


2009

Preventive War, Deterrent Retaliation, and Retrospective Disproportionality

Brian Lee

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

2009 BYU L. Rev. 253 (2009)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Preventive War, Deterrent Retaliation, and Retrospective Disproportionality

*Brian Angelo Lee**

ABSTRACT: The legal and moral (“just war”) permissibility of preventive military attacks has been one of the most urgent questions in international law since the onset of the War on Terror. Debates in this area commonly rest upon an assumption that the relevant strategic choice is between preventive war and deterrence, and that even if preventive war may be controversial, deterrence at least is legally straightforward and relatively unproblematic. This Article challenges that conventional assumption. I argue that deterrence and preventive war have more in common than is typically noticed—specifically, a shared future orientation and reliance on retrospectively disproportionate violence—and that in virtue of these common features, much of what we say about the permissibility of one of these strategies we shall have to say also about the other, both under international law as manifested in the United Nations system and under contemporary “just war” arguments. Contrary to common assumption, deterrence offers no easy escape from the legal and moral concerns raised by preventive war.

TABLE OF CONTENTS

I. INTRODUCTION.....	254
II. FUNDAMENTAL SIMILARITIES BETWEEN DETERRENCE AND PREVENTIVE WAR.....	257
A. Preview	257
B. Preliminaries.....	257
C. Future orientation.....	259
D. Shared Dependence on Violence	260

* Law Clerk, United States Court of Appeals for the Second Circuit. J.D., Yale Law School. Ph.D., Princeton University. B.A., University of California, Berkeley. My thanks to Michael Doyle, Lea Brilmayer, and members of the Yale Journal of International Law Works-in-Progress workshop for their helpful comments. Any errors are my own. The opinions expressed in this Article are solely those of the author and not of any government entity.

E. Retrospective Disproportionality	265
F. Implications of Retrospective Disproportionality	269
G. Permitting the Threat, Prohibiting the Act?	270
H. Implications and Roadmap	271
III. LEGAL STATUS UNDER THE U.N. SYSTEM.....	272
A. Operative Treaty Law and Judicial Interpretations	272
B. Elaboration in Case Law and the General Assembly	274
C. Academic Interpretations	277
IV. CONTEMPORARY “JUST WAR” ARGUMENTS	282
A. Non-Consequentialist Arguments.....	282
B. Consequentialist Arguments—General Observations	284
C. The Psychological Argument.....	284
D. The Epistemic Argument	286
E. The Symmetry Argument	287
F. The Self-Fulfilling Prophecy Argument	288
V. CONCLUSION	290

I. INTRODUCTION

In the aftermath of the September 11, 2001, terrorist attacks on New York and Washington, D.C., President George W. Bush declared that henceforth the United States would consider preventive war to be among its options for addressing threats posed by hostile regimes abroad.¹ This declaration, formalized in the 2002 National Security Strategy document, bore practical fruit in the 2003 United States-led invasion of Iraq and continues to shape current debates over the proper way to respond to the threat of global terrorism and seemingly “rogue” regimes, such as in North Korea and Iran.²

This embrace of preventive war has been highly controversial. Defenders of the policy assert that preventive war is sometimes necessary in an era of rogue states, weapons of mass destruction

1. President George W. Bush, Commencement Address at the United States Military Academy in West Point, New York, 1 PUB. PAPERS 917 (June 1, 2002) [hereinafter West Point Speech].

2. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, 13–16 (Sept. 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY].

(“WMD”), and terrorist organizations capable of attacks anywhere in the world.³ Critics of the policy decry the fact that preventive war involves the use of military force to thwart an attack that has not yet occurred and perhaps never will occur. These critics consider such a policy to be both incompatible with international law norms and a reckless abandonment of the global security system that has been constructed at enormous human cost out of the previous centuries’ wars.⁴

It is common to frame this debate as a choice between two alternatives: either preventive war or deterrence (and strategies such as containment and power-balancing that rely upon deterrence).⁵ It is also common to assume that, however controversial preventive war’s legal and moral permissibility may be, deterrence is clearly less problematic than preventive war.⁶

This Article challenges that fundamental assumption. I argue that preventive war and general deterrence share certain fundamental features and that, by virtue of this similarity, much of what one says about the legal and moral permissibility of preventive war one shall also need to say about deterrence and related approaches. Deterrence

3. See, e.g., West Point Speech, *supra* note 1, at 919 (“For much of the last century, America’s defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.”); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 749–50 (2004) (“A second reason to modify the use-of-force rules is that they do not address the recent changes in technology and political organization that pose threats to nations. The easier availability of weapons technology, the emergence of rogue states, and the rise of international terrorism have presented more immediate threats to national security than those from attack by other nation-states.”).

4. See, e.g., Neta C. Crawford, *The Slippery Slope to Preventive War*, 17 ETHICS & INT’L AFF. 30 (2003); Jordy Rocheleau, *Preventive War and Lawful Constraints on the Use of Force: An Argument Against International Vigilantism*, in RETHINKING THE JUST WAR TRADITION 183, 202 (Michael W. Brough et al. eds., 2007) (“Few deaths in history can be traced to a failure to wage preventive war, whereas preventive wars themselves have taken countless lives. Although some fear the consequences of deference to international authority, the greatest danger to peace and justice today lies in the too-ready abandonment of law.”).

5. See, e.g., Editorial, *In Defense of Deterrence*, N.Y. TIMES, Sept. 10, 2002, at A24 (arguing against discarding deterrence from America’s strategic arsenal in the wake of the September 11 terrorist attacks); Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at 1, 8–10 (book review) (assessing options for addressing the threat of terrorism). See generally IAN SHAPIRO, CONTAINMENT: REBUILDING A STRATEGY AGAINST GLOBAL TERROR *passim* (2007).

6. See, e.g., commentators discussed *infra* Part II.E.

thus offers no easy escape from the legal and moral concerns raised by preventive war.

The implications of this conclusion are broad, since deterrence is an essential part of national security strategy in general, both on its own and as a fundamental element in strategies of containment and power balancing:

[I]t should now be apparent that deterrence is not going to disappear just because the Cold War is gone. It is the underlying basis of most prospective or plausible regimes for the management of regional or global security. . . . It is not simply a way of trying to force others to behave; it is woven into many elements of foreign and national security policy. For instance, deterrence in place remains a political prerequisite for cooperation with adversaries or potential adversaries—for making meaningful and risky concessions, pursuing “engagement,” and reaching many types of agreements. . . . And if we are to build successful international communities, general deterrence will play a role comparable to police protection in fostering democratic society.⁷

Thus, an accurate assessment of the relative legal and moral statuses of deterrence and preventive war is essential.

Part II of this Article develops the claim that general deterrence and preventive war have fundamental similarities that make key concerns about preventive war equally applicable to deterrence and introduces the resulting problem for claims that deterrence as a general security strategy is necessarily legally or morally superior to a strategy that includes possible recourse to preventive war. Part III examines in more detail how these fundamental similarities affect the respective statuses of deterrence and preventive war under current international law as embodied in the United Nations system. Part IV focuses on contemporary “just war” arguments against preventive war and concludes that those criticisms either apply equally to deterrence or are unpersuasive. Thus, neither under the international law of the United Nations system nor under contemporary “just war” analyses does deterrence offer a refuge from the legal and moral concerns raised by preventive war. Part V concludes the discussion.

7. PATRICK M. MORGAN, *DETERRENCE NOW*, xix (2003) (emphasis omitted); *see also* LAWRENCE FREEDMAN, *DETERRENCE* 11, 41 (2004) (noting that “containment as an objective lent itself to deterrence as a method” and referring to general deterrence “in the guise of a balance of power”); MORGAN, *supra* at 87–89 (noting the role of deterrence in balance-of-power systems).

One note about scope: This Article's discussion will focus exclusively on legal and moral ("just war") issues raised by deterrence and preventive war. Deterrence and preventive war obviously have substantial practical differences in their day-to-day operation, and there may be compelling prudential reasons to prefer one over the other in individual cases or even universally. However, although those practical differences are important, and although legal and moral considerations can themselves have significant prudential implications, whether deterrence or preventive war ultimately makes for a more effective foreign policy is a question of statecraft that lies largely outside the scope of this Article. The questions at issue here will be legal and moral.

II. FUNDAMENTAL SIMILARITIES BETWEEN DETERRENCE AND PREVENTIVE WAR

A. Preview

What are these fundamental similarities between deterrence and preventive war? This Part discusses those similarities in detail, but a brief preview of the course of that discussion may be helpful. I argue first that both deterrence and preventive war share a fundamental *future orientation*—that is, they both focus primarily on averting future attacks rather than on responding to ongoing or past attacks. Moreover, as a result, both deterrence and preventive war necessarily rely upon *retrospectively disproportionate* violence. Preventive war does so by attacking an adversary who has made no prior attack; deterrence does so by responding to an adversary's attacks with a level of retaliation that deliberately and substantially exceeds the size of the provocative attack. Since a proportionality requirement is a basic element of standard frameworks for regulating the use of force, this shared reliance on retrospectively disproportionate use of force raises serious questions about the extent to which deterrence really is less problematic than preventive war.

B. Preliminaries

Some definitions and distinctions will prove useful in our analysis. First, both "preventive war" and "preemption" are forms of "anticipatory self-defense"—uses of force motivated by the expectation or concern that the target regime will, in the future, perform an aggressive act in response to which the anticipating party

would be entitled to defend itself, even though at present the target has not yet performed that aggressive act. Exactly how and where to draw the line between preemptive and preventive forms of anticipatory self-defense is uncertain and somewhat controversial,⁸ but the basic distinction is straightforward—the sooner or more certain the feared aggressive act is, the more the anticipatory response is “preemptive;” the more distant or uncertain the threat, the more the anticipatory response is “preventive.”⁹

There are many definitions of deterrence, most fairly similar. Lawrence Freedman’s is sufficient for our purposes: “[D]eterrence is concerned with deliberate attempts to manipulate the behavior of others through conditional threats.”¹⁰ Patrick Morgan usefully distinguishes between immediate and general deterrence:¹¹

An immediate deterrence situation is one in which an actor realizes that another specific actor is seriously contemplating attacking and undertakes to deter that attack. . . . General deterrence has to do with anticipating possible or potential threats, often hypothetical and from an unspecified attacker, and adopting a posture designed to deter other actors from ever beginning to think about launching an attack and becoming the “potential” or “would-be” challengers so prominent in deterrence theory.¹²

8. See, e.g., David Luban, *Preventive War*, 32 PHIL. & PUB. AFF. 207, 230 (2004) (advocating changing the definition of preventive war by replacing a temporal-imminence requirement with a probabilistic requirement).

9. For sheer vividness in characterizing situations of preemption, one would be hard-pressed to improve upon a starship captain in an old TV show: “The trigger’s been pulled. We’ve got to get there before the hammer falls.” *Star Trek: Errand of Mercy* (NBC television broadcast Mar. 23, 1967), available at http://www.cbs.com/classics/star_trek/ (follow Season 1 hyperlink, go to Episode 26). (The strategic situation in that episode was, regrettably, described with insufficient detail for thorough analysis. Captain Kirk’s remark notwithstanding, the *Enterprise’s* actions may not have been strictly preemptive.) Note that although the 2002 National Security Strategy document speaks in terms of “preemption,” the sorts of actions that it describes would more typically be called “prevention.” See NATIONAL SECURITY STRATEGY, *supra* note 2, at 13–16. In this Article, I shall follow common practice in using “prevention” to describe such actions.

10. FREEDMAN, *supra* note 7, at 6.

11. Because our discussion will focus almost exclusively on general deterrence, in the interest of economy I will routinely use the unmodified term “deterrence” to refer to general deterrence. If I intend a specific point to be about immediate deterrence, I will indicate that explicitly.

12. MORGAN, *supra* note 7, at xvi.

C. Future Orientation

The distinctive difference between preventive war and more familiar defensive uses of force is that the latter address an ongoing act of aggression, while the former aims at forestalling aggression that will occur only in the future (if at all). Fighting the German army north of Paris in 1940 was garden-variety defense; fighting the German army in the Rhineland in 1936 to impede Nazi Germany's remilitarization and discourage Hitler's expansionist ambitions would have been preventive war.

However, this future orientation is not unique to preventive war; it is an essential feature of deterrence as well.¹³ Both preventive war and deterrence fundamentally seek to achieve successful long-term defense by shaping the future actions of potential adversaries, including actions that might not occur for many years into the future. In terms of goals, the distinction between the two approaches is not sharp and can easily become quite blurry. Patrick Morgan noted that deterrence theory's central aim was to prevent an adversary from launching an attack,¹⁴ while an anonymous Bush Administration official remarked that one effect of declaring a

13. Jeff McMahan would press the connection even further, asserting that: [T]here is a clear sense in which *all* defen[s]e is preventive. One can defend oneself only against *future* harm. . . . One can, of course, defend oneself against the *continuation* of harm that is being caused by an attack in progress, but it is still only harm that one *will* otherwise suffer that one can defend oneself against. . . . It seems, indeed, a conceptual truth that successful defen[s]e consists in *preventing* harm from occurring.

Jeff McMahan, *Preventive War and the Killing of the Innocent*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS 169, 172 (Richard Sorabji & David Rodin eds., 2006). Although McMahan's claim may be true in some narrow sense of "future," that sense seems inappropriate to this debate. Even though military clashes extend through time, and thus some parts of a clash may be in the future relative to other parts of the same clash, when we reason about the justice and legality of the act of resorting to force at all—for example, address issues of *jus ad bellum* rather than *jus in bello*—we treat the resulting clash as a single complex entity and measure past and future relative to it. The distinction between actions occurring within an ongoing conflict and actions that initiate a conflict is essential and longstanding and not to be abandoned lightly. To be sure, determining the beginnings and ends of conflicts is notoriously often quite difficult, and important theoretical issues may arise from such puzzles. But for the issues at stake in this discussion, such metaphysical subtleties are a distraction.

14. MORGAN, *supra* note 7, at 13.

willingness to wage preventive war would be to produce “a deterrent element for the bad guys.”¹⁵

D. Shared Dependence on Violence

Deterrence and preventive war share another fundamental similarity: both depend upon violence for the attainment of their prospective aims. Although preventive war’s reliance on violence is obvious, the way in which deterrence relies on violence can easily go unnoticed, since successful deterrence is “marked by nothing much happening.”¹⁶ Moreover, the history of deterrence theory offers an additional reason why the role of violence in deterrence has been easy to overlook. Modern deterrence theory developed largely during the Cold War, in a strategic environment dominated by the presence of nuclear weapons.¹⁷ The apocalyptic destructive power of nuclear weapons had two relevant consequences. First, it made serious consideration of retaliation seem rather pointless—if nuclear deterrence failed, the potential retaliator was probably doomed anyway.¹⁸ In this respect, nuclear deterrence was a one-time-only tactic, albeit one that extended over several decades. Second, nuclear weapons’ overwhelming destructiveness offered a way to avoid credibility concerns. The weapons were so destructive that even a threat with relatively low credibility might still be enough to deter, since the consequences of guessing incorrectly were so dire as to make even minimally credible threats become frightening.¹⁹

15. Michael R. Gordon, *Serving Notice of a New U.S., Poised to Hit First and Alone*, N.Y. TIMES, Jan. 27, 2003, at A1.

16. FREEDMAN, *supra* note 7, at 25; *see also* COLIN S. GRAY, MAINTAINING EFFECTIVE DETERRENCE 1 (2003) (“[E]pisodes of successful deterrence are recorded as blanks in the pages of history books.”).

17. *See, e.g.*, FREEDMAN, *supra* note 7, at 116 (“In all cases [deterrence] is about setting boundaries for actions and establishing the risks associated with the crossing of those boundaries. . . . During the cold war, this effort became focused on the superpower confrontation, dominated by nuclear deterrence, to the point where it sucked in all theory. The study of deterrence became synonymous with the study of the strategic conduct of the cold war.”).

18. *See, e.g.*, MORGAN, *supra* note 7, at 19 (“Retaliation against a nuclear-armed state (or one of its allies) might set off a nuclear war and *cancel the future*—your society and state could disappear. There would be no point to retaliating to prevent future attacks.”).

19. Morgan describes one influential Cold War school of thought as having concluded that the credibility of the West’s nuclear deterrent was altogether not a concern: “A state with massive destructive capabilities primed and ready to go could not be dismissed as bluffing, discounted for lacking the will to retaliate, or counted on to avoid escalation, because an attacker making a mistake on this would be committing suicide.” *Id.* at 24. In a similar vein,

Those two features, however, were idiosyncratic to nuclear deterrence. Outside the special nuclear context, a willingness and ability to retaliate against aggression when deterrence fails is fundamental to an effective long-term general deterrence strategy.²⁰ Deterrence is a conditional threat—if you attack, you will be sorry—and to be effective the threat must be both credible and daunting.²¹ Establishing a threat's credibility, however, is impossible if the threatener's previous actions suggest that the threat is empty—for example, if the threatener had not retaliated in the past when deterrence failed. And, even if the threat is credible, if it does not include the possibility of retaliation, it often will be insufficiently daunting. Samuel Huntington notes that deterrence by defense alone would be insufficient to provide much security: “[A]s both logic and experience make clear, a purely denial strategy inherently is a much weaker deterrent than one which combines both denial and retaliation.”²²

Morgan explains how nuclear weapons short-circuited another standard question in implementing a deterrence strategy: “The key question became: how much harm would be unacceptable? . . . [N]uclear weapons made it relatively simple to prepare a level of harm—destroying much or all of the enemy as a viable twentieth-century society—which was presumed to be unacceptable to any rational government.” *Id.* at 15.

20. Morgan has suggested that “[w]hile deterrence theory has always stressed retaliation capabilities, for most states general deterrence means having forces for a vigorous defense; they seldom rely on retaliation.” *Id.* at 87. That empirical observation, if borne out by actual data, would raise interesting questions about why deterrence practice has diverged so much from deterrence theory. However, Freedman has noted that empirical claims about deterrence, and especially about general deterrence, are by nature remarkably difficult to establish. FREEDMAN, *supra* note 7, at 43–47. And questions about retaliation are likely to be especially opaque to empirical analysis, since we would expect to see retaliation occur only when the deterrer really possessed both the capacity and the will to retaliate effectively. But in those cases, deterrence is especially unlikely to fail. Thus, opportunities to observe actual retaliation in response to failed deterrence are likely to be rare, leaving empirical analysts with a data set that is sparse at best.

21. Establishing the credibility of threats has been one of deterrence theory's central concerns. *See, e.g.*, MORGAN, *supra* note 7, at 15 (“Credibility quickly became one of the two central concerns and problems in the theory and practice of deterrence. (Stability was the other.)”).

22. Samuel P. Huntington, *Conventional Deterrence and Conventional Retaliation in Europe*, 8 INT'L SECURITY 32, 37 (1984). Huntington distinguishes among three different ways that military forces can deter. *Id.* at 35–36. One way is to serve as a proxy for the real deterrent. *Id.* Huntington gives as an example the NATO garrison of West Berlin, a force that had no chance of stopping any determined Warsaw Pact assault but whose presence ensured that any such assault would risk a wider war with NATO. *Id.* at 36. Second, military forces may deter by being sufficiently powerful to thwart the aggressor's plans, “forcing the aggressor to risk defeat in his effort or to pay additional costs for success.” *Id.* Finally, military forces “can deter by threatening retaliation against assets highly valued by the potential aggressor.” *Id.*

That weakness arises from deterrence's need to convince adversaries that the expected value of any attack would be negative (or highly negative, if the potential adversary has low risk-aversion)²³—that is, from the need to affect potential adversaries' perceptions either of the probability that an attack would fail or of the severity of the consequences if it did fail (or both). To see why retaliation is necessary to meet that need, we can consider the various sorts of threats that deterrence may need to forestall.

Against raids—surprise attacks that were not intended to open a sustained military campaign—or against assistance for terrorist attacks, a deterrent that relied wholly on the deterrer's ability to mount a vigorous defense would be wholly ineffective, since the aggressive act would be over before the defense had even managed to begin.

Against more ambitious threats, such as invasions aimed at territorial conquest, defensive measures would presumably have a chance at least to come into play. But even against threats of territorial conquest there are several significant problems for deterrence by defense alone.

First, the adversary may be ignorant of the aspiring deterrer's true defense capabilities and thus may be unaware that they are adequate to make an attack unattractive. In the real world, accurate intelligence about adversaries' true capabilities and intentions is notoriously difficult to acquire.²⁴ The possibility of retaliation,

23. See, e.g., MORGAN, *supra* note 7, at 44 (“[I]t is clear that the conception of deterrence concerns an effort to prevent an attack by threatening unacceptable damage so that in the attacker’s cost-benefit calculations the best choice is not an attack.”) (emphasis omitted). Note that my characterization of deterrence’s task is slightly oversimplified, because under certain circumstances a state that is contemplating aggression may be deterred even if the expected value of the attack is not negative, provided merely that the expected value is low enough to be less than the expected value of other available alternatives. However, since general deterrence requires deterring a wide range of adversaries over a long period of time in many different circumstances, and since information about the alternatives contemplated by those adversaries and the subjective values they place upon them is very scarce under even the best of circumstances, in practice there is no hope of being able to tailor deterrent threats so nicely. The best that one can do is assume that everyone to be deterred will always have at least one alternative—namely, not attacking—which has an expected value of at least zero, and then construct one’s deterrent to ensure that attacking would have an expected value of less than zero.

24. Defective intelligence regarding a potential opponent’s capabilities and resolve can foster overoptimism in predicting the results of armed conflict. Geoffrey Blainey has emphasized the role of such overoptimism as a cause of war. GEOFFREY BLAINNEY, *THE CAUSES OF WAR* 53 (“Why did nations turn so often to war in the belief that it was a sharp and quick

however, provides a margin of safety by increasing the potential costs of an attack, thus mitigating the risk of an adversary's misestimating the deterrent to be below the threshold at which an attack would seem attractive.

Second, in the absence of the possibility of retaliation, a potential attacker could draw encouragement from knowing that it could maintain some control over the cost of the attack, since that control would both facilitate accurate estimation of that cost and provide a safety net in case the attack went poorly.²⁵ Samuel Huntington noted the resulting problem for deterrence:

For a prospective attacker, the major difference between denial and retaliation concerns the certainty and controllability of the costs he may incur. If faced simply with a denial deterrent, he can estimate how much effort he will have to make and what his probable losses will be in order to defeat the enemy forces and achieve his objective. He can then balance these costs against the gains he will achieve. . . . If, however, he is confronted with a retaliatory deterrent, he may well be able to secure the gains he wants with relatively little effort, but he does not know the total costs he will have to pay, and those costs are in large measure beyond his control. . . . Precisely this uncertainty and absence of control made

instrument for shaping international affairs when again and again the instrument had proved to be blunt or unpredictable? This recurring optimism is a vital prelude to war. Anything which increases that optimism is a cause of war. Anything which dampens that optimism is a cause of peace.”); *see also id.* at 35–56.

25. In addition to the uncertainty inherent in uncontrolled risks, the lack of control itself may enhance the psychological effect of the deterrent. It is often said that people are more fearful of risks that they feel unable to control (for example, an airplane's crashing) than of risks that they feel able to control (for example, an automobile's crashing), even when the former is statistically smaller than the latter. *See, e.g.,* BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* 27 (2003) (“People underestimate risks they willingly take and overestimate risks in situations they can't control Commercial airplanes are perceived as riskier than automobiles, because the controls are in someone else's hands—even though they're much safer per passenger mile.”); CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 72 (2002) (“People find uncontrollable risks especially unacceptable. Automobile accidents may seem less troublesome than airline disasters partly for this reason.”). Empirical verification of this hypothesis seems rather thin, but one widely cited paper from 1987 does suggest some confirmation for the link between uncontrollability and fearsomeness, at least among non-experts. Paul Slovic, *Perception of Risk*, 236 *SCIENCE* 280, 283 (1987). *But see* Jonathan Baron, John C. Hershey & Howard Kunreuther, *Determinants of Priority for Risk Reduction: The Role of Worry*, 20 *RISK ANALYSIS* 413, 424 tbl.VII (2000) (finding that twenty-one percent of survey respondents cited “[l]ack of personal control” as one reason for worrying about a risk factor, but also that twenty-five percent of respondents cited lack of control as a reason for *not* worrying about the risk factor).

the threat of retaliation a strong deterrent. If these problems of uncertainty and uncontrollability are eliminated or greatly reduced, the effectiveness of the deterrent is seriously weakened.²⁶

Nor is this concern purely theoretical. Lawrence Freedman offers an example from recent history:

[Deterrence through denial during the cold war] was really about boosting conventional defenses on NATO's central front so that Warsaw Pact armies could not penetrate into Western Europe even if they wanted to. Despite the obvious merits of such an approach, . . . it was always undermined by the cost that was expected to be involved in building NATO's forces up to Warsaw Pact levels, and also because, while denial was more credible, it was not necessarily so hazardous for the Warsaw Pact. It might be tempted to probe and push its luck knowing that the worst that could happen was that it would not make much progress.²⁷

Third, even if the adversary accurately recognizes the capability of the deterrer's defenses, the adversary may not be very risk averse. Indeed, risk-loving "adventurers" are precisely the sort of troublemaking national leaders that may be most important to deter, since even a successful defense comes at a significant cost in lives and wealth. For deterrence to be successful against a risk-tolerant adversary, a deterrer may need to increase, in the eyes of the potential aggressor, the cost of an attack beyond the estimated cost of overcoming the defender's defenses. That, again, is the role of retaliation.

Finally, just as the adversary's ignorance poses problems for deterrence by defense alone, so too can the deterrer's ignorance be a problem. Because accurate intelligence is often scarce, nations seeking to deter aggressors may have difficulty assessing or even identifying potential adversaries. Thus, it may be impossible for a deterrer to know *ex ante* what amount of defense would be sufficient to deter. The solution to this problem is to leave open the door to *ex post* adjustment—that is, to retaliation, which can fill the deterrent gap. Deterrence by defense alone is relatively brittle, vulnerable to dramatic failures if the deterrer's intelligence is inadequate. Deterrence that includes the possibility of retaliation is more resilient because it is more flexible, and thus relatively more reliable.

26. Huntington, *supra* note 22, at 37–38.

27. FREEDMAN, *supra* note 7, at 37–38.

In sum, since effective deterrence requires that the defender's total deterrent response be large enough to make a potential attacker's net expected gain from an attack be negative (or highly negative, if the adversary is not risk-averse), building up defenses will often not be sufficient unless those defensive measures are backed up by the threat of retaliation.

E. Retrospective Disproportionality

Although the importance of retaliation for an effective system of general deterrence is widely noted, less commonly appreciated is the extent to which this retaliation must be disproportionate to the attack that provoked the retaliation—that is, it must be *retrospectively disproportionate*. There are at least three reasons why this must be so.

First, and most generally, the need for retrospectively disproportionate retaliation follows directly from deterrence's central task, namely establishing or preserving the credibility of a threat that is sufficiently grave to dissuade future aggression. In order for such dissuasion to occur, the threat must be scaled to negate the advantage that the potential attacker would hope to gain by attacking, not merely be proportioned to the magnitude of the attack itself.²⁸ The threatened retaliation would thus be prospectively proportionate but retrospectively disproportionate.²⁹

An example might be helpful. Suppose that *A* would benefit greatly if a military coup overthrows the government of *B*, and that *A* estimates that a surprise air attack that destroyed two of *B*'s military bases near the border between *A* and *B* would have a fifty percent chance of sparking such a coup. For simplicity's sake, suppose that *A* is almost certain that it could successfully conduct such a surprise attack without significant losses of aircraft or pilots during the attack. What would deter *A* from launching the attack?

28. Cf. Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 675, 678 (1988) ("A state may believe that the chances of victory are small and yet rationally decide to fight if the gains of victory are large and the costs of losing are not much greater than those of making the concessions necessary to avoid war.").

29. See, for example, Freedman's account of strategic deterrence: "B should be convinced that any aggressive moves will fail to prosper either because of A's likely resistance or, even if they do prosper, because of retaliatory moves by A which will hurt B badly and far outweigh any prospective gains." FREEDMAN, *supra* note 7, at 27; see also Philip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221, 238 (1990) ("The extent of the original injury has little bearing on the amount of force necessary to coerce an offending state to refrain from further acts of aggression.").

Since we have stipulated that the probability that the attack would successfully prompt a coup fifty percent is identical to the probability that it would fail to do so fifty percent, the expected value of the attack would depend wholly upon the size of the potential gain if the attack succeeds and the size of the potential cost if the attack fails. Since *A* would benefit greatly from a coup, if *B*'s retaliation is limited to matching the size of *A*'s attack—in this case destroying two military bases—*A* may feel that because the potential gains from the attack are so great, the risk (or even certainty) of *B*'s retaliating is worth accepting. (The potential gains from the attack are much greater than the potential costs.) *A* therefore would not be deterred, and would launch its attack. In this case, the attack would have a negative expected value from *A*'s point of view only if *B*'s expected retaliation would not be limited to destroying two military bases, but rather would be considerably greater—that is, only if the retaliation was proportioned to the size of *A*'s hoped-for benefit rather than to the size of the attack itself.

A second reason why deterrence, as a general strategy, requires retrospectively disproportionate retaliation is the need to be able to deter aggression by any one of many possible adversaries. If a state adopts deterrence as a general defensive strategy, its retaliation against aggressive acts will need to be sufficient to deter not only future attacks from that same adversary but also from *other* potential adversaries, including adversaries who may be currently unknown.³⁰

30. See, e.g., ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 10 (2006) (“The classic theory of deterrence contemplates the state’s absorbing the first harm, apprehending its perpetrator, and then punishing him publicly and proportionally, so as to show potential future harmdoers that it does not pay to commit the harm.”). Note the inherent tension in Dershowitz’s remark: If by “proportionally” he means “retrospectively proportionally,” as is traditional in law-of-war contexts, then the retaliation may well be inadequate to “show potential future harmdoers that it does not pay to commit the harm.” Only retaliation that is *prospectively* proportionate to potential adversaries’ hoped-for net future gains would be sufficient. See also FREEDMAN, *supra* note 7, at 48 (“A may threaten B with retaliation if C is attacked. . . . With luck, D, E, and F have also been impressed and will adjust their expectations accordingly in their future dealings with both A and B.”); *id.* at 60–61 (discussing third-party deterrence in analogous criminological contexts); GRAY, *supra* note 16, at 1 (“[D]eterrence may work most efficaciously when it can rely not upon the potency of explicit threats, but rather upon the fears of publicly undesigned deterees who are discouraged from taking action by their anticipation of the threats [sic] that adventurous behavior would bring down upon their heads.”). *But see* MORGAN, *supra* note 7, at 102 (“We lack compelling evidence that commitments are interdependent in this way. Case studies and statistical analyses find little evidence that states assess each other’s resolve on the basis of past actions vis-à-vis third parties, and only modest evidence that past actions vis-à-vis themselves shape images of others’ credibility. A deterrer’s reputation certainly is important, it’s just that

This is especially true if any of those other adversaries, or any alliance of them, is more powerful than the original attacker and thus might not be impressed if the deterrer demonstrates merely the will and ability to retaliate against lesser powers. The deterrer may therefore have to hit the original attacker harder in retaliation, not because of any act or characteristic of that particular attacker, but because of a threatening feature of unrelated third parties. The retaliation thus would necessarily be disproportionate to what the initial provocation, taken alone, would justify. It would be proportioned instead to the size of the feared future threat.

Third, if we relax the assumption of rationality in a potential aggressor, the need for retrospectively disproportionate retaliation may be even greater. Insofar as deterrence is even possible against agents with limited rationality, the deterrent threats involved would presumably have to be especially large and credible to cut through the fog of irrationality that governed the potential aggressor's decisions.³¹

The amount of disproportionality involved in efforts to make deterrence effective may be quite large. Indeed, some of deterrence's advocates unapologetically embrace even highly retrospectively disproportionate retaliation.

For example, Bart Szewczyk argues that preventive war is unnecessary because the prospect of existentially disproportionate retaliation can deter even rogue states from providing weapons of mass destruction ("WMD") to terrorists: "It is unlikely that future rogue states would engage in such a risky policy, which could jeopardize the existence of the state itself—or at least its

(a) past actions don't always shape it, (b) there is no consistently reliable source of reputation, and (c) reputation is not always crucial or even important. This makes it hard to use analysis of the credibility problem to design an effective deterrence or explain reliably what happens when one tries to deter."). However, although empirical evidence on this matter would be highly useful, a lack of such evidence either for or against propositions about third-party deterrence tells us little, since such evidence, naturally hard to come by even for the easiest cases of deterrence, is likely to be even thinner for the inherently diffuse workings of third-party deterrence.

31. A situation in which the party to be deterred is partially or wholly irrational has structural similarities to a situation in which the deterring party cannot obtain adequate information about how the other party's rational deliberations work. Morgan notes that during the Cold War, the latter situation led to the development of the ultimate in disproportionate deterrence—the doctrine of Mutually Assured Destruction ("MAD"): "MAD was not based on a calibration of unacceptable damage. It was designed to cope with the *inability of the US to know what it would actually take to deter.*" MORGAN, *supra* note 7, at 30.

government.”³² Ian Shapiro echoes that sentiment in asserting that containment through deterrence is a sufficient response to Iran’s current nuclear ambitions:

[Iran’s] tactics scarcely distinguish them from the Soviets, against whom containment was successfully practiced. In any case, Iran is no better positioned than was Iraq to deploy nuclear weapons for anything other than defensive purposes. Even in that case it would have to be a tactic of absolute last resort, since provoking a nuclear response from Israel or the United States would for all practical purposes leave them without a country.³³

Similarly, in the wake of 9/11, the *New York Times* editorialized against hasty abandonment of deterrence, which the *Times* described as “diplomatic parlance for a brutally simple idea: that an attack on the United States or one of its close allies will lead to a devastating military retaliation against the country responsible.”³⁴ Indeed, the *Times* found this inherent disproportionality to be one of deterrence’s key attractions:

One advantage of deterrence is that it induces responsible behavior by enemies as a matter of their own self-interest. Even dictators tend to put certain basic interests above all else—pre-eminently their survival in power, with their national territories and a functioning economy intact. Aggression becomes unattractive if the price is devastation at home and possible removal from power.³⁵

And during the presidential campaign of 2000, the pre-9/11 incarnation of Condoleezza Rice—then foreign policy advisor to

32. Bart M.J. Szewczyk, *Pre-emption, Deterrence, and Self-Defence: A Legal and Historical Assessment*, 18 CAMBRIDGE REV. INT’L AFF. 119, 133–34 (2005).

33. SHAPIRO, *supra* note 5, at 67; *see also id.* at 68 (“An obvious reason for [Iran’s and Saddam Hussein’s] reluctance to sponsor terrorist attacks [against the United States] is the low probability of remaining undiscovered—subjecting the sponsoring regime to the same devastating retaliation as if they had mounted the attack themselves.”). This embrace of “devastating retaliation” stands in ironic contrast to Shapiro’s earlier assertion:

An additional source of containment’s moral appeal derives from its affinity with the doctrine of just war, and particularly those parts of the doctrine that require force used always [sic] to be proportionate to the ends sought, and war always to be the strategy of last resort. . . . We need not delve into the doctrine’s ultimate basis, if it has one, to note that the policies flowing from containment do not contravene just war theory and might even be seen as embodying it.

Id. at 52.

34. *In Defense of Deterrence*, *supra* note 5, at 24.

35. *Id.*

candidate Bush—said that “the first line of defense [against rogue states] should be a clear and classical statement of deterrence—if they do acquire WMD, their weapons will be unusable because any attempt to use them will bring national obliteration.”³⁶

F. Implications of Retrospective Disproportionality

This inherent reliance upon retrospectively disproportionate retaliation raises significant questions about the legal and moral superiority of general deterrence strategies over strategies that potentially involve recourse to preventive war, and similar questions about deterrence-based strategies such as containment and power balancing. Later Parts of this Article will examine important details of those questions, but we can now sketch the basic concern that retrospectively disproportionate retaliation raises, especially in the extreme forms advocated for dealing with rogue states.

The fundamental problem is that retrospective *proportionality* is commonly considered a necessary condition for a use of force to be legitimate. For example, Michael Walzer, echoing traditional “just war” requirements, explicitly includes retrospective proportionality among the three conditions necessary for deterrent retaliation (which he terms “peacetime reprisal”) to be morally permissible. Such reprisals, he says, “are [morally] governed, after the rule of noncombatant immunity, by the rule of backward-looking proportionality. Though life cannot be balanced against life, the second raid must be similar in character and scope to the first.”³⁷ And one might think of categorical prohibitions of preventive war as merely specific instances of a general rule requiring retrospective proportionality: since there was no initial provocation to which preventive war responds, the retrospectively proportionate use of force in such cases would be zero use of force.³⁸

36. Condoleezza Rice, *Campaign 2000: Promoting the National Interest*, FOREIGN AFF., Jan.–Feb. 2000, at 45, 61.

37. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 218 (4th ed. 2006). Walzer takes himself to be establishing a moral framework within which peacetime reprisals may occur, but in light of the inherent role that retrospectively disproportionate retaliation plays in deterrence as a systematic security strategy, his proportionality requirements call into question the legitimacy of any such system. Walzer unfortunately provides no argument to explain why these particular requirements are either necessary or jointly sufficient to make deterrent retaliation permissible.

38. Parts III and IV discuss the proportionality requirement in greater depth.

The more extreme forms of deterrent retaliation mentioned earlier raise the proportionality problem in especially stark fashion. Whether such retaliation could ever be morally justifiable is a question beyond the scope of this Article, and a question already discussed at length in Cold War debates about nuclear retaliation. It is worth noting, however, that the justifiability of such retaliation is at least not obvious. Moreover, risking the occurrence of a situation that would require a massively lethal retaliatory response may not be obviously superior to launching a far smaller and less deadly preventive attack to stop the situation from arising in the first place.³⁹ More important for present purposes, however, is to note that the proportionality concern is not limited to these spectacular instances of massive, possibly nuclear, retaliation. Although the examples are less dramatic when one steps back from Cold War-style deterrent situations to situations involving lesser levels of retaliation, the basic proportionality concern remains.

G. Permitting the Threat, Prohibiting the Act?

One cannot sidestep this difficulty by asserting that general deterrence never requires *actually* engaging in retrospectively disproportionate retaliation, but only *threatening* to do so. That evasion might have been possible in the context of Cold War nuclear deterrence, where any failure of deterrence would have eliminated the failed deterrent, and thus made moot any questions of deterring future adversaries. But that was a special case. More generally, if deterrence is to be an element of a lasting security strategy (such as containment) or global security system (such as a balance of power),

39. Using deterrence through threats of massive retaliation to stop WMD threats may seem intuitive to strategists conditioned by the “Mutual Assured Destruction” (“MAD”) framework of the Cold War to think of delivering apocalyptic responses—or at least threatening to deliver apocalyptic responses—as the normal way of dealing with WMD threats. But even if such an approach made moral sense during the Cold War, the reason that it did was because there seemed to be no available alternative other than simple capitulation. Today, however, now that MAD is no longer the dominant context for strategic choices, there is at least one alternative—preventive war. Thus, there is a genuine question about the legal and moral propriety of embracing a system that would choose to rely upon a willingness to wreak horrific levels of destruction on innocent and often captive civilian populations when less horrific means seem to be available. Note also that if such retaliation would not be morally or legally permissible, that impermissibility could itself have strategic consequences by undermining the credibility of the threat of such retaliation. And the weaker that deterrence is, the less plausible it is as an alternative to a system that under certain circumstances permits preventive war.

then it will have to be effective over many cycles of aggression and response. Maintaining that effectiveness without actual retaliation to preserve the credibility of deterrent threats is likely to be impossible.

Moreover, if one cares about the global legal and moral framework for the use of force, a rule that permitted states to threaten to retaliate but prohibited them from actually following through on those threats would confront states with a dilemma. They could signal their adherence to the global legal and moral order, but only at the cost of stripping their threats of the credibility that is necessary for deterrence to be possible. Alternatively, they could preserve their deterrence capability by separating themselves from that global order, but only at a legal and moral cost both to themselves and to the order that their separation had undermined. Thus, a rule permitting only threats of retaliation, but not actual retaliation, would effectively declare that deterrence as a systematic strategy was simply incompatible with the law or morality, or both. Such an attempt to make deterrence palatable would therefore ultimately amount to a concession of its impermissibility.

H. Implications and Roadmap

It thus begins to be clear that there is no legal and moral free ride for deterrence. Because of its inherent reliance on retrospectively disproportionate retaliation, deterrence—and any deterrence-based security system, such as containment or balance of power—rests on a foundation relevantly similar to preventive war.⁴⁰ This similarity is essential, not accidental, because both approaches to security inherently involve the present use of violent force to diminish or eliminate merely potential threats. Both approaches require a willingness to “punish” a state for something that it has not yet done and may never do. And both necessarily involve retrospective disproportionality.

So far, however, our discussion has been in general terms. The next Parts will explore the implications of deterrence’s and preventive war’s similarities in more detail by examining established

40. For an especially clear acknowledgement of the similarity between deterrent retaliation and preventive war, see Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L. L. 586, 591 (1972) (“[W]hat appears as a reprisal when considered within the restricted context of the action in response to which the ‘retaliatory’ measure is taken, appears as self-defense—albeit, of an anticipatory nature—when considered within the broad context of a hostile relationship between states.”).

legal and “just war” moral analyses of preventive war and deterrent retaliation. Part III focuses on legal issues arising out of specifics of the United Nations system. Part IV addresses broader “just war” arguments.

III. LEGAL STATUS UNDER THE U.N. SYSTEM

Under the United Nations (“U.N.”) system, a few compact principles establish the basic law governing the use of force. Although there is some controversy about the proper interpretation of those principles when applied to contentious issues such as preventive war, and although states and adjudicative bodies may not always follow those principles’ literal requirements, among those who do give those requirements great deference there is a general trend toward interpretations under which both preventive war and deterrent retaliation would be illegal.

A. Operative Treaty Law and Judicial Interpretations

Article 2(4) of the U.N. Charter declares that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁴¹

Article 1 specifies those “Purposes,” two of which are relevant for our inquiry. The first purpose is “[t]o maintain international peace and security, and to that end . . . to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations that might lead to a breach of the peace,”⁴² and the second purpose is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”⁴³

These rules have two exceptions, which I shall turn to in a moment. But first note that if the exceptions do not apply, then Article 2(4) would, on its face, seem to prohibit both preventive war and deterrence as systematic strategies. The entire purpose of

41. U.N. Charter art. 2, para. 4.

42. *Id.* at art. 1, para. 1.

43. *Id.* at para. 2.

preventive war is to use force to change the political decisions of the attacked state, whether by limiting its capacity to take undesirable future actions or by deposing the attacked regime altogether. And deterrence, even setting aside the use of force involved in deterrent retaliation, simply *is* the making of conditional threats to affect political decisions. Using these threats to constrain a potential adversary's political independence is the very point of deterrence.⁴⁴ As Patrick Morgan puts it, "The essence of deterrence is that one party prevents another from doing something the first party does not want by threatening to harm the other party seriously if it does. This is the use of threats to manipulate behavior so that something unwanted does not occur"⁴⁵

The International Court of Justice ("I.C.J."), in its *Threat or Use of Nuclear Weapons* advisory opinion, offered an interpretation of Article 2(4) that might seem somewhat friendlier to the legality of deterrence, at least in individual instances, than a literal reading of Article 2(4):

Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. . . . The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.⁴⁶

44. Michael Doyle has noted that deterrence aims to affect the political independence of foreign states only to the extent that what the foreign state might choose to do would be illegal—i.e., what the foreign state is being deprived of the political independence to do is something that it had no legal right to do anyway. Letter from Michael Doyle to Brian Angelo Lee (Sept. 2007) (on file with author). However, one could say much the same about preventive war—it aims to preempt an attack that the target country would have had no legal right to launch.

45. MORGAN, *supra* note 7, at 1; *see also* GRAY, *supra* note 16, at 13 ("There is an obvious and undeniable sense in which [a deteree's] decision [whether or not to be deterred] is made in a context of coercion, but still the intended deteree is at liberty to refuse to allow his policy to be controlled by foreign menaces."); Robert L. Jervis, *The Confrontation Between Iraq and the US: Implications for the Theory and Practice of Deterrence*, 9 EUR. J. INT'L REL. 315, 320 (2003) (describing deterrence as a form of "coercion").

46. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246 (July 8).

However, the I.C.J.'s opinion also endorsed the court's previous affirmation in the *Nicaragua* case that it is "well established in customary international law" that "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it."⁴⁷ Thus, deterrence's essential reliance on the threat, and sometimes the actuality, of retrospectively disproportionate retaliation would still bring deterrence into conflict with Article 2(4)—if that article stood alone.

The U.N. Charter, however, includes two important exceptions to its generally pacific provisions. First, the Charter authorizes the U.N. Security Council to undertake collective action "to maintain or restore international peace and security."⁴⁸ Second, Article 51 makes a limited allowance for unilateral use of force in self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."⁴⁹ The collective-action provision is not relevant to our inquiry, but the provision about the inherent right of self-defense is quite relevant. Indeed, interpreting the scope of Article 51's self-defense exception is the pivotal issue in determining the legality of preventive war and of deterrent retaliation.

B. Elaboration in Case Law and the General Assembly

Two oft-cited U.N. General Assembly resolutions, although nonbinding, are at least *prima facie* relevant to this interpretive issue. General Assembly Resolution 2625 reiterated that "[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States," and declared that "[s]tates have a duty to refrain from acts of reprisal involving the use of force."⁵⁰ Both preventive war and deterrent retaliation are contrary to this resolution.

47. *Id.* at 245 (quoting *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27)).

48. U.N. Charter art. 39.

49. *Id.* at art. 51.

50. G.A. Res. 2625, U.N. Doc. A/8018 (Oct. 24, 1970).

General Assembly Resolution 3314 set forth a very expansive understanding of what constitutes the crime of “aggression.” “Aggression” was to include, inter alia, “invasion or attack by the armed forces of a State of the territory of another State,”⁵¹ the “use of any weapons by a State against the territory of another State,”⁵² and “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.”⁵³ If read literally, this very broad language would entail that even use of force in garden-variety self-defense could sometimes constitute “aggression,” and this language seems to prohibit both preventive war and deterrent retaliation. But the resolution has a saving clause: “Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.”⁵⁴ Thus, in the end, Resolution 3314 provides little help in determining the proper interpretation of the scope of Article 51, since the resolution merely incorporates that interpretation, whatever it may be.

A handful of I.C.J. cases offer some interpretive guidance. *The Corfu Channel Case* involved a dispute over damage suffered by British warships that struck mines in Albanian waters while legally exercising their right to travel through straits used for international navigation.⁵⁵ The I.C.J. held Albania liable for that damage but also concluded that Britain’s subsequent removal of the mines from those straits illegally violated Albania’s territorial sovereignty. Although removing the mines was remediation, and thus presumably easier to justify legally than retaliation would have been, the court still rejected its legality:

The United Kingdom Agent, in his speech in reply, has further classified “Operation Retail” among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. . . . [T]o ensure respect for international law, of which it is the organ, the Court must declare

51. G.A. Res. 3314, Annex, art. 3(a), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

52. *Id.* at art. 3(b).

53. *Id.* at art. 3(d).

54. *Id.* at art. 6.

55. *The Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

that the action of the British Navy constituted a violation of Albanian sovereignty.⁵⁶

In the *Nicaragua* case, the I.C.J. addressed the legality of the United States' support for armed Nicaraguan rebels.⁵⁷ The court explicitly set aside the question of the legality of preemptive strikes in anticipation of imminent attacks,⁵⁸ but stated that "the exercise of [the right of individual self-defence] is subject to the State concerned having been the victim of an armed attack."⁵⁹ The court further asserted the illegality of using coercion to affect a state's foreign policy:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force⁶⁰

Taken alone, this condemnation would seem to imply the illegality of both preventive war and deterrent retaliation.⁶¹ However, the I.C.J. took some pains to state that Article 51's exception for the "inherent" right of self-defense indicates that the Charter does not wholly supersede customary international law, and thus that certain actions permissible under customary law may still be permissible under the Charter.⁶² Even if this controversial claim is accepted as true, the *Nicaragua* court's affirmation of the proportionality requirement implies that retrospectively disproportionate deterrent retaliation, not to mention preventive war, would be illegal.

56. *Id.* at 35.

57. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

58. *Id.* at 103.

59. *Id.*

60. *Id.* at 108.

61. The court also cited General Assembly Resolution 2625's condemnation of reprisals. *Id.* at 101.

62. *Id.* at 94.

C. Academic Interpretations

Yoram Dinstein asserts that deterrent retaliation—“armed reprisals” in his terminology—“can be a permissible form of self-defence (in response to armed attack) under Article 51” but concedes that “most writers” disagree.⁶³ Dinstein’s argument is largely consequentialist, reasoning that since a full-blown *war* of self-defense is permissible under Article 51, *a fortiori* the lesser use of force involved in reprisal ought also to be permissible:

It would be incomprehensible for war to be acknowledged—as it is—as a legitimate form of self-defense in response to an isolated armed attack, if defensive armed reprisals were inadmissible. Taking into account that Article 51 allows maximal use of counter-force (war) in self-defence, there is every reason for a more calibrated form of counter-force (defensive armed reprisals) to be legitimate as well.⁶⁴

This argument, however, is unconvincing since Article 51 permits the waging of defensive war only until the U.N. Security Council has had time to act. As Dinstein himself acknowledges, reprisals, unlike defensive wars, occur only after the original provocation is complete, so immediate execution of the reprisal is not of great urgency.⁶⁵ A state that fights a defensive war is forced into combat as soon as the aggressor attacks, but a state that intends to launch an armed reprisal can afford to wait for Security Council approval. Thus, the most plausible reading of Article 51 would seem to be that deterrent retaliation is permissible only if the Security Council has authorized it.

Moreover, Dinstein acknowledges the continued importance of proportionality: “As in other circumstances in which self-defense is invoked, defensive armed reprisals must meet the conditions of necessity, proportionality and immediacy. Proportionality is the quintessential factor in appraising the legitimacy of the counter-measures executed by the responding State.”⁶⁶ Although at one point Dinstein suggests a potentially permissive and vague definition

63. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 198 (3d ed. 2001).

64. *Id.* at 201.

65. *Id.* at 200 (referring to “the built-in time-lag between the original armed attack and the response of the victim State, which is an inevitable feature in all armed reprisals”).

66. *Id.* at 197.

of “proportional” as equivalent to “reasonable,”⁶⁷ he later acknowledges that retrospective proportionality is what is required: “[T]he responding State must adapt the magnitude of its counter-measures to the ‘scale and effects’ of the armed attack. A calculus of force, introducing some symmetry or approximation between the dimensions of the lawful counter-force and the original (unlawful) use of force, is imperative.”⁶⁸

Thus, given the essential dependence of deterrence on retrospectively disproportionate retaliation, Dinstein’s defense of the legality of armed reprisals under Article 51 becomes untenable. The only permissible reprisals under his reading would be retrospectively *proportionate* reprisals, that is, reprisals of a sort that would be ineffective in maintaining general deterrence.

Mary Ellen O’Connell asserts, on the basis of General Assembly Resolution 2625 and *Corfu Channel*, that use of force for “general deterrence” is legally prohibited unless authorized by the U.N. Security Council.⁶⁹ She also asserts that preventive war “is clearly unlawful under international law,” since “[a]rmed action in self-defense is permitted only against armed attack.”⁷⁰

The most interesting part of O’Connell’s analysis arises when she turns to the question of how broadly to interpret Article 51’s exception for the “inherent” right of self-defense, and specifically whether that exception implies that states still are permitted to exercise the rights of self-defense that they have under customary international law. O’Connell argues that it does not—that the proper interpretation of the exception is quite narrow. O’Connell’s main reason for reaching that conclusion is historical and textual:

The UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945 Even if earlier custom allowed [preventive] self-defense, arguing that it persisted after 1945 for UN members requires

67. *Id.* at 184 (“It is perhaps best to consider the demand for proportionality in the province of self-defense as a standard of reasonableness in the response to force by counter-force.”).

68. *Id.* at 198.

69. Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, in AM. SOC’Y OF INT’L LAW TASK FORCE PAPERS 1, 6 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

70. *Id.* at 2–3.

privileging the word “inherent” over the plain terms of Article 2(4) and the words “armed attack” in Article 51.⁷¹

Intuitively, this conclusion seems plausible, but the argument seems fundamentally incomplete.

First, someone might argue that the purpose of the U.N. Charter was to create a wider prohibition on the use of *aggressive* force, not to create a wider prohibition on the use of force even in self-defense, especially when doing so would lead to less violence overall. (Recall that the General Assembly’s broad definition of “aggression” is non-binding and did not appear until years after ratification of the Charter.)

O’Connell’s textual argument—that the broad understanding of “inherent” improperly privileges part of Article 51 over the plain terms of Article 2(4)—is no genuine objection. Since Article 51 is explicitly an exception to Article 2(4), Article 51’s language necessarily has priority over Article 2(4)’s. Moreover, it is not clear why privileging the word “inherent” in Article 51 over the words “armed attack” in that same article is any more objectionable than what O’Connell advocates, which is to privilege “armed attack” over “inherent.” At best, which of those two terms should take priority seems indeterminate.

Here Dinstein’s argument for the same conclusion seems more telling: the language of Article 51 would be quite perplexing if its drafters had intended to allow states to continue to exercise a customary international law right to resort to preventive war: “What is the point in stating the obvious (i.e., that an armed attack gives rise to the right of self-defense), while omitting a reference to the ambiguous conditions of preventive war?”⁷²

But another, more fundamental response is potentially available to defenders of a broad understanding of “inherent.” O’Connell describes it briefly and rejects it:

Some writers promoting the “inherent right” theory argue that the parameters of the right of self-defense are unchangeable by Charter text and subsequent state practice. Indeed some principles of international law are unchangeable, even by subsequent agreement

71. *Id.* at 13. O’Connell’s terminology differs slightly from mine. What I have been calling “preventive,” she refers to as “preemptive.”

72. DINSTEIN, *supra* note 63, at 168. Again, note that parallel reasoning would also rule out retrospectively disproportionate deterrent retaliation.

or practice. These are the so-called *jus cogens* principles. But no authority has ever identified a unilateral right of anticipatory self-defense as a *jus cogens* principle.⁷³

Even if no one has acknowledged such a principle (or a similar principle permitting retrospectively disproportionate deterrent retaliation) it still might be possible to construct an argument that such a principle must exist. For example, Whitley Kaufman, in arguing for a conclusion similar to O'Connell's, has advanced a contractualist argument. Kaufman suggests that establishment of the U.N. Charter moved the world from a state of nature, where traditional just war rules applied, to a condition of "civil society" governed by the U.N. as sovereign, and that the "social contract" requires states to "agree to submit disputes to a central authority and to abide by its decisions (even when they vehemently disagree)."⁷⁴ But if one takes this "social contract" notion seriously, the correct conclusion might be the exact opposite—that states retain a broad inherent right of self-defense no matter what language is in the Charter.

If a social contract is what creates "civil society" at the international level, presumably a social contract is also what creates "civil society" at the national level. Thus, international "civil society" would be the product of a contract among entities (states) which are themselves the products of social contracts. So one would expect that the authority of those component states would not be unlimited—there are certain concessions that the individuals who contracted to provide that authority would not have made. For example, individuals would be unlikely to contract to create a state with the authority to enter a treaty that sold the state's population into slavery. So no such treaty provisions could be binding, even if the relevant governments observed all the formalities in creating that "treaty"—those governments would necessarily have lacked the authority to accept such provisions. The crucial question then becomes whether individuals entering a social contract would have agreed to give their states the authority to relinquish the customary right of preventive self-defense (or of retrospectively

73. O'Connell, *supra* note 69, at 13. O'Connell does not mention which writers she has in mind.

74. Whitley Kaufman, *What's Wrong with Preventive War? The Moral and Legal Basis for the Preventive Use of Force*, ETHICS & INT'L AFF., Dec. 2005, at 32, 37.

disproportionate deterrent retaliation) in exchange for the protection of the U.N. as global sovereign.

The answer to that question seems to hinge on how effective those individuals would expect the U.N. to be at enforcing peaceable relations. And the establishment of veto-wielding permanent members of the Security Council, not to mention all of the U.N.'s other institutional constraints, arguably made inevitable the U.N.'s sadly dismal record as guarantor of world peace. As a result, from a contractualist point of view, there is at least a *prima facie* plausible argument that Article 51 cannot be read as depriving states of their former rights of self-defense, because no state would have had the authority to consent to such a term in a "social contract."

Nor does this conclusion necessarily require contractualist premises. For example, one might argue that a "civil society" of the sort that Kaufman describes is something that those who drafted the Charter did indeed attempt to create, but that their attempt failed: the U.N. never actually became a global sovereign. As recent events abroad remind us, creating a genuine civil society requires considerably more than drafting a constitution and declaring success.

Alternatively, one may argue that the right to defend oneself as effectively as possible against mortal threats is an inalienable "natural right,"⁷⁵ or that states have a natural law *duty* to protect their citizens and thus necessarily lack the authority to cede the rights of self-defense necessary to fulfill that duty.⁷⁶

Of course, such arguments involve complex and profound issues, and assessing their merits is far beyond the scope of this Article. For present purposes, it is enough to note their possibility and three consequences of our discussion: First, the legal statuses of deterrent retaliation and of preventive war are likely to be similar. Second, what those statuses are will depend upon the proper interpretation of the scope of Article 51. And, third, simple textual or historical analysis may not be enough to determine the legal permissibility of deterrence and preventive war.

75. This sort of idea may lie behind Burton Leiser's argument that "[c]onditions being what they are, there can be no blanket moral or legal condemnation of reprisals. Some reprisals must be permissible, for without the right to resort to them, peace-loving nations would be at the mercy of those who are more inclined to engage in international outlawry." Burton M. Leiser, *The Morality of Reprisals*, 85 ETHICS 159, 163 (1975).

76. For the notion of a state's natural law duty to protect its citizens, see, e.g., William C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1426–36, 1450–53 (2004).

IV. CONTEMPORARY “JUST WAR” ARGUMENTS

Our discussion so far has focused on the U.N. Charter system. Different questions arise when we consider more general debates about the requirements of “just war” theory.

A. Non-Consequentialist Arguments

Traditional just war criteria, which are often (although not necessarily) taken to be non-consequentialist principles, pose serious difficulties for preventive war. We have already seen the formidable difficulty that the traditional just war requirement of retrospective proportionality poses for deterrence and, *a fortiori*, for preventive war. But an equally grave problem arises from the criterion designating who may legitimately be subject to attack. As Jeff McMahan notes, “Because in just war theory the criterion of liability to attack is actively posing a threat to others, it is simply not possible for that theory to acknowledge the permissibility of any instance of preventive war.”⁷⁷ Note that this same criterion would also rule out general deterrent retaliation in most instances (since the attack to be deterred would not yet be in the offing) and always to the extent that the retaliation is intended to deter third parties. Thus, general deterrence would be an impermissible security strategy.

The implications of non-consequentialist *jus in bello* precepts about legitimate targets reinforce this conclusion. It is common to take *jus in bello* principles, principles about how to fight the wars that occur, to be conceptually and practically distinct from *jus ad bellum* principles, principles about when it is permissible to go to war in the first place. However, in the case of deterrent retaliation, those categories blur together.

Michael Walzer has advanced a rights-based *jus in bello* criticism of *belligerent* reprisals (reprisals within an already existing war) when directed against civilians, prisoners of war, and other innocents—for example, against responding to an adversary’s massacre of prisoners of war by killing an equal number of the adversary’s soldiers who are now prisoners. Such belligerent reprisals, Walzer asserts, violate the rights of their innocent victims: “[T]he helplessness of the victims rules them out as objects of military attack, and their noninvolvement in criminal activity rules them out as objects of

77. McMahan, *supra* note 13, at 179.

retributive violence.”⁷⁸ David Rodin concurs, “[T]he innocent victims of reprisal have not violated anyone’s rights, and therefore retain full rights against being harmed for the purposes of deterrence. Reprisal is a case of punishing the innocent to deter the guilty. As such, it is reciprocal action directed at the wrong subjects”⁷⁹

Although introduced in a *jus in bello* context, such rights-based arguments naturally imply a straightforward *jus ad bellum* rejection both of what Walzer calls “peacetime reprisal”—that is, deterrent retaliation—and of preventive war.⁸⁰ That conclusion is fairly obvious in cases of third-party deterrence—for example, cases in which *B* attacks *A* and then *A* amplifies its retaliation with an eye toward deterring not only *B* but also *C* and *D*. Because the residents of *B* who experience the resulting extra suffering bear no responsibility for what *C* or *D* may do, their rights are violated in being forced to pay the price nonetheless.

Even if there are only two actors, *A* and *B*, if *A*’s launching a preventive attack against *B* to forestall something that *B* has not yet done would violate the rights of *B*’s residents, then *A*’s increasing its level of retaliation against *B* to deter attacks that *B* has not yet launched would seem to violate those residents’ rights just as much. To be sure, prior acts can forfeit rights, so *B*’s initial attack may forfeit its residents’ right to be immune from some violent response, but that is far from entailing that *B*’s residents have forfeited all immunity from any sort of attack—just as a criminal’s crime forfeits his right not to be imprisoned but does not make him morally liable for punishment for crimes that he has not yet committed. Absent such a restriction, any (non-consequentialist) retrospective proportionality requirement would be a dead letter.

So these standard rights-based accounts do not provide grounds for morally distinguishing preventive war from deterrent retaliation; the impermissibility of the one closely tracks the impermissibility of the other.

78. WALZER, *supra* note 37, at 213–14.

79. David Rodin, *The Ethics of Asymmetric War*, in *THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS* 153, 163 (Richard Sorabji & David Rodin eds., 2006).

80. WALZER, *supra* note 37, at 216–22.

B. Consequentialist Arguments—General Observations

Consequentialist arguments provide a stronger prima facie case for the permissibility of deterrent retaliation, but also for the permissibility of preventive war. A basic outline for an argument of this sort is easy to sketch: Since the violence and destructiveness of war are bad, states should, all else being equal, at least be allowed (and perhaps even required) to take measures that lead to a smaller total amount of such violence and destructiveness. And since sometimes relatively small preventive actions or deterrent retaliation can forestall much larger and more destructive wars, states should therefore sometimes be allowed to engage in those actions of retaliation, if the total net consequences would be positive.⁸¹

Of course, that sketch is much too simple, and any full development of a consequentialist argument in favor of either preventive war or deterrent retaliation would require considerable elaboration. However, the sketch is a sufficient backdrop for examining the current consequentialist literature, which typically has been skeptical of preventive war and thus has focused on arguing against its permissibility rather than for it. We shall once again see that the concerns raised about preventive war commonly apply with equal force to deterrent retaliation.

Although these consequentialist criticisms vary in their details, they are typically variations on a common theme: Because of self-interested human nature and the inherent limitations on human knowledge, permitting preventive war would have negative net total consequences by leading to the occurrence of too many wars.

C. The Psychological Argument

One consequentialist argument focuses on psychological issues. Jeff McMahan asserts that natural human partiality irremediably biases decisions in favor of going to war:

Americans are not alone in thinking that whatever threats they face must be unjust, while any threats they pose must be just. For most citizens of most countries cherish the same patriotic delusions about their own country. And this means that, even if we could identify a plausible doctrine of preventive war that would specify

81. For one version of a consequentialist argument in favor of preventive war see Luban, *supra* note 8, at 220–21.

the precise conditions in which such a war could be justified, the doctrine would be bound to be regularly misapplied.⁸²

Similarly, David Luban reworks Michael Walzer's non-consequentialist concern about making war too "ordinary" into a consequentialist concern about lowering psychic barriers to engaging in preventive war: permitting preventive war would make war part of politics as usual, by establishing that the trigger for war need not be a truly exceptional imminent threat—"the adversary's unmistakable signal that it has crossed the line from diplomacy to force"—but rather only a "set of policy choices not much different in kind from those that states always make."⁸³ We therefore must ban preventive war because "it looks too much like aggressive war, and experience has taught that routinizing aggression costs too much blood and too much suffering."⁸⁴

Luban's argument that permitting preventive war would make war too ordinary might seem to establish a clear distinction between deterrent retaliation and preventive war, since deterrent retaliation requires at least a prior attack against which to retaliate. Thus there is a natural limitation on deterrent retaliation's ordinariness, provided that the overall deterrence system is working well enough that provocative attacks are not themselves commonplace.

However, there is an important respect in which deterrence's essential dependence on deterrent retaliation makes state violence even *more* ordinary than a doctrine of preventive war does. Preventive war doctrines say only that launching a preventive war is *permitted* under certain circumstances in which future threats exist. Even when those circumstances arise, it is quite consistent with that doctrine for a state to choose not to launch a preventive attack, for any of a multitude of reasons. Deterrence theory, by contrast, *requires* deterrent retaliation in response to attacks when a future threat exists—otherwise the deterrence system breaks down. Thus deterrence theory makes the use of force a normal part of policy in a

82. McMahan, *supra* note 13, at 175.

83. Luban, *supra* note 8, at 224–25; *see also* WALZER, *supra* note 37, at 79 (asserting that consequentialist criteria for what constitutes a legitimately actionable threat are inadequate "not because the wars they generate are too frequent, but because they are too common in another sense: *too ordinary*. . . . They radically underestimate the importance of the shift from diplomacy to force.").

84. Luban, *supra* note 8, at 225.

way that goes significantly beyond even the doctrine of preventive war.

D. The Epistemic Argument

A related concern is epistemic: under the best of circumstances it is difficult to know what other parties may do in the future, and often it may be wholly impossible. Thus, when a state contemplates launching a preventive war, even if it sincerely believes that such a war would have a net positive result overall, it is quite possibly wrong. Michael Walzer finds in this sort of concern a reason to reject consequentialist analysis altogether: "Given the radical uncertainties of power politics, there probably is no practical way of making out that position—deciding when to fight and when not—on utilitarian principles."⁸⁵

But even some consequentialists who would reject Walzer's conclusion as too extreme nevertheless find this epistemic limitation to be compelling enough to require a prohibition on preventive war. Jeff McMahan concludes that "the fundamental objection to preventive defence and, by implication, preventive war is not that it necessarily targets the innocent, but that, in practice, matters of evidence and probability are virtually never such that the effort at justification can succeed."⁸⁶ Similarly, David Luban argues that allowing preventive war brings into play human judgment and its irrationalities. Even when acting in good faith, decision makers cannot adequately gauge the size of an unactualized threat, so risk-aversion will lead those decision makers to launch too many wars.⁸⁷ The end result, critics agree, is that granting moral permissibility to preventive war would increase the frequency of wars and induce global instability.

These underlying observations about human psychological and epistemic limitations clearly have some merit. As anyone who has observed the history of stock market speculation can attest, predicting the behavior of other agents in a competitive environment is extremely difficult even under very favorable conditions. Accurate prediction becomes only more difficult when we switch to international relations, and the stakes become incomparably higher.

85. WALZER, *supra* note 37, at 77.

86. McMahan, *supra* note 13, at 185.

87. Luban, *supra* note 8, at 227.

However, those very same limitations would affect decisions about deterrent retaliation as much as they affect decisions about preventive war. Citizens of country *A* are likely to overestimate their innocence in provoking *B*'s attack on *A*, and thus to overestimate the extent to which deterrent retaliation is necessary to keep *B* (or *C* or *D*) from launching a future attack. Moreover, the epistemic difficulties that *A* faces in predicting the future behavior of *B*, *C*, and *D* are the same whether *A* is making predictions for the purpose of deciding about deterrent retaliation or for the purpose of deciding about preventive war. Deterrent retaliation thus stands on epistemic ground that is no firmer than preventive war's.

E. The Symmetry Argument

David Luban has argued that making prevention a universal principle available to any nation would lead to the absurd conclusion that attacks "by both states in any of the world's hot spots" would be *justified*, as each acted to strike before it was struck.⁸⁸

However, this criticism evaporates once one notes (as Luban does in a footnote) that a rule specifically prohibiting preventive war would be only one of the "just war" limitations on states' ability to use force in preventive attacks.⁸⁹ Traditional *jus ad bellum* criteria still apply, including the requirement of necessity.⁹⁰ Thus, even if preventive wars were not generically prohibited, adversary states in the world's hot spots would still not be morally entitled to launch preventive attacks against their opponents unless those opponents were (or genuinely seemed to be) preparing an aggressive attack and unless preventive war was the only possible way to mitigate that threat effectively. If *B*'s justification for attacking *A* is that *B* needs to prevent an attack from *A*, and *A*'s reason for considering attacking *B* is because *A* in turn feels compelled to prevent an attack which it anticipates from *B*, then the appropriate thing for *B* to do is not to attack *A*, but rather to reassure *A* of *B*'s peaceful intentions. Preventive attack by *B* would be unnecessary and thus unjustified.⁹¹

88. *Id.*

89. *Id.* at n.35.

90. Although historically there have been non-consequentialist arguments for the existence of those criteria, consequentialist arguments to the same conclusion are also available.

91. Of course, such reassurances may fail, but then *A*'s attack would be tragically unjustified (because it is unnecessary), and if *A*'s ignorance or irrationality was propelling *A* toward attacking *B* despite *B*'s best efforts to defuse the situation, it is not obvious that justice

Thus, contrary to Luban, removing the prohibition against preventive war would not necessarily give Japan moral permission to attack North Korea preventively, nor give North Korea moral permission to attack Japan.⁹²

F. The Self-Fulfilling Prophecy Argument

Luban further argues that the doctrine of preventive war makes rival states *become* potential threats to each other (and thus *creates* genuine reasons for preventive attacks), because it permits each rival to attack another “based on risk calculations whose indeterminacy makes them inherently unpredictable by the adversary—and then it licenses attacks by both of them, because now they are potential threats to each other.”⁹³ The idea is that permitting preventive wars would actually induce states to launch preventive wars, as each reciprocally anticipated an anticipatory attack by the other.

However, just as in the symmetry argument, the continued applicability of the *jus ad bellum* requirement of necessity short-circuits this problem. A blanket just war prohibition of preventive war will discourage states from creating such threats only to the extent that state behavior actually complies with just war restrictions, and if states do comply with those restrictions, then they will also comply with the necessity condition. Thus, rather than plan for a preventive attack to forestall their neighbor’s preventive attack, they will work to convince the neighbor of their peaceful intentions, either through unilateral actions or through formal agreements such as non-aggression treaties.

Moreover, deterrence is little better than preventive war in this regard, since deterrent retaliation would be open to a similar criticism: permitting retrospectively disproportionate deterrent retaliation might lead to cycles of escalating violence, as each party sought to deter the other from engaging in such retaliation in the future. But again the necessity requirement acts as a limiter: there would be no necessity for the party that launched the first attack to retaliate in order to avoid receiving deterrent retaliation in the

or morality would always require that *B* refrain from protecting its population by anticipating *A*’s attack.

92. Luban’s Japan-North Korea example appears in Luban, *supra* note 8, at 227. His acknowledgment of the possible relevance of other moral rules appears in *id.* at 227 n.35.

93. *Id.* at 227.

future, since it could avoid future retaliation simply by refraining from launching aggressive attacks.

Nor does instability provide a convincing ground for distinguishing between deterrent retaliation and preventive war, for at least two reasons. First, deterrent retaliation can itself be destabilizing, since, if unsuccessful in deterring the recipient of the retaliation, it could trigger counter-retaliation and even escalating counter-retaliation.

Second, the destabilizing effects of granting *moral* permission to some instances of preventive war should not be overstated. It bears repeating that granting moral *permission* to launch a given preventive war does not imply a moral *compulsion* to do so. Luban asserts that “in life-and-death games, the gap between ‘permitted’ and ‘prudentially required’ thins to the vanishing point.”⁹⁴ But one must be careful not to confuse moral and prudential reasons. Even in life-and-death situations, the gap between *morally* permitted and *prudentially* required is often very large indeed. For example, even if the United States was morally permitted to lead an invasion of Iraq in 2003, many critics would nevertheless maintain that the United States was not prudentially required to do so—indeed that prudence dictated the opposite. And in light of what transpired after the invasion, the likelihood that the United States will launch more preventive wars in the foreseeable future seems sharply diminished, even if the United States would be morally permitted to do so. Thus, a system which granted a limited moral permission for preventive wars under certain circumstances would not necessarily open the floodgates to a destabilizing sea of preventive wars. The actual effect on global stability might be comparable to the effect of granting moral permission for retrospectively disproportionate deterrent retaliation. (And in each case the effect of granting or denying moral permission might be small. One need not be a thoroughgoing “realist” to suspect that *moral* rules about permissible uses of force are not ubiquitously determinative of state action.)

Moreover, it is not certain that an increase in preventive wars would increase *long-term* global instability rather than decrease it. An increase in preventive wars would clearly increase *short-term* instability, but if those wars actually were successful in thwarting even larger threats, the net effect might actually be to decrease the

94. *Id.*

total amount of international violence. Michael Walzer noted that historically preventive war has been tied to the maintenance of systems of balance of power,⁹⁵ and we might think of such systems as accepting a higher frequency of small-scale instability in exchange for a lower risk of large-scale instability. Of course, if preventive wars are most often launched when *prudentially* unjustified (from the standpoint of total welfare), then we would indeed expect greater total instability from permitting such wars. But whether such prudentially unjustified preventive wars would be the norm is an empirical question which armchair theorizing, by either preventive war's defenders or its critics, is inadequate to replace. And since adequate empirical data seems unlikely to be available, the question remains open.⁹⁶

Thus, neither non-consequentialist nor consequentialist arguments, even to the extent that they are persuasive, provide grounds for finding any significant difference in the relative permissibility of deterrent retaliation and of preventive war.

V. CONCLUSION

This Article has argued that future orientation and reliance on retrospectively disproportionate retaliation make general deterrence subject to many of the same fundamental objections that are raised against doctrines which permit preventive war. There are three possible responses to this situation.

One might assert that deterrence clearly is permissible (both legally and morally), and therefore preventive war must also be permissible, at least sometimes. For someone who takes this approach, the main challenge will then be to identify an appropriate legal and moral framework within the current system to regulate, without prohibiting, unilateral recourse to preventive war.

Alternatively, one might assert that preventive war is clearly impermissible (either legally or morally or both), and therefore retrospectively disproportionate deterrent retaliation, and thus general deterrence, must also be impermissible.

95. WALZER, *supra* note 37, at 76–77.

96. Randall Dipert asserts that computer simulations of the Iterated Prisoner's Dilemma indicate that preventive war does not ultimately lead to more wars and destruction. (He also asserts the existence of game-theoretic proofs of a similar result for deterrent retaliation.) Randall R. Dipert, *Preventive War and the Epistemological Dimension of the Morality of War*, 5 J. MIL. ETHICS 32, 47–48 (2006).

Someone who took that approach then would have two options. One option is to conclude that the legal or moral rules that prohibit such use of force must therefore be incorrect and need to be changed. Michael Walzer, for example, has concluded that the current prohibition on preventive war needs modification and has proposed “a major revision of the legalist paradigm.”⁹⁷ The principal challenge facing someone who takes this option is to set forth and justify what those revisions ought to be.

The other option is to assert that we should take the current legal and moral rules as essentially unchangeable, and thus that states should refuse to use strategies involving preventive war or deterrence, no matter how costly that refusal may be. The main challenge for anyone who adopts this option is to identify some practically adequate permissible substitute for the strategies that they prohibit, strategies that form the foundation of the existing global security system. For without a reasonable substitute, the result of this prohibition might not be the marginalization of those disfavored strategies but rather the marginalization of the system of rules that prohibits them and predation by the rule-disregarding upon the rule-abiding.⁹⁸

Which of these three responses is best is a question too large to be settled here. What is important for our purposes is to recognize that the question cannot be avoided. Common assumptions notwithstanding, deterrence and strategies such as containment that depend on deterrence, are not legally and morally easy alternatives to preventive war. Rather, they are all close cousins, and we must be cautious about making a legal or moral judgment about one of them, unless we are willing to make that same judgment about the other.

97. WALZER, *supra* note 37, at 85. Walzer proposes adopting a rule along the lines of: “[S]tates may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence.” *Id.*

98. *Cf.* DINSTEIN, *supra* note 63, at 201 (“Evidently, international law is created in the practice of States and not in scholarly writings. Even if clarity existed on the doctrinal level that a State ‘is not entitled to exercise a right of reprisal in modern international law’, this would merely serve ‘to discredit doctrinal approaches to legal analysis.’”) (quoting R.A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415, 430 (1969)).

