther, and More); Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999), pp. 18-31, which discusses this theme relative to Cicero, Gentili, and Bacon; and Neff, *War and the Law of Nations*, op. cit., pp. 126-30.

<sup>6</sup> For an account of how the just war tradition can be distinguished from other approaches to the ethics of war (pacifism, realism, perpetual peace, and regular war), see the preface to *The Ethics of War: Classic and Contemporary Readings*, edited by G.M. Reichberg, H. Syse, and E. Begby (Blackwell Publishing: Oxford, 2006), pp. 8-12.

<sup>7</sup> This distinction may be found, e.g., in Michael Walzer's *Just and Unjust Wars* (New York: BasicBooks, 1977), in the chapter "Anticipations", pp. 74-85.

that it was fear of future harm which impelled the Lacedaemonians to initiate a war against Athens and its allies.<sup>8</sup>

### **Preemption in medieval canon law**

For the medieval canon lawyers, preemption was discussed as a mode of defensive force. Defense, on this understanding, was considered to be one of two legitimate aims for which Christians might wage war, the other aim being the punishment of wrongdoing. Thus, in a section of the *Decretum* (ca. 1140) which is devoted to the theme of war and coercion (part II, causa 23), Gratian noted that “the point of all soldiering is either to resist injury to carry out vengeance”.<sup>9</sup> Whether injury may be resisted even before it has been inflicted was not expressly discussed within the *Decretum*. This topic was however taken up by one of Gratian’s commentators, in the gloss *Qui repellere possunt*, which advanced one of the first explicit theories of legitimate defense within Western Christianity. The gloss adhered closely to the rules on self-defense which had earlier been set forth in Roman Law. It broke new ground, however, when it discussed self-defense as a special kind of action which could be undertaken by individuals and polities alike. In this respect, it went well beyond the conception that had been articulated in ancient Rome, where the law of self-defense applied solely to the interrelations of private individuals, and not to the public domain of war.<sup>10</sup>

The gloss asserted that force could be employed in self-defense only if two key conditions were met: it must be exercised in the heat of the moment and the defender should limit himself to using only so much force as was necessary to ward off the attack. Today we would term the first condition “immediacy” (or “imminence”) and the second “proportionality”. It was in relation to the former that the gloss raised the problem of preemption.

In discussing immediacy (“in continenti” was the Latin term used) the gloss distinguished between defense of persons and defense of property. It made clear that the defense of persons (either of oneself or of others who might be in harm’s way) allowed for some forward looking (preemptive) action, while the latter generally did not. Although the gloss did not elaborate on this distinction, it made clear that Christians, both clerical and lay,

<sup>8</sup> Thucydides first states this view in Book I, chap. 23.

<sup>9</sup> *Decretum Magistri Gratiani*, in Emil Friedberg, ed., *Corpus Iuris Canonici*, pars prior (Leipzig: Tauchnitz, 1879). A translation of the passage in question may be found in Reichberg et al., *The Ethics of War*, pp. 109–111.

<sup>10</sup> On this, see Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), pp. 94–5.

who used force to defend themselves, were entitled to engage in more than simple blocking motions. They were also permitted to strike back, even to the point of killing an assailant, either preemptively, as, for instance, to ward off an ambush, or, after the attack had already been initiated, to prevent its renewal. This active resistance to injury the author sharply distinguished from revenge. Defense and revenge were thus construed as two contrasting reasons for the sake of which someone might return violence for violence.

But certain people have contended that no one ought to resist force before it strikes; yet it is permitted to kill an ambusher and anyone who tries to kill you. ... If, however, someone returns violence, this should be done with the assumption that it is for defense, rather than for revenge... and only if the first attacker intends to strike once more; otherwise, if the attacker does not intend to strike once more and the other person still returns force, this should be seen as revenge rather than resistance to force. And this is what I understand when it is said that force may be resisted “on the spot” (*in continenti*). It is therefore required that a return blow be in defense, not in revenge...; and self-defense must be exercised in moderation.<sup>11</sup>

In a text written some fifty years later (ca. 1240), the legal casuist Raymond of Peñafort proposed an expanded version of the main principles outlined in *Qui repellere possunt*. Like his predecessor, Raymond emphasized how the condition of immediacy was meant to distinguish the force used in countering an attack (“repulsio iniurie”), i.e., defense, from any resort to force that had punishment (revenge) as its primary goal. Raymond explained that while punishment sought rectification for offenses that were past and done, self-defense was exercised against threats that were in some measure ongoing.

[I]f someone after [suffering] an act of violence strikes back, and does it immediately (*in continenti*), that is, when he sees the other ready to strike again, he is in no way liable, but if he strikes back while the other does not want to hit him again, this is impermissible, because this is not to fend off injury (*repulsio iniurie*) but is for revenge (*vindicta*), which is prohibited for everyone, and most of all for the clergy.<sup>12</sup>

<sup>11</sup> From the Decretum gloss *Qui repellere possunt*, in *Decretum Divi Gratiani una cum glossis & thematibus prudentum, & doctorum suffragio comprobatis* (Lyon, 1554); English translation in Reichberg *et al.*, *The Ethics of War*, pp. 109–11.

<sup>12</sup> Raymundus de Pennafort, *Summa de poenitentia, et matrimonio, cum glossis Ioannis de Friburgo* [= William of Rennes], part II, §18, Rome, 1603. Translation of the passage cited in Reichberg *et al.*, *The Ethics of War*, op. cit., p. 140.

The problem, of course, was how exactly to define the immediacy in question. On this question, Raymond adhered closely to the teaching of *Qui repellere possunt*. Upon observing how some people say restrictively “that no one ought to repel force unless it has [first] been applied (*nisi illatam*)”, he made clear on the contrary that such force may also justifiably be repelled in anticipation of the actual attack (*priusquam sit illata*), stating that the defender is even permitted “to kill an ambusher and one who intends to kill” ... “if there is no other way (*si aliter non potest*) to counter the threat of the ambusher”.<sup>13</sup> This last phrase points to what is today termed necessity, the condition that a forcible defensive action will be justified only when no other mode of recourse (e.g., by seeking protection from one’s superior – prince or judge – who would ordinarily be entrusted with protecting the innocent from violations of the law) lies open to the defender.<sup>14</sup>

If “necessity” allowed the defender some degree of anticipatory action, it also, on Raymond’s account, permitted him a reasonable delay in undertaking his response to an unjust attack.

If force is directed against property, then one is permitted to repel it, whether it has already occurred (*illatam*), or is planned (*inferendam*), but rather, that is, most of all, when it has already occurred; provided this happens immediately (*in continenti*), that is, as soon as one knows that the attack has occurred, and before one turns to a contrary action (*contrarium actum*).<sup>15</sup>

In other words, far from signifying a necessity so overwhelming that it could leave no time for deliberation, the requirement of immediate response was construed to be fairly elastic. Strictly speaking, the defender was not obliged to mount his counter-attack contemporaneously with the assault; for he was allowed to set aside time to prepare an adequate defense, under condition, however that, in the interim, he did not engage in a “contrary action”.<sup>16</sup>

<sup>13</sup> *Ibid.*

<sup>14</sup> For a brief account of just-war “necessity”, see Endre Begby, Gregory M. Reichberg, and Henrik Syse, *The Ethics of War. Contemporary Authors and Issues*, Philosophy Compass, forthcoming, May 2012.

<sup>15</sup> Reichberg *et al.*, *op. cit.*, p. 141.

<sup>16</sup> *Ibid.* Raymond’s commentator William of Rennes explained (in Raymundus de Pennafort, *Summa de poenitentia*, *op. cit.*, §18, “contrary action”) that it is not a “‘contrary action’ if one in the meanwhile eats, drinks, or sleeps, or prepares to drive the enemy out of an unjustly occupied possession or recover booty brought away by him, even if this preparation demands a period of delay (as has been said); but if one disregards the injury and gives up the intention to pursue one’s goods, turning to other occupations, then this is ‘a contrary action’” (Reichberg *et al.*, *The Ethics of War*, pp. 142–3).

In sum, then, the early canon law treatment of legitimate defense did allow for some forms of preemptive action, as long as these remained within the bounds of necessity and immediacy. Moreover, the texts that we have considered implicitly distinguished between two sorts of preemption. One sort is exercised against an aggression that is about to begin for the very first time, as in the example of an ambush; the other is exercised within the context of an aggression that has already occurred but is likely to be renewed. To employ the twin terms that are of fairly recent coinage, these may be termed respectively *ad bellum* and *in bello* preemption.

Thomas Aquinas (ca. 1224–1274) In elaborating his famous outline of just war principles in *Summa theologiae* II-II, q. 40, a. 1,<sup>17</sup> Thomas Aquinas made no mention of anticipatory military action. However, the notion which he places at the center of his account – just cause – *prima facie* would seem to exclude any purely preventive action, since only a party that is already guilty of determinable wrongdoing would be liable to attack. Attacking a party for what it might do, rather than what it has already done, would appear to contradict Aquinas’s fundamental premise that there is just cause for war only when “those who are attacked deserve attack on account of some fault”. By contrast, the possibility that armed force might justifiably be used to impede wrongful actions that have been concretely planned, but not yet executed, would seem not to be excluded within the context of Aquinas’s broader moral theory, which does include a concept of inchoate wrongdoing.<sup>18</sup>

In a related text,<sup>19</sup> Aquinas remarks that taking due care to judge fairly (inwardly in thought, outwardly in words and actions) of someone else’s character and actions (including, presumably, the character and actions of another polity and its leaders) is itself an obligation of justice. He warns against being overly suspicious, as “when a man, from slight indications, esteems another man’s wickedness as certain”.<sup>20</sup> “Consequently, unless we have evident indications of a person’s wickedness, we ought to deem him good by interpreting for the best whatever is doubtful about him”.<sup>21</sup> If we extrapolate this comment beyond its immediate context (the ethics of judgment) and apply it to the domain of war, it would appear to militate against

<sup>17</sup> Latin text in Sancti Thomae Aquinatis Doctoris Angelici, *Opera Omnia iussu impensaue Leonis XIII*, vols. 8 (Rome: Editori di san Tommaso, 1895), p. 313. English translation in Reichberg et al., *The Ethics of War*, op. cit., pp. 176–78.

<sup>18</sup> See for example, STh I-II, q. 72, a. 7.

<sup>19</sup> STh II-II, q. 60.

<sup>20</sup> *Ibid.*, art. 3, in corp.

<sup>21</sup> *Ibid.*, art. 4, in corp.

any strategy of purely preventive action. This should not be taken to imply, however, that only an evil must be fully manifest before effective action may be taken against it. As he notes within the same article, “when we have to apply a remedy to some evil, whether our own or another’s, in order for the remedy to be applied with greater certainty of a cure, it is expedient to take the worst for granted, since if a remedy be efficacious against a worse evil, much more is it efficacious against a lesser evil”.<sup>22</sup> On a prudential level, the lesson seems to be that opposing wrongdoing at its inception is preferable to combating it only once it has reached full strength.

### Francisco de Vitoria (ca. 1492-1546)

Drawing on Aquinas’s earlier sketch of just war theory, the Spanish Dominican Francisco de Vitoria wrote one of the very first full-fledged treatises on the law of war (*De iure belli*, ca 1539).<sup>23</sup> Therein he made a rather sharp distinction between the different causes (“grounds”) of a just war. A war that was waged to repel an (unjustified) armed attack would be classed under the category of “defense”. Engagement in this sort of war would not require the permission of the highest authority in the realm (a prince or king), as anyone, a duke, a magistrate, or even a private individual could resort to force under circumstances of “necessity”.<sup>24</sup> However, like his predecessors, Vitoria placed fairly strict limitations on what might be done in the name of defense, especially when carried out at the initiative of a lower official or private individual. Such action could be resorted to only in the absence of other viable options (most especially, if time constraints precluded contact with one’s superior or he was unable to respond quickly to the threat), it had to be exercised “in the heat of the moment” (*in continenti*), i.e., contemporaneously with the attack or just before it, if it was imminent, and in strict observance of proportionality.<sup>25</sup> Most importantly, a person or

<sup>22</sup> *Ibid.*, ad 3.

<sup>23</sup> Latin text: Francisco de Vitoria, *Relectio de iure belli; o, Paz dinámica*, L. Pereña, V. Abril, C. Baciero, A. García, & F. Maseda, eds., *Corpus Hispanorum de Pace VI* (Madrid: Consejo Superior de Investigaciones Científicas, 1981). English translation: Francisco de Vitoria, *Political Writings*, Anthony Pagden and Jeremy Lawrance, eds. (Cambridge: Cambridge University Press, 1991), 295-327.

<sup>24</sup> *De iure belli*, §9 (Pagden and Lawrance, p. 302).

<sup>25</sup> In the 12<sup>th</sup>-13<sup>th</sup> centuries, fairly detailed accounts of self-defense, articulated in terms of the criteria now known as “necessity”, “immediacy”, and “proportionality”, were elaborated by authors such as John the Teutonic, Raymond of Peñafort, and William of Rennes. For an overview, see Gregory M. Reichberg, “Aquinas on Defensive Killing: A Case of Double-Effect?” *The Thomist*, vol. 69, July 2005, pp. 341-70, especially pp. 354-61.

group acting in self-defense was not allowed to seek redress for past harms or to punish wrongdoers. The latter two aims constituted what Vitoria termed “offensive war”. The prosecution of this sort of war, was, he held, exclusively the prerogative of the prince, the supreme authority in the land.

On the question of defensive preemption, Vitoria added little to the teaching of the canon lawyers. He repeated their admonitions about not exceeding the bounds of immediacy, necessity, and proportionality, which, as we have seen, allowed for some very limited modes of anticipatory action. In his earlier lectures on question (64) of the *Summa theologiae* II-II (“On homicide”), Vitoria made clear that preemptive measures can licitly be adopted by a private individual (and, we can add, by extension a state) only when these three conditions are in place, and where, in addition, there is “scientific certitude [certitudine scientiae] that his enemy will seek him and kill him”.<sup>26</sup>

In his treatment of offensive war, by contrast, Vitoria did open up some new perspectives. His treatment was basically divided into two parts. In the first, he discussed what now goes under the heading of *ius ad bellum*, i.e., the set of problems associated with the resort to armed force. In close continuity with Aquinas, he maintained that only such wrongdoing as constituted the serious violation of a right, could justify the use of force against an enemy. For this reason, his theory would seem to leave very little opening for preventive strategies, and indeed, at this juncture he says nothing explicitly about them. On the other hand, however, when discussing punishment, which, as we saw above, was considered by him to be one of the aims of war, Vitoria asserted that this could justifiably be intended not only to effect retribution for past misdeeds, but also and by the same token, to deter against the renewal of such wrongdoing in the future. Punishment, on this account, aims at both retribution and deterrence.<sup>27</sup>

The deterrent aspect of punishment was discussed by Vitoria in the second part of the *De iure belli*, where he focused on issues that would today go under the heading of *ius in bello*, or in Vitoria’s summation of what is to

<sup>26</sup> *Commentarios a la Secunda Secundae de Santo Tomás*, q. 64, a. 7. Latin text and English translation in J.P. Doyle, ed., Francisco de Vitoria, O.P., *On Homicide* (Milwaukee: Marquette University Press, 1997), pp. 202–3.

<sup>27</sup> *De iure belli*, §5 (Pagden and Lawrance, p. 300): [T]he commonwealth cannot sufficiently guard the public good and its own stability unless it is able to avenge injuries and teach its enemies a lesson, since wrongdoers become bolder and readier to attack when they can do so without fear of punishment. It is necessary for the proper administration of human affairs that this authority [to punish injuries done to itself and its members] should be granted to the commonwealth”.

follow, “what, and how much, may be done in the just war”.<sup>28</sup> At the outset of this treatment, he notes that “in a just war one may do everything necessary for the defense of the public good”.<sup>29</sup> Hence, whatever defensive measures are allowed to private individuals will also, and to an even greater degree, be conceded to a commonwealth and its prince. Expanding on this last point, Vitoria explains how in a just war “a prince may do everything ... which is necessary to secure peace and security from attack”.<sup>30</sup> Thus not only is the prince permitted to repel an attack at the very point where it occurs, but, in addition, he is within his rights in adopting preventive measures, “say by demolishing the enemy’s castles or setting up garrisons in his territory, if that is necessary to secure himself from attack”.<sup>31</sup> Under this description, punishment is forward looking; having disrupted the peace, the unjust enemy is liable to suffer such measures as may prevent him from renewing his hostile action in the future:

The proof of this is that... the purpose of war is peace, and therefore those who wage just war may do everything necessary for security and peace. Tranquillity and peace are accounted among the good things that men strive for; without security, all the other good things together cannot make for happiness. When enemies upset the tranquillity of the commonwealth, therefore, it is lawful to take vengeance upon them.<sup>32</sup>

The scope of this forward-looking vengeance is not limited to the period which precedes victory. Not only during the war, “but even after the victory has been won and property restored to its rightful owners, and peace and security established, it is lawful to avenge the injury done to the enemy and, and to teach the enemy a lesson by punishing them for the damage they have done”.<sup>33</sup> On this basis, a victorious prince may be justified in removing the defeated prince from power, thereby effecting, in the interests of future security, what today we would term “regime change”:

However,<sup>34</sup> it cannot be denied that there may sometimes be legitimate reasons for supplanting princes, or for taking over the government.

<sup>28</sup> *Ibid.*, §15 (Pagden and Lawrance, p. 304)

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, §18 (Pagden and Lawrance, p. 305).

<sup>31</sup> This is the variant reading which is indicated in Pagden and Lawrance, p. 300, footnote 19.

<sup>32</sup> *Ibid.*, §18 (Pagden and Lawrance, p. 305).

<sup>33</sup> *Ibid.*, §19 (Pagden and Lawrance, p. 305).

<sup>34</sup> In the paragraph immediately preceding (§58), Vitoria had explained that enemy princes should not be deposed at the outcome of each and every just war; this practice should be reserved only for the most egregious cases: “... punishments should be dimin-

This may be because of the number or atrocity of the injuries and harm done by the enemy, and especially when security and peace cannot otherwise be ensured, when failure to do so would cause a dangerous threat to the commonwealth. This is clear enough; if it is lawful to occupy a city for this reason ... then it must be lawful to remove its princes.<sup>35</sup>

Vitoria's views regarding the permissibility of preventive measures, while quite robust, were nevertheless framed squarely within the context of wars that were either underway or just completed. In other words, this was a teaching about the *ius in bello*, and, at its fullest extension, about what might be done *post bellum*. Most emphatically, however, it was not a teaching about the *ius ad bellum* and the justifiability of starting a war so as to protect one's commonwealth from the threat of some future harm.

### **Alberico Gentili (1552-1608)**

An Italian Protestant and professor of law at Oxford, whose family had fled their homeland in order to avoid persecution, Gentili was one of the first authors in the Christian West openly to endorse the idea of preventive war. His writings combine elements from two quite different normative approaches to war. On the one hand, he engaged in what was by then a standard discourse (in theology and canon law) about just war. From this perspective, war was deemed a unilateral instrument by which a belligerent enforced its rightful claim to sanction an injury that had been done to it by the opposing party. On the other hand, in continuity with the ancient Roman legal theorists, the juriconsults, who endorsed what Vattel would later term "regular war" (*guerre réglée*),<sup>36</sup> Gentili conceptualized armed conflict as a contest between equal belligerents who both, owing to their sovereign status, enjoyed a similar capacity to wage war, regardless of the cause that had prompted the conflict. As in a duel, they were both entitled to exercise the same legal prerogatives against each other. Gentili likened this

ished in favor of mercy. This is a rule not only of human law, but also of natural and divine law. Therefore, although the harm done by the enemy may be a sufficient cause of war, it will not always be sufficient to justify the extermination of the enemy's kingdom and deposition of its legitimate native princes; this would be altogether too savage and inhumane" (Pagden and Lawrance, p. 326).

<sup>35</sup> *Ibid.*, §59 (Pagden and Lawrance, p. 326).

<sup>36</sup> On the contrast between just war and regular war, see Peter Haggemacher, "Just War and Regular War in Sixteenth Century Spanish Doctrine", *International Revue of the Red Cross*, September–October 1992 (no. 290), pp. 434–45.

contest to a legal process in which the two litigants are presumed to have entered the proceedings in good faith. Since in war (as in litigation) it usually remains doubtful which of the opposing sides is possessed of the just cause, it is incumbent on the belligerents to observe the same code of honor in their conduct toward each other.

Gentili combined the two approaches described above by implicitly distinguishing the theoretical versus the practical implications of the idea of just cause. Theoretically and on the level of principle, he maintained that the difference between just and unjust causes of war can be determined with adequate clarity. He emphasized however that the application of this knowledge to concrete cases will often be problematic. Awareness of this practical difficulty appears to have been the central factor that induced him to argue, in line with some other proponents of Roman law, that “war may be waged justly on both sides”.

A focus on the practical uncertainty surrounding decision-making in situations of conflict was one of the key factors which led Gentile to advocate in favor of preventive war. This theme arises in bk I, chap. XIV of *De iure belli libri tres* (*Three Books on the Law of War*),<sup>37</sup> where he discusses “defense on grounds of utility”. Under conditions of uncertainty, he argues, it is justifiable to

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. [...] We ought not to wait for violence to be offered us, if it is safer to meet it halfway. [...] Therefore... those who desire to live without danger ought to meet impending evils and anticipate them.

One ought not to delay, or wait to avenge at one’s peril an injury which one has received, if one may at once strike at the root of the growing plant and check the attempts of an adversary who is meditating evil.<sup>38</sup> [...]

This last statement could suggest that Gentili is here simply considering preventive action against a wrong that has already been decided on and is in process of being planned. In such a case the application of armed force would be akin to a police operation that is mounted to thwart an ongoing criminal conspiracy. While this sort of scenario would undoubtedly fall within the purview of his comments, it becomes clear, as we read through

<sup>37</sup> Hanau: G. Antonius, 1612, pp. 96–107; citations from the English translation in Reichberg *et al.*, *The Ethics of War*, pp. 372–7.

<sup>38</sup> Reichberg *et al.*, p. 376.

the chapter, that he is first and foremost concerned with a situation in which another polity, which one has reason to fear as an adversary, has acquired a capacity by which it might do future harm:

No one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool. One ought to provide not only against an offence which is being committed (*est in actu*), but also against one which may possibly be committed (*est in potentia ad actum*). Force must be repelled and kept aloof by force. Therefore one should not wait for it to come; for in this waiting there are the undoubted disadvantages.<sup>39</sup> ...

[I]t is better to provide that men should not acquire too great power, then to be obliged to seek a remedy later, when they have already become too powerful.<sup>40</sup>

Gentili takes care to clarify that the fear of possible future harm must be grounded a careful and reasonable assessment of the risks:

A just cause for fear is demanded; suspicion is not enough. 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. Yet in the case of great empires I cannot readily accept that definition, which applies to private affairs. For if a private citizen commit some offence against a fellow citizen, reparation may be secured through the authority of a magistrate. But what a prince has done to a prince, no one will make good.<sup>41</sup> [...]

But 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, which has always been a powerful argument and must be considered so today and hereafter: namely, that we should oppose powerful and ambitious chiefs. For they are content with no bounds, and end by attacking the fortunes of all.<sup>42</sup>

In the passage which brings this chapter to a close, Gentili expresses some ambivalence about the doctrine he has just expounded. On the one hand, he states quite boldly that his intent throughout has been to assert the justice of defending one's commonwealth not only against "dangers that are already meditated and prepared" but also and especially against

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p. 377.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

“those which are not meditated, but are probable (*verisimilia*) and possible (*possibilia*)”.<sup>43</sup> On the other hand, he indicates that this doctrine must be applied with circumspection, since it is not meant to cover just any situation in which a prince has grown in power against his peers, for example through successions and elections. More than sheer power must be taken into account, “some other reason must be added for justice’s sake”;<sup>44</sup> presumably (Gentili does not elaborate on this point) the prince in question must, by his past behavior, have provided some indication of his ambitious and aggressive character if he is to be deemed liable to preventive attack.

Finally, among the reasons which motivated Gentili’s endorsement of preventive war, in addition to the one already mentioned – the practical difficulty of ascertaining just causes for war in concrete circumstances – it must also be noted that he articulated another reason which appears to have moved him in this direction. In the chapter (XIII, “Of necessary defense”) which immediately preceded his treatment “of defense on grounds of utility”, Gentili had explained, how, in conformity with the teaching of the ancient Greeks and Romans, self-defense must be viewed as a natural right (*ius naturae*) which applies to brutes and human beings alike. This right proceeds not from some rational argumentation (*opinionem*); rather, we (and presumably brutes as well) are persuaded of it by a kind of inborn power (*innata quadam vi*). Since it arises in us naturally, spontaneously, as it were, the acts to which it inclines have no inherent connection with the rational order of justice (*non pertinent ad iustitiam*). It answers rather to the law of necessity. In this vein Gentili quotes Bodin approvingly, when the latter cited the ancient Roman adage that “War is just for whom it is necessary” (*Justum bellum, quibus necessarium*).<sup>45</sup>

From this account of self-defense, it follows, quite logically, that preventive (*ad bellum*) strategies need not be justified first and foremost on grounds of justice and of law. To the contrary, this sort of defense pertains to a realm more basic than law, where one’s very survival is at stake. Not long thereafter, Hobbes would develop this view into an elaborate normative theory of social interaction. And for the humanist thinkers of the period, it was manifest that the doctrine of prevention was built on premises quite alien to the natural law based, just-war teaching of the scholastics. This divergence was pointedly expressed by Gentili’s contemporary Francis Bacon (1561–1626), in a passage well-worth quoting:

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Bodin, *On the Republic*, V.v.

However some schoolmen, otherwise reverend men, yet fitter to guide penknives than swords, seem precisely to stand upon it, that every offensive war must be 'ultio', a revenge, that presupposeth a precedent assault or injury; yet neither do they descend to this point, which we now handle, of a just fear; neither are they of authority to judge this question against all the precedents of time. For certainly, as long as men are men ... and as long as reason is reason, a just fear will be the cause of a preventive war ...<sup>46</sup>

### Hugo Grotius (1583-1645)

In the Dutch jurist's great work *De jure belli ac pacis* (1625),<sup>47</sup> we find the first concerted attempt to assess the justifiability of preventive war by reference to a systematic treatment of just war principles. A close reader of both Gentili and Thucydides (whose Peloponnesian War is amply cited in this connection), Grotius was well aware of the key issues at stake in the debate about prevention, and consequently his reasoned opposition to this strategy takes on special salience.<sup>48</sup>

From the outset, he sets his entire treatment within the context of law, for, as he puts it, "where judicial means fail, war begins" (II.I.II<1>).<sup>49</sup> War,

<sup>46</sup> Francis Bacon, *The Letters and the Life*, VII, ed. James Spedding (London, 1874), p. 477; quoted by Richard Tuck, *The Rights of War and Peace*, op. cit., p. 19.

<sup>47</sup> *De iure belli ac pacis liber tres*, B.J.A. De Kanter-van Hettinga Tromp, ed. (Leiden: Brill, 1939); all citations are taken from the English translation in Reichberg *et al.*, *The Ethics of War*, pp. 385-437.

<sup>48</sup> In *The Rights of War and Peace*, op. cit., Richard Tuck maintains (pp. 102-8) that Grotius's normative approach to war shows considerable continuity with the line earlier marked out by Gentili and, more generally, with the tradition of "humanist jurisprudence": "Far from being an heir to the tradition of Vitoria and Suarez ... he [Grotius] was in fact an heir to the tradition Vitoria most distrusted, that of humanist jurisprudence" (p. 108). Since Tuck makes much of the fact that Gentili endorsed the idea of preventive war (p. 18), the reader could easily infer that the position taken by Grotius on this point was very much the same. But as is clearly manifest from the texts cited below, on the question of preventive war, Grotius was clearly at pains to distance himself from Gentili. Thus, despite Tuck's contention that Grotius had much in common with Gentili (and later with Hobbes), if we take into account the Dutch thinker's position on preventive force (and related issues), it is more plausible to class him alongside the scholastic theologians as a representative of traditional just war theory; cf. for some critical comments on Tuck's reading of Grotius, see Peter Haggemacher, "Droits subjectifs et système juridique chez Grotius", in Luc Foisneau, ed., *Politique, droit et théologie chez Bodin, Grotius, et Hobbes* (Paris: Éditions Kimé, 1997), pp. 73-130, on pp. 77, 89, 102 and 120.

<sup>49</sup> Reichberg *et al.*, *The Ethics of War*, p. 401.

on this account is taken to be an extension of the rule of law (i.e., of determinable rules of right conduct) into a realm where the standard procedures of law (i.e., the enforceable decisions of courts of law) no longer apply. Grotius's discusses anticipatory defense within two different contexts. The first is his treatment of self-defense in IBP, bk. II, chap. I, where the focus is on what we have termed "preemption"; while the second, bk. II, chap. XXII, is directed specifically to the problem of prevention. Let us survey each of these in turn.

(1) Preemption. Building on the analogy between legal action and war, Grotius first notes (II.I.II<1>) such procedures may be directed either against offenses that have not yet been committed (*non factum*), or inversely, against offenses that have already been carried out. In the latter case the aim to coerce restitution or effect punishment; applied to armed conflict this constitutes the domain of *bellum offensivum*. With respect to the former, steps will be to prevent imminent harm (*damni infecti*), thus giving rise to *bellum defensivum*.

Focusing initially on the conditions of private self-defense (II.I.V<1>), Grotius explains that if an application of force is to be justified, the danger must be immediate (*praesens*) and on the spot as it were (*quasi in puncto*). Thus "if an assailant seizes weapons in such a way that his intent to kill is manifest, the crime can be forestalled".<sup>50</sup> Grotius quickly qualifies this assertion by adding that it obtains only in situations where the risk of harm is truly immediate; under less urgent circumstances other measures will have to be adopted:

Further, if a man is not planning an immediate attack (*vim non... praesentem intentet*), but it has been ascertained that he has formed a plot, or is laying an ambush, or preparing a poison in our way, or that he is making ready a false accusation and false evidence, corrupting the judicial procedure, I maintain that he cannot rightly (*iure*) 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. Usually, in fact, the delay that will intervene affords opportunity to apply many remedies and to take advantage of many accidental occurrences ... There are, it is true, theologians and jurists who would extend their indulgence somewhat further; but the opinion stated, which is better and safer, does not lack the support of authors (II.I.V<2>).<sup>51</sup>

<sup>50</sup> *Ibid.*, p. 403.

<sup>51</sup> *Ibid.*

In a more general vein, Grotius comments (presumably against Gentili) that fear alone is an insufficient standard for decision-making about the limits of defensive action:

[T]hose who accept fear of any sort as justifying anticipatory slaying, are themselves greatly deceived, and deceive others. Cicero said truly, in book I of *On Duties*, that most injuries have their origin in fear, since he who plans to do harm to another fears that, otherwise he may himself suffer harm. In Xenophon, Clearchus says: 'I have known men who, becoming afraid of one another, in consequence of calumny or suspicion, and purposing to inflict injury before receiving injury, have done the most dreadful wrongs to those who had had no such intention, and had not even thought of such a thing (II.I.V<1>).<sup>52</sup>

Grotius concludes this first part of his treatment with a comment about how the principles enunciated above (immediacy and necessity), require some adjustment when they made to regulate the actions of states rather than individuals. The first adjustment arises due to the longer duration of inter-state conflicts, while the second relates to the admixture of defense and punishment which characterizes force as exercised within the public sphere:

What has been said up to this point, concerning the right to defend oneself and one's possessions, applies chiefly, of course, to private war; yet it may be made applicable also to public war, if the difference in conditions be taken into account. In private war this right is, so to say, momentary; it ceases as soon as circumstances permit an approach to a judge. But since public wars do not arise except where there are no courts, or where courts cease to function, they are prolonged, and are continually augmented by the increment of fresh losses and injuries. Besides, in private war, self-defense is generally the only consideration; but public powers have not only the right of defense but also the right to exact punishment. Hence for them it is permissible to forestall (*praevenire*) an act of violence which is not immediate (*praesentem*), but which is seen to be threatening (*imminere*) from a distance (*de longo*); not directly – for that, as we have shown,<sup>53</sup> would work injustice – but indirectly, by inflicting punishment for a crime commenced (*coeptum*) but not yet carried through (*non consummatum*) ... (II.I.XVI).<sup>54</sup>

<sup>52</sup> *Ibid.*

<sup>53</sup> Bk. II, II, V<1-2>.

<sup>54</sup> Reichberg *et al.*, *The Ethics of War*, p. 404.

This last point is especially important. Grotius is here suggesting that holders of public authority may be justified in undertaking long-term preemptive action only when the target of such action (which may be the leadership of another state) has been found guilty of conspiracy to commit future aggression. In other words, a discernable wrong must already have been committed if such preemption is to have a grounding in sound moral and legal principle. It would then take on the form of deterrent punishment. Thereby excluded would be purely preventive action, in which an attack is mounted solely to preclude another party from achieving the capacity to engage in a project (not yet decided on) to engage in future harm. Grotius thus condemns as illicit any use of force which would aim to counter misdeeds which have not yet been “meditated”, but are merely “possible”.<sup>55</sup>

(2) Prevention. Already alluded to in the passage just quoted, the issue of *ad bellum* prevention is taken up explicitly in the section of IBP which immediately follows. Discussing what he will later classify (II.XXII) among the “unjust causes of war”, Grotius asserts unequivocally (II.I.XVII) that “a public war is not admitted to be defensive which has as its only purpose to weaken the power of a neighbor”:<sup>56</sup>

Quite untenable is the position, which has been maintained by some [Gentili], that according to the law of nations it is right to take up arms in order to weaken a growing power which may do harm (*nocere posset*), should it become too great. That this consideration does enter into deliberations regarding war, I admit, but only on grounds of utility, not of justice. Thus if a war be justifiable for other reasons, for this reason also it might be deemed far-sighted, to undertake it; that is the gist of the argument which the writers cited on this point present. But 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 (*plena securitas*) is never guaranteed to us (II.I.XVII<1>).<sup>57</sup>

<sup>55</sup> Grotius’s position on preventive war has been well summed up by Peter Haggemacher, who notes that the eminent Dutch jurist excludes “la guerre préventive, dans la mesure du moins où elle se fonderait uniquement sur un motif de défense; il admet en revanche la légitimité d’une action visant à frapper à titre punitif un délit en cours d’exécution, mais cela ne jouera en pratique qu’au bénéfice des puissances publiques, à l’exclusion des particuliers” *Droits subjectifs et système juridique chez Grotius*, op. cit., p. 101.

<sup>56</sup> *Ibid.*, p. 405.

<sup>57</sup> *Ibid.*

In the subsequent chapter on unjust causes of war, amplifying on this theme of security, Grotius takes another swipe at Gentili. This affords him with an opportunity to elucidate the key element – intention – which separates justifiable preemption from wrongful prevention:

We have said above that fear with respect to a neighboring power is not a sufficient cause [for war]. For in order that defense may be lawful it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbor, but also regarding his intention (*animo*), the degree of certainty required being that which is accepted in moral matters (II.XXII.V <1>).<sup>58</sup>

Grotius concludes with a prescription about what may be done in self-defense against a neighboring country that has grown in power, but has not yet manifested an evil intent (say, by breaking a sworn treaty or other such agreement): Build your own fortress!

Wherefore we can in no wise approve the view of those who declare that it is a just cause of war when a neighbor who is restrained by no agreement builds a fortress on his own soil, or some other fortification which may some day cause us harm. Against the fears which arise from such actions we must resort to counter-fortifications on our own land and other similar remedies, but not to force of arms (II.XXII.V <2>).<sup>59</sup>

While it cannot be doubted that Grotius intends to deny any moral or legal foundation to capacity prevention, to the question whether preventive strategies may be employed against an adversary who is “meditating evil”, yet whose project to cause harm still remains distant from any concrete action,<sup>60</sup> he gives no straightforward answer. As we have seen, he does allow that forcible measures may be taken (especially by public authorities) to thwart inchoate wrongdoing. Yet he is clearly keen to restrict the application of such measures to circumstances where there is discernable wrongdoing on a par with what we would today term “criminal conspiracy”. In other words, such measures could not be taken on the basis of vague suspicions or tenuous allegations, but on the sort of evidence which would be admis-

<sup>58</sup> *Ibid.*, pp. 410–1.

<sup>59</sup> *Ibid.*, p. 411.

<sup>60</sup> The use of armed force to counter a long-term project of harm (as distinct from preemption on the one hand, and pure capacity prevention on the other), has been well explored by Raino Malnes in an essay that thus far has appeared only in Norwegian: “Er forebyggende krig rettferdig krig?” (Is preventive war a just war?), in Bjørn Erik Rasch, Janne Haaland Matlary, and Per Kristen Mydske, eds., *Spillet om Irak*, (Oslo: Abstrakt forlag, 2003), pp. 151–86.

sible in a court of law. Moreover, evidence of mere planning (simple intention) would be an insufficient warrant for resort to such force. For, as Grotius argues, taken in isolation, the intent to engage in wrongdoing is an insufficient basis for punishment; in addition there must be some outward manifestation (incitement to wrongdoing, enlisting the support of fellow conspirators, etc.), since, as he writes in II.XX.XVIII, “internal acts are not punishable by men”:

Crimes that have only just begun (*inchoata delicta*) are therefore not to be punished by armed force, unless the matter is serious, and has reached a point where a 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, so that the punishment is joined either with a precaution against future harm (about which we spoke above in the chapter on defense), or protects injured dignity, or checks a dangerous example (II.XX.XXXIX<4>).<sup>61</sup>

There is, in other words, a strong presumption against this sort of preventive action, which, to be overcome, requires that quite rigorous standards of proof and necessity be met.

### **Emer de Vattel (1714-1767)**

The issue of preventive war was given a prominent place in the just war theory of Emer de Vattel. We find the Swiss diplomat first raising this issue in bk. I, chap. IV, of the *Le droit des gens*<sup>62</sup> where, after noting (§49) that both individuals and nations enjoy the moral power, i.e. a right, “to protect themselves from all injury,” he asserts (§50) that “[t]he safest plan is to forestall (*prévenir*) evil, where that is possible”, “by anticipat[ing] the other’s design”.<sup>63</sup>

From the later and more ample treatment given in book III of the same work, it becomes clear that Vattel is very consciously working with a distinction between what we have here termed “preemption” versus “prevention”. Quite interestingly, these appear as subdivisions within the broader category of “offensive war”. In contrast to defensive war, the purpose of which is the protection of self and others from attack, the aim of offensive war is twofold:

<sup>61</sup> *Ibid.*, p. 406.

<sup>62</sup> London (i.e., Neuchâtel), 1758. Citations are taken (with some amendments) from the English translation by Charles G. Fenwick, *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and the Affairs of Nations and of Sovereigns*, The Classics of International Law (Washington, D.C.: Carnegie Institution, 1916).

<sup>63</sup> *The Law of Nations*, p. 130.

(1) the enforcement (*poursuite*) of rights and (2) security (*la sûreté*).<sup>64</sup> While the first subdivides into the classic distinction between recuperation of goods and the punishment of injury, the latter, as defined by Vattel, permits of two different modes. On the one hand, force may be used preemptively against another nation to forestall (*prévenir*) an injurious action which it is preparing to commit (*elle se prépare à faire*). Yet, force may also be employed preventively to ward off the harm which one nation believes itself to be threatened by the increased power of the other (*dont on se croit menacé de sa part*).

Vattel seems little interested in the problems associated with protection from imminent harm, which earlier authors had discussed in terms of concepts such as defense *in continenti*, necessity, and proportionality.<sup>65</sup> He appears to take for granted that such defense is fully licit and therefore requires little in the way of moral or legal justification. By contrast, more so than any of his predecessors (yet in line with Gentili) he appears intent on thematizing the issue of prevention as a central problem in the normative assessment of war. In this respect, his doctrine brings a new dimension to earlier treatments within the just war tradition. The discussion arises in a section (book III, chap. III) of the *Le droit des gens* where Vattel has just finished considering (§41) under what circumstances a nation can engage in offensive war to punish injury done to it by another nation. Recognizing that the issue of preventive force is of “the greatest importance”, he begins his treatment in a manner reminiscent of Gentili, whom he echoes by asking (§42)

whether the aggrandizement of a neighboring State, in consequence of which a Nation fears that it will one day be oppressed, is a sufficient ground for making war upon it; whether a Nation can with justice take up arms to resist the growing power of that State, or to weaken the State, with the sole object of protecting itself from the dangers with which weak States are almost always threatened from an overpowerful one. The question presents no difficulties to the ma-

<sup>64</sup> Bk. III, chap. I, §5. Nevertheless, later in the same book (chap. III, §28) Vattel appears to reverse himself when he describes security from future attack (“nous défendre, en nous garentir d’injure”) as a mode of defense, thereby contrasting it to offensive war, which is concerned with recuperation and punishment. The inconsistency is only apparent, however, since Vattel subsequently clarifies (chap. III, §28) that “sûreté” will be posited as an aspect of punishment (in which case it will come under the heading of offensive war), in those cases where a party (including a nation) that has already been judged guilty of an offense, is compelled to offer guarantees for the future.

<sup>65</sup> Hence he writes (bk. III, chap. III, §35, op. cit., p. 246) that “defensive war is just when carried out against an unjust aggressor”, and, as such, it “needs no proof”.

majority of statesmen; it is more perplexing for those who seek at all times to unite justice with prudence.<sup>66</sup> From this statement we can see that Vattel was at pains to harmonize two very different and in fact competing points of view on preventive force: the natural law tradition as represented most eminently by Grotius, and realist tradition, represented by thinkers such as Thucydides, Bacon, and Gentili. There results, in the *Droit des gens*, an uneasy compromise between the two orientations, with some comments supporting the realist view, while others stipulate limits that seem most in keeping with the perspective of the natural lawyers. This tension is of a piece with Vattel's attempt at merging the two normative approaches to war – just war and regular war – which were discussed above by reference to Gentili.<sup>67</sup> Although, on a theoretical level, Vattel maintains the language and conceptual framework of just versus unjust causes of war, when it comes to the actual implementation of these norms in concrete settings, he follows the line marked out by Gentili according to which no one state may stand in judgment over any other.<sup>68</sup> Conceiving of states in characteristically modern terms as compact entities confronting each other within a distinct sphere of action, Vattel places particular emphasis on each nation's inherent right of self-preservation.<sup>69</sup> The exercise of this right lays upon leaders a special obligation to “avoid carefully and so far as possible whatever might bring about [the state's] destruction”.<sup>70</sup> In this respect more in keeping with the thought of Hobbes than of Grotius,<sup>71</sup> Vattel

<sup>66</sup> *The Law of Nations*, p. 248.

<sup>67</sup> For a brief discussion of Vattel's attempt (in line with his predecessor Christian Wolff) at synthesizing these two approaches, see the editors' comments in Reichberg *et al.*, *The Ethics of War*, pp. 469–70 and 504–6.

<sup>68</sup> This is expressed in the Introduction (§21) to the *Droit des gens* as derivative upon his postulation, very much in keeping with the regular war idea, of the equality of states: “Since Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfill its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among Nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which it is not for others to make a definitive judgment upon; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights (*un droit égal*) (*The Law of Nations*, p. 7).

<sup>69</sup> On the right and duty of national self-preservation, Bk. I, chap. II.

<sup>70</sup> *Ibid.*, §19, p. 14.

<sup>71</sup> This point has been well seen by Peter P. Remec (*The Position of the Individual in International Law according to Grotius and Vattel* [The Hague: Martinus Nijhoff, 1960], who notes that “The law of nature, as exposed by Wolff and Vattel, follows Hobbes, in the

considers the foresight of dangers, and the taking of efficacious action against them, as the paramount role of political leaders. And, in line with thinkers of the realist orientation, he perceives an especially wide gap between the requirements of private and public (leadership) prudence. Leaders must be on their guard to a degree not expected of private individuals; by virtue of their role, the former have a responsibility to take suspicions much more seriously than would be permitted, morally speaking, of the latter.<sup>72</sup>

Yet in keeping with the natural law tradition, Vattel states (§30) that “an act in violation of justice can never be truly beneficial to the state”,<sup>73</sup> and for this reason “prudence ... can never counsel the use of illegitimate means in order to obtain a just and praiseworthy end” (§43).<sup>74</sup> And following out this line of reasoning, he asserts unambiguously that “it is a sacred rule of the law of nations that the aggrandizement of a [neighboring] state cannot alone and of itself give anyone the right to take up arms to resist it” (§43).<sup>75</sup> He thus rejects, as incompatible with the true dictates of justice and morality, any preventive attack the sole aim of which is to eliminate the growing power of another state which has hitherto given no evidence of malicious behavior or intent.<sup>76</sup> Acknowledging (§46) that the statesman should nevertheless remain diligent in the face of such a possible threat – “a nonchalant imprudence would be impardonable in a matter of such great importance”<sup>77</sup> – Vattel makes clear that overt military action must be emphatically excluded. He does however countenance the use of softer means (*moyens plus doux*) – military alliances, exclusionary trading partnerships and the like –

main, not Grotius or any classic writer on natural law. It is Hobbes’s idea of individualistic self-preservation and not the classic notion of rational and social human nature that prevails in Wolff’s and Vattel’s writing” (p. 53).

<sup>72</sup> See, for instance, bk. III, §44, where Vattel writes that “The interests of nations have an importance quite different from the interests of individuals; the sovereign can not be indolent in his guardianship over them; he can not put aside his suspicions out of magnanimity and generosity. A Nation’s whole existence is at stake when it has a neighbor that is at once powerful and ambitious. Since it is the lot of men to be guided in most cases by probabilities, these probabilities deserve their attention in proportion to the importance of the subject-matter; and, if I may borrow a geometrical expression, 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” (*The Law of Nations*, p. 249).

<sup>73</sup> *Ibid.*, p. 244.

<sup>74</sup> *Ibid.*, p. 248

<sup>75</sup> *Ibid.*

<sup>76</sup> This specific issue is taken up in bk. III, §§46–49.

<sup>77</sup> *The Law of Nations*, p. 250.

in order to preserve the balance of power from the distortions which have been introduced into the system by the growth of this “formidable power” (§46). In this vein, he hastens to add (§46) that if Rome’s neighbors had only been possessed of the foresight to “set limits to her progress, they would not progressively have become subject to her”.<sup>78</sup>

Purely preventive measures are thus excluded. Force may be used, he reiterates (§43), “only in order to avenge an injury received, or to guarantee oneself (*se garantir*) against an injury by which one is threatened (*menacé*)”.<sup>79</sup> In line with the first disjunct, Vattel readily acknowledges that forcible preventive strategies may be employed as a mode of deterrent punishment against a neighboring power that has previously been guilty of some grave breach of justice.<sup>80</sup> In this respect, he adheres to the just war doctrine as it was earlier articulated by Vitoria and Grotius.

A notable divergence with the earlier just war tradition emerges however when Vattel considers whether one state may use force preventively to protect itself from another that has previously done it no harm, when this latter behaves in a way that the former has reason to believe it will be deliberately threatened with future harm. Vattel describes this scenario by reference to the following four conditions: the “menacing” power (1) has the ability to oppress a neighboring country (*le pouvoir d’opprimer impunément*), (2) whose whole existence is thereby at stake (*il y va de tout*), (3) it intends to do so (*la volonté y soit jointe*), and (4) it has shown signs (*marques*) of “injustice, greed, ambition, and a will to dominate” in the past (§44).<sup>81</sup> These four conditions conjoined, the potential victim(s) may justifiably resort to arms, “at the moment it [the other] is about to receive a formidable addition to its power” in order to “impede its designs” (§44).<sup>82</sup> From the context (the imaginary case of Louis XIV) it is manifest that Vattel is not here referring to imminent harm, but rather a long-range plan by which the formidable power hopes one day to dominate other less powerful neighbors. Yet it was precisely under such a scenario that Grotius had tightly circumscribed the resort to preventive force, to the point of denying it under all but the most convincing of circumstances, since “the delay that will intervene affords the opportunity to apply many remedies and to take advantage of many accidental

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, p. 248.

<sup>80</sup> See bk. III, §28, pt. 2.

<sup>81</sup> *The Law of Nations*, p. 249.

<sup>82</sup> *Ibid.*

occurrences ...” (see above, p. 17). Such action would thus ordinarily be disallowed under the heading of (what we today term) “necessity”.

It is true that Vattel qualifies his account somewhat when he adds the caveat that any state threatened with harm in the manner just described must first “demand guarantees (*des sûretés*)” of the would-be aggressor; the former will be justified in resorting to force only once it becomes clear that these guarantees will not be forthcoming. But this condition does little to modify the overall tenor of Vattel’s argument, since the entire burden of proof is on the state suspected of future aggression; the onus is on it, and not its accuser, to provide evidence of peaceable intent. Any failure to provide such guarantees will automatically warrant the adoption of forcible measures of defense by the other.<sup>83</sup> Similarly, the least injustice committed by the state under suspicion will justifiably enable other states, “profiting by the occasion”, to “join forces with the injured state in order to put down the ambitious prince, disable him from so easily oppressing his neighbors, or from giving them constant cause for fear” (§45).<sup>84</sup> The strict correlation of crime to punishment, central to Grotius’s theory of penal justice,<sup>85</sup> seems no longer operative in the “prudential” scheme proposed by the Swiss diplomat.<sup>86</sup>

Vattel concludes by asserting that “if this formidable prince... betrays his plans by preparations or other advances, other nations have the right to check him; and if the fortune of war be favorable to them, they may profit by the favorable opportunity to weaken and reduce his strength, which up-

<sup>83</sup> In this formulation Vattel seems dependent on Pufendorf (*De iure naturae et gentium* [1672], bk. VIII, chap. 6), who wrote that “not only may I use force against an enemy until I have warded off the peril with which he threatened me, or have received or extorted from him what he had unjustly robbed me of, or refused to furnish, but I can also proceed so far as to secure guarantees for the future. And if he allows that to be forced from him, he shows clearly enough that he still intends to injure me again in the future” (in Reichberg *et al.*, *The Ethics of War*, pp. 460-1).

<sup>84</sup> *Ibid.*, 250.

<sup>85</sup> See IBP, bk. II, chaps. XX-XXI.

<sup>86</sup> In this respect as well Vattel appears to have been influenced by Pufendorf, who suggested that when a party has shown bad behavior in the past, any single instance of renewed wrongdoing can be met with a severer response than would otherwise have been the case, since its bad “track record” (as we would now say) justifies the imposition of proportionately more stringent measures to prevent the likely repetition of such wrongdoing in the future (*De iure naturae et gentium*, bk. VIII, chap. 6): “Nor is it in fact always unjust to return a greater evil for a less... since the evils inflicted by right of war ... [do not] have as their direct object the reform of the guilty party or others, but the defense and assertion of my safety, my property, and my rights” (in Reichberg *et al.*, *The Ethics of War*, p. 461).

sets the balance of power and constitutes a menace to the common liberty of all” (§49).<sup>87</sup> Here again the divergence with Grotius is patent. The most the eminent Dutchman could council under suchlike conditions of insecurity would be to build “counter-fortifications on our own land and other similar remedies, but not... [a resort] to arms” (see above, p. 20).

### Conclusions: Just War, between the Webster and Bush Doctrines

Contemporary discussion of the permissibility of preventive force has been oriented around two key texts which together have framed the parameters of the debate. On the one hand, there is the famous Webster doctrine of 1841, which, in defining legitimate defense by reference to threats which are “instant, overwhelming, leaving no choice of means, and no moment for deliberation,” would seem emphatically to exclude any preventive military action.<sup>88</sup> On the other hand, there is the Bush doctrine as expounded in the 2002 National Security Strategy (NSS) document, which asserts that the United States would be justified in using its military force “to prevent or forestall hostile acts by [its] adversaries,” “even if uncertainty remains as to the time and place of the enemy’s attack” (p. 15).<sup>89</sup>

<sup>87</sup> *The Law of Nations*, p. 252.

<sup>88</sup> The formula is taken from a letter by U.S. Secretary of State Daniel Webster to British Ambassador Henry Fox, dated April 24, 1841. For the full text of the passage, see Reichberg *et al.*, *The Ethics of War*, op. cit., pp. 563–4. A extended treatment of the Caroline incident of 1837, which gave rise to the exchange of diplomatic letters between Webster and Fox, may be found in Kenneth R. Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837–1842* (Tuscaloosa: University of Alabama Press, 1989). The author notes that Webster was apparently well-versed in the writings of Grotius and Pufendorf, since some years prior he had pleaded an admiralty case before the U.S. Supreme Court, wherein he and a colleague had utilized arguments drawn from these two thinkers (*ibid.*, p. 104). It remains the case, however, that the criteria of legitimate defensive action which Webster applied to the Caroline case were considerably more restrictive than the doctrine earlier articulated by Grotius (and Pufendorf). Aside from the advocacy role which Webster assumed in this case, which clearly lent itself to a restrictive interpretation, it must be said, in addition, that the debate over the Caroline incident was concerned with determining the conditions under which the neutrality of a third party (in this instance the U.S.) might justifiably be violated; this was not, *ex professo*, a debate about the limits of preemptive force.

<sup>89</sup> The National Security Strategy of the United States of America (Washington, D.C.: The White House, September 2002; available online at [www.whitehouse.gov/nsc/nss.pdf](http://www.whitehouse.gov/nsc/nss.pdf)). For a good treatment of the moral and legal issues involved in the 2002 NSS document, see Dieter Janssen, “Preventive Defense and Forcible Regime Change: A Normative Assessment”, *Journal of Military Ethics* 3/2 (2004, special issue on Ethics and International Law): pp. 105–28.

Read in light of the earlier just war tradition, Webster's formula seems an apt description of the sort of defense which might legitimately be carried out by private individuals. But as applied to the action of states, it falls short of the full range of defensive strategies which might justifiably be carried out in the face of a dangerous threat.<sup>90</sup> For, as we have seen, writers as early as Raymond of Peñafort made clear that the condition of immediacy was fairly elastic; it was in no wise restricted to contemporaneity with an actual attack, but could allow for a period of careful deliberation and planning. In addition, the formula leaves wholly out of consideration the admixture of defense and punishment which is characteristic of state action in this field. Inchoate wrongdoing, when it takes the form of conspiracy to engage in future acts of aggression, can ground a limited resort to preventive force. Likewise, states that have fallen victim to aggression can be warranted, post bellum – i.e., assuming the adversary has been defeated – in adopting forcible measures to eliminate its capacity to undertake future aggression.

By contrast, it must be said that the policy articulated in the 2002 NSS exceeds what would be deemed legitimate by the mainstream of just war thinkers. In essence, this document promotes a doctrine of pure capacity prevention,<sup>91</sup> which, as we have seen, is incompatible with the central just war postulate that resort to offensive force is permissible only when it is a reaction to determinable wrongdoing.

True, the NSS does base its argument on the premise that the targets of this preventive military action are “rogue states”, which, by their past behavior, cannot be trusted to refrain from deploying (or sharing with terrorists groups) unlawful weapons of mass destruction, should such weaponry come into their possession. But strikingly, the text is entirely silent on the key issue of wrongful intention (conspiracy to engage in harm), which, as we have seen, was central to the justification for preventive attack on Grotius's carefully circumscribed account (“[preventive] defense is not lawful ... unless we are certain, not only regarding the power of our neighbor,

<sup>90</sup> This is the position taken by Michael W. Boyle in *Striking First: Preemption and Prevention in International Conflict* (edited and introduced by Stephen Macedo [Princeton: Princeton University Press, 2008]): “The Caroline standard is too extreme. ... Moreover, the principles themselves are deeply flawed. They justify reflex defensive reactions to imminent threats and nothing more (p. 15).

<sup>91</sup> “We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends” (NSS, op. cit., p. 14, emphasis added).

but also regarding his intention”<sup>92</sup>). Even Vattel, who was more liberal than his Dutch predecessor in allowing for preventive military measures, recognized that a pattern of nefarious behavior in the past could warrant the employment of such measures only under condition that one’s (would-be) adversary reveal (if only by his actions) a resolute will to cause specific harm in the future.<sup>93</sup>

Of the doctrines that we have reviewed on the question of prevention, the NSS stands closest to the position outlined much earlier by Gentili. Neither can properly be described as a version of just war theory. Rather, they represent a form of realism that the classical just war thinkers sought to refute.

<sup>92</sup> IBP II.XXII.V <1>, cited above p. 18.

<sup>93</sup> See above, p. 26.