

Altering *Jus ad Bellum*: Just War Theory in the 21st Century and the 2002 National Security Strategy of the United States

Brian Crisher
Western Michigan University

“The idea of undertaking a war because it might be inevitable later on and might then have to be fought under more unfavorable conditions has always remained foreign to me, and I have always fought against it...For I cannot look into Providence’s cards in such a manner that I would know things beforehand.”

Otto von Bismarck (Speech of Jan 11, 1887)¹

Introduction

In the aftermath of September 11th, the war against Afghanistan, and the recent war in Iraq, just war theory has become a focal point of discussion in international affairs. Due to the fact that the Bush administration justified the Iraqi war on preemptive principles, preemptive wars have become an even greater focus. As just war theory enters the twenty-first century and the new war on terrorism unfolds, two questions arise: Are the *jus ad bellum* principles of just war theory flexible enough to be applicable to a new international system where Cold War strategies are no longer pertinent? If so, should there be an alteration to the limited exception of preemptive self-defense, which would justify the Bush administration’s use of anticipatory self-defense as set forth in the National Security Strategy of 2002?

In order to answer these questions, first I will undertake a survey of the origin and development of just war theory. Then, an examination of the distinction between preemptive and preventive self-defense will follow. To better understand the distinction, current just war principles will be applied to empirical cases which include; World War I, the Six-Day War, the war in Afghanistan, and the second Iraqi War. Following the empirical cases is an

¹ Quoted in: Vagts, Alfred. Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations. New York: King's Crown Press, 1956. p 291.

analysis of the Bush administration's 2002 National Security Strategy, and its relationship to just war theory. Lastly, a brief examination of how the international community alters international law is conducted to determine the viability of changes to *jus ad bellum* laws.

After all analysis is complete, the answers to the previous two questions will become apparent. History shows that just war theory is very flexible and indeed owes its survival to an ability to adapt to new international systems. Therefore, while the theory can adjust to the post-September 11th world, there is a limit to its flexibility. Because of this, President Bush's concept of anticipatory self-defense is, and will continue to be, unjust according to international law.

Development of Just War Theory

The basic premise of just war theory is that some wars are just while others are unjust. For example, a war of aggression is seen as unjust, while a war to liberate a people from occupation is seen as just. Hence, it is a normative theory that distinguishes between just and unjust on moral grounds. Also important to the theory is that war is broken down into two main components. First is the *jus ad bellum*, which deals with principles of going to war. Second is the *jus in bello*, that deals with principles concerning how a war is conducted. Because of the distinction between *jus ad bellum* and *jus in bello*, it is possible to have a just war yet fight it unjustly. The reverse is also true; one can fight a war justly yet the war itself is unjust.

Just war theory has origins that reach back to Roman times, as Christianity became the official religion of the Empire. Traditional Christian pacifism made it impossible to justify war. However, St. Augustine, writing at the turn of the fourth to the fifth century, set out the justification for when Christians could go to war and kill their fellow man without committing a sin. "Fighting was permissible, he said, if the war was just – that is, if one fought on the just side of a war" (Claude Jr. 1980, 87). The immediate problem with this is apparent, how does one define justice? In medieval times, defining justice was a difficult proposition. This is because just war theory was "a moral doctrine rather than a legal code, and broad principles were in some respects preferable to fine rules" (Claude Jr. 1980,

87). It was to be applied on a case-by-case basis rather than being a set of universal rules. In medieval times the Roman Church and Holy Roman Emperor claimed to have the ultimate authority in deciding issues of justice. Through this authority, for instance, they proclaimed the Crusades a just use of military force.

Augustine's main successor as a just war theorist was St. Thomas Aquinas who carried on the tradition in the thirteenth century. Aquinas cleared up some of the vagueness of just war theory and set up three principles that became the precursors to the modern principles of the twentieth century. According to Aquinas, in order for a war to be just it must satisfy the principles of sovereign authority, just cause, and right intention (Johnson 2003). For Aquinas, the most important principle was that of sovereign authority. Sovereign authority refers to the concept that only a sovereign leader has the right to start a war. Just cause states that only under certain conditions, such as defense against attack, punishment of evil, and recovery of items taken unjustly, can war be waged. The principle of right intention made certain that war was to ensure peace, rather than gain territory, a point not made clear by Augustine.

While the theory originated in the Catholic Church, in time it found supporters in the secular world. These secular theorists used the theory against the Church. In response to the Crusades, Francisco de Vitoria, a secular just war theorist writing in the fifteenth and sixteenth century stated, "Difference of religion cannot be a cause of just war" (Walzer 2002, 926). The successors of Vitoria, Grotius (1583-1645) and Pufendorf (1632-1704), further solidified just war theory in the secular world. These early secular writers carried the tradition into the modern age and secured just war theory as both a Christian and secular theory.

A latent consequence of the Reformation and the Renaissance was the fall of the Church and the Holy Roman Empire from universal power. Shortly thereafter, the modern state was born. With the rise of the modern state, just war theory fell from prominence as statesmen considered it unrealistic. Machiavellian realism was now the main ideology that dominated international relations. According to Machiavelli, "in the actions of all men and especially of princes [state leaders], where there is no judgment to call upon, one looks to the results" (Machiavelli, 67). In short, the ends justify the means. State interests, not justice, now defined the *jus ad*

bellum of war. Arguments in favor of justice “were treated as a kind of moralizing, inappropriate to the anarchic conditions of international society” (Walzer 2002, 927).

With the rise of the modern state also came the rise of international law. Legal jurisprudence became the guide for how states interacted to fill the power void left behind from the fall of the Church. Moral positions were no longer important; rather it was legal positions that mattered. The common interpretation of international law was, “sovereign states have an unqualified right to resort to war” (Claude Jr. 1980, 88). In essence, the *jus ad bellum* became unrestricted. The international system was, “in principle as well as in reality, a war system; it was indifferent to the tragedy and the evil of war” (Claude Jr. 1980, 89).

Throughout the eighteenth and nineteenth centuries, the view that sovereign states could wage war whenever they felt it necessary remained unchallenged. Writing in the early nineteenth century, Carl von Clausewitz exemplifies this view. He stated, “war, therefore, is an act of policy...War is not a mere act of policy but a true political instrument, a continuation of political activity by other means” (Handel 2001, 68). It is important to note that Clausewitz was writing in the aftermath of the French Revolution and the Napoleonic Wars. Warfare had undergone a fundamental change. The limited wars of the eighteenth century had given way to the ideological wars of the nineteenth. Replacing the professional armies, motivated mainly by pursuit of wealth were Napoleon’s Grand Armies motivated by nationalistic zeal. For Clausewitz, in order to be victorious in this new type of warfare, a state must match its opponent’s willingness to fight with all available military, economic, and political resources. This is the concept of total war, whose true horrors the world would soon witness in the twentieth century.

Epitomizing total war was the scale and destruction of the two world wars. World War I and World War II initiated an unprecedented surge in military technology that produced some of the most effective killing machines in military history. The experience had a profound effect on western civilization. Never before, or since, has war been acted out on such a massive scale. In WWI, civilian deaths outnumbered military deaths for the first time in history. Massive bombing raids leveled entire cities as civilians became military targets in WWII. Morality, long discarded since

Machiavelli, once again entered into international politics. U.S. President Woodrow Wilson became the chief proponent of morality. Towards the end of WWI, Wilson stated, “this age is an age...which rejects the standards of national selfishness that once governed the counsels of nations and demands that they shall give way to a new order of things in which the only questions will be: ‘Is it right?’ ‘Is it just?’ ‘Is it in the interest of mankind?’” (Kissinger 1994, 51). For Wilson, “power would yield to morality and the force of arms” (Kissinger 1994, 51). While Wilson was not referring directly to just war theory, he was in fact expounding its *jus ad bellum* principles. Just war theory was now slowly reentering the arena of international politics.

However, reasserting morality into international politics produces a dilemma for which the just war theory of St. Augustine and St. Aquinas offers no solution. When a conflict arises between states, both parties claim their action is morally justified, and therefore just. How does one reconcile rival claims of morality? What makes the morality of one state more legitimate than the morality of another state? These are questions traditional just war theory cannot answer.

At the heart of the problem is the attempt to judge the actions of states in moral terms. This is indeed the case, as no universal set of values exists. George Kennan illustrates this point; “let us not assume that our moral values, based as they are on the specifics of our national tradition and the various religious outlooks represented in our country, necessarily have validity for people everywhere” (Kennan 1954, 47). Thus, one cannot assume “that the *purposes* of states, as distinct from the methods, are fit subjects for measurement in moral terms” (Kennan 1954, 47).

It is because of this moral dilemma that secular just war theory in the twentieth century shifted from a moralist paradigm to a legalist paradigm. The justness of a state’s actions could now be determined through legal principles rather than moral principles. Therefore, following the conclusion of WWI just war theory reemerged through international law. Both the newly formed League of Nations and the Kellogg-Briand Pact of 1928, which outlawed war, stated the illegality of war. Following WWII, the laws regarding *jus ad bellum* became codified within the U.N. Charter. War was no longer the sovereign right it had previously been in international law. Proactive military force “was limited to self-defense and

then only insofar as, and until, the international community could come to the assistance of a victim of unlawful military force" (Reisman 2003, 83).

It is important to note that the early reemergence mainly affected the *jus ad bellum* of war. International law had yet to greatly affect the *jus in bello*, although weak attempts were made in the late nineteenth century.

"The immunity of medical personnel and of those in their care had been established by the first Geneva Convention of 1864 and some limitation of the destructiveness of weapons had been negotiated at St. Petersburg in 1868" (Keegan 1998, 17). Additionally, the Hague Convention of 1899 sought a "limitation of armaments, in particular the banning of aerial bombardment" (Keegan 1998, 17-18). These early institutions were mostly symbolic. When major warfare erupted in the twentieth century, combatants soon disregarded the so-called rules of war. World War II serves as a prime example of this. The western allies of WWII fought on just grounds, but fought with unjust tactics, such as the massive aerial bombing of cities. Codification of *jus in bello* principles within international law finally came about following the conclusion of WWII.

The just war theory that reemerged in the twentieth century became conceptualized into several main principles. While there are numerous variations to the principles of just war theory, the nine principles of the National Conference of Catholic Bishops are fairly representative. Seven of these principles deal with the *jus ad bellum* and two of them deal with the *jus in bello*.

1. Just Cause: 'War is permissible only to confront "a real and certain danger" i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights.'
2. Competent Authority: '[W]ar must be declared by those with responsibility for public order, not by private groups or individuals.'
3. Comparative Justice: In recognition of the fact that there may be some

justice on each side, ‘[e]very party to a conflict should acknowledge the limits of its “just cause” and the consequent requirement to use *only* limited means in pursuit of its objectives.’

4. Right Intention: ‘[W]ar can be legitimately intended only for the reasons set forth above as a just cause.’
5. Last Resort: ‘For resort to war to be justified, all peaceful alternatives must have been exhausted.’
6. Probability of Success: This criterion is not precisely stated but the bishops affirm that ‘its purpose is to prevent irrational resort to force or hopeless resistance when the outcome of either will clearly be disproportionate or futile.’
7. Proportionality: ‘[T]he damage to be inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms...This principle of proportionality applies throughout the conduct of war as well as to the decision to begin warfare’ (Elshtain ed. 1992, 212-213).

The two principles that govern the *jus in bello* are:

1. Proportionality: as above.
2. Discrimination: ‘[T]he lives of innocent persons may never be taken directly, regardless of the purpose alleged for doing so...Just response to aggression must be...directed against unjust aggressors, not against innocent people caught up in a war not of their making’ (Elshtain ed.1992, 212-213).

Twentieth century just war theory differed from the theory of the Middle Ages in two important ways. First, the *jus in bello* of war changed

greatly with the large scale of civilian destruction seen in the two world wars. The ensuing Nuremberg trials, the United Nations Charter, and other institutions such as the Geneva Conventions all served to codify the laws of war within international law. As stated earlier, these were not the first attempts to limit the conduct of war. The difference between the efforts of the nineteenth century and the post-WWII efforts is the laws of war became “seen in principally legal, rather than in moral or ethical, terms” (Rengger 2002, 355). Professional militaries, at least Western militaries, now consider international jurisprudence instead of morals when planning wars. This shift towards legal rather than moral considerations is a result of the liberal-leaning views of post-WWII Western society. The liberal conscience “seemed to have required Western states, if they were to fight, to fight in ever more bloodless and ‘humane’ ways” (Rengger 2002, 356).

The second change just war theory underwent is located within the *jus ad bellum*. Since sovereign states no longer had freedom to wage war whenever they felt it necessary, under what conditions is war acceptable? Just war became limited to “defensive war, war in response to aggression – as Article 51 of the United Nations Charter puts it, individual or collective self-defense” (Claude Jr. 1980, 93). Again, this new hostility towards war comes from dominant liberal Western views. This neo-just war doctrine “holds that fighting can be justified only in resistance to unjustified fighting” (Claude Jr. 1980, 94). Therefore, we now fight against going to war, and in essence, “peace has in fact been elevated over justice” (Claude Jr. 1980, 95). This viewpoint was particularly strong during the Cold War when the possibility of a nuclear holocaust made justice seem both irrelevant and unattainable.

The changes to *jus ad bellum* went even further. Aggression now became the focal point for the just cause principle. Following WWII, many viewed aggression as “a criterion of the illegality of war as well as the immorality of war” (Elshtain ed. 1992, 209). Therefore, a simplified definition of aggression in the post-WWII era is as follows: the aggressor is whoever fires the first shot. Michael Waltzer, a just war theorist, expanded the definition of aggression to help justify the concept of preemptive strikes. He states “aggression can be made out not only in the absence of a military attack or invasion but in the (probable) absence of any immediate

intention to launch such an attack or invasion.” Therefore, not only can a state act aggressively if there is no attack, a state can also be aggressive if there is no intention of an attack. If a state finds itself faced with this situation, “it can be fairly said that they have been forced to fight and that they are the victims of aggression” (Walzer 1977, 85). Now it is possible to have a perceived threat qualify as an act of aggression.

Not only has the definition of aggression expanded, the way the world sees aggression has also changed. In the post-Cold War era, aggression is no longer the great threat to peace. Rather, aggression is now justified if it “is in support of what that majority [population] deems a ‘good cause’” (Claude Jr. 1980, 94). Justice once again is more important than peace. This is especially true in the post-September 11th world where many view war as a way of achieving security. Essentially, the “world has returned to an idea of just war more nearly in accord with the medieval view” (Claude Jr. 1980, 94). Simply put, if the end is just, war is an acceptable means, even if it involves being the aggressor. “The problem of defining aggression had become irrelevant, having been replaced by the problem of defining good cause” (Claude Jr. 1980, 95).

Preemptive vs. Preventive Self-defense

The concept of preemption is not a new development and in the past been employed by various states.² However, the inclusion of preemptive strikes into the 2002 National Security Strategy of the United States for the first time has made preemption an explicit policy option for a superpower. The ability of the U.S. to act unilaterally virtually anywhere in the world has raised concerns both domestically within the U.S. and internationally about the abuses of military power. These concerns highlight a major distinction made within just war theory. This is the distinction between preemptive and preventive wars.

² Israel has openly acknowledged its right to the use of preemptive war and launched what it considered preemptive strikes in both 1967 (against Egypt) and 1981 (against Iraq).

In 1842, Daniel Webster gave the traditionally accepted justification for preemptive strikes; referred to as the Caroline Doctrine.³ He said preemptive action is justified if there is a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation” (Byers 2003, 11). For Webster, the right to use preemptive strikes rested upon the concept of imminent attack. This type of preemption “is like a reflex action, a throwing up of one’s arms at the very last minute” (Walzer 1977, 75).

In the 1960s, Waltzer included for the first time preemptive strikes into just war theory. Rather than Webster’s imminent attack, the justification for employing preemption rests upon the concept of sufficient threat. A sufficient threat must include three points: “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk” (Walzer 1977, 810). Therefore, the use of a preemptive strike is just “if, and only if, it is indisputably the case that there is an imminent threat of an unprovoked aggression” (Brown 2003, 2). Therefore, while states do not have the unrestricted right to wage war, they do have the right to defend themselves (Brown 2003). Action can now be undertaken even before an attack has materialized.

While Waltzer has expanded the definition of aggression to justify a sufficient threat, preemptive strikes remain highly controversial. This is mainly because it is difficult to define a sufficient threat. Fear more often than not is the main factor for a state to launch a preemptive strike. However, fear cannot be the only justification for preemption. The problem is obvious. “Once a group has suffered a terrible surprise attack, a government and people will, justifiably, be vigilant...seeing small threats as large, and squashing all potential threats with enormous brutality” (Crawford 2003, 33). If fear becomes the justification for attack, “then the occasions for attack will potentially be limitless since...we cannot always know with certainty what the other side has, where it might be located, or when it might be used” (Crawford 2003, 33). Therefore, for state leaders

³ The Caroline Doctrine came about after an incident in 1837 when British forces, claiming self-defense, destroyed an American ship sending supplies to a Canadian rebel group.

the task of evaluating evidence to determine a sufficient threat is difficult. The “threshold of evidence and warning cannot be too low, where simple apprehension that a potential adversary might be out there...triggers the offensive use of forces.” While, “the threshold of evidence and warning for justified fear cannot be so high that those who might be about to do harm get so advanced in their preparations that they cannot be stopped or the damage limited” (Crawford 2003, 33).

Once fear becomes the main factor for a state to launch an attack, the line between preemptive and preventive is crossed. In contrast to preemptive wars, a preventive war is a “war that begins when a state attacks because it feels that in the longer term (usually the next few years) it will be attacked or will suffer relatively increasing strategic inferiority” (Reiter 1995, 6-7). In short, the aggressor feels war is inevitable and better to fight now rather than later. The crucial element separating preemptive and preventive wars is the issue of time. Although Waltzer declines to offer a time frame for the threat attached to a preemptive strike, many theorists believe that imminent threat represents an attack that could occur within no more than three to five days. Preventive war carries no such time frame. The justification is simply that in the future, being a few weeks to a few years, an adversary would become too powerful and turn aggressive.

Within just war theory, preemptive wars are an acceptable application of the just cause principle. However, preventive wars do not satisfy the just cause principle. Waltzer illustrates the difference between preemptive and preventive wars.

In the first case [preemptive], we confront an army recognizably hostile, ready for war, fixed in a posture of attack. In the second [preventive], the hostility is prospective and imaginary, and it will always be a charge against us that we have made war upon soldiers who were themselves engaged in entirely (non-threatening) activities (Walzer 1997, 80).

Additionally, preventive wars fail to satisfy the last resort principle. Attacking an enemy that represents a threat in the future eliminates all possible diplomatic options for resolving a crisis.

Besides moral failures, preventive wars also have practical failures. This failure mainly involves evidence. “Antagonists divided by a political

conflict of interest are rarely certain whether each other's mobilization and preparations for war are aggressive or defensive" (Betts 2003, 19). Political scientists commonly refer to this situation as the security dilemma. In an anarchic system, "one state builds its strength to make sure that another cannot hurt it, the other, seeing the first getting stronger, may build its strength to protect itself against the first" (Nye 2000, 15). Therefore, states react rationally to a perceived threat from another state. The security dilemma can lead to preventive wars since states might act under the assumption that an adversary is building military strength for the purpose of an impending attack. When a state's intelligence does not support the assumption of an attack, their actions resemble preventive rather than preemptive self-defense.

Since Augustine's inception of the just war doctrine in Roman times, the theory has undergone numerous changes. These changes to just war theory have coincided with changes to the theories of international politics. From Machiavellian realism to Wilsonian liberalism, just war theory has survived into the twenty-first century. The theory was transformed from its ambiguous medieval version to the modern principles in the twentieth century, and has become embedded within international law. Preemptive wars are now a just military option; representing the changing worldview of aggression. Theorists, such as Waltzer, have drawn a clear line separating preventive self-defense from preemptive self-defense. The distinction between preventive and preemptive becomes apparent after applying just war criteria to empirical cases.

World War I

The assassination of Arch Duke Francis Ferdinand on June 28, 1914 was the spark that ignited World War I. While there are numerous underlying causes that led to the outbreak of war, it was the German invasion of Belgium and subsequent invasion of France that transformed an Austrian-Serbian War into WWI. While it is possible to argue that Germany's action was preemptive, given the standards set by Waltzer, the action was in fact preventive.

In a paper discussing preemptive wars, Dan Reiter classifies WWI as a preemptive war. He defines a war as preemptive if “it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term” (1995, 6) Additionally he states that, “a war is preemptive if a primary motivation for the attack is that the attacker thinks that the target is likely to strike first within 60 days” (1995, 13). Based on this criterion, Germany’s fear of a Russian invasion forced it to implement the Schlieffen Plan for defensive reasons. Therefore according to Reiter, the war was preemptive rather than preventive.

After Russia brought its military forces under full mobilization, there is little doubt that Germany feared an invasion. However, it was possible for Germany to avoid a direct confrontation with the Russians shortly after the assassination of the Arch Duke. Following the assassination, the Austrians approached Germany for support rather than acting unilaterally against the Serbians. On July 5, 1914, Kaiser Wilhelm II offered Germany’s full support to whatever course of action Austria took (Nye 2000). In essence, this “blank check” gave the Austrians a free hand to launch a war against Serbia with the support of the German armies. Not until July 29, did the Russians put their forces under *partial* mobilization, with their forces concentrating against Austria. Germany still had the chance of withdrawing its support of Austria and keeping the conflict localized. Instead, Germany sent ultimatums to both France and Russia. The Russian ultimatum was to demobilize all forces, and to France to not attack in the event of a German-Russian war. Both countries rejected their respective ultimatums and German forces mobilized, shortly thereafter invading Belgium.

By July 31, 1914, as the major European powers mobilized their forces and upheld their alliances, Germany faced a two-front war. While many in Germany feared being in this position, it was expected. In 1914, “General von Moltke and Foreign Secretary Jagow...believed that war with Russia was inevitable” (Nye 2000, 72). It is because of this that Germany took advantage of the July Crisis to implement the Schlieffen Plan. To wait for another crisis would weaken Germany’s strategic position. Germany’s Schlieffen Plan would become “obsolete by 1916 because Russia was using French money to build railroads” (Nye 2000, 72). These new railroads would greatly decrease the time it took for Russian forces to mobilize, a key

factor in the Schlieffen Plan. It is also important to note that development of the Schlieffen Plan occurred in 1904. This was long before the July Crisis and locked Germany into a military position that offered few, if any, diplomatic exits.

Therefore, a war in 1914 was better than a war in 1916. Even Reiter admits that preventive reasoning played a key role in German decision making. He states, “the German leadership believed that Russian power was increasing relative to German power and that war with Russia was probable in the next few years; therefore, the sooner it was fought, the better” (1995, 22). Finally, it is the German historian Fritz Fischer who sums up the situation best. As quoted in Reiter’s paper he describes Germany’s actions as “an attempt to defeat the enemy powers before they became too strong, and to realize Germany’s political ambitions which may be summed up as German hegemony over Europe” (Reiter 1995, 23).

Six-Day War

On June 5, 1967, the Israeli army launched a preemptive strike against Egypt and her allies, Syria and Jordan. The resulting Six-Day War is a prime example of Waltzer’s preemptive exception to the just cause principle. Unlike WWI, there was ample reason for the Israelis to fear an Egyptian attack. Therefore, Israel launched the attack in self-defense against aggression from the Egyptians.

The crisis began in early May when a false Soviet report stated that Israel was mobilizing its forces along the Syrian border (Walzer 1977). Despite the false nature of the reports, the Egyptians began massing their forces in the Sinai. Further enhancing Israeli fears, Gamal Abdel Nasser, the Egyptian leader, expelled United Nations peacekeeping forces that had been in place since the 1956 crisis.

On May 22, Nasser announced the closing of the Straits of Tiran to Israeli shipping. The Israelis had long considered this an act of war (Reiter 1995, 16). To allow the Straits to remain closed would be both a domestic and international political disaster. Additionally, the Straits were vital to the economy and Israel could not afford the economic costs from the closing.

Two more events solidified Israeli fears. On May 29, Nasser made a major speech in which he said that in the event of war, the “Egyptian goal would be nothing less than the destruction of Israel” (Walzer 1977, 83). Finally, the next day, King Hussein of Jordan signed a treaty placing the Jordanian army under Egyptian command. Shortly after this, Iraq joined the Arab alliance.

When Israel attacked on June 5, there was clearly ample evidence of Waltzer’s sufficient threat. Nasser “did everything possible to convince Israel that an attack was imminent: making extreme statements, pushing military mobilization, and closing the Straits of Tiran, an action which Israel had for years declared would be a *casus belli*” (Reiter 1995, 18). Clearly the Israelis acted out of fear of an imminent attack rather than the fear of rising Arab power. This is what separates Germany’s action in WWI from Israel’s actions in the Six-Day War.

Furthermore, closely related to the issue of fear, is the issue of state survival. As previously stated, Nasser declared the complete destruction of Israel as the goal of the Egyptian army. Whether Nasser’s statement was true or an attempt to gain popular support from the Arab world is irrelevant. What is relevant is Israeli belief that their survival was at stake if they lost the seemingly inevitable war. In the case of WWI, there is no evidence available that suggests German leaders felt at any time the survival of the German state was in jeopardy if they lost the war. Additionally, there is no evidence that suggests that either the French or the Russians wanted to destroy the German state. The Germans knew that even if they lost a war against the French and Russians, the German state would remain intact. The issue of state survival furthers the claim that the Israeli preemptive strike in the Six-Day War was just.

While the previous two empirical cases demonstrated the difference between preemptive and preventive self-defense, the following two cases intend to show how *jus ad bellum* principles regarding self-defense can indeed expand. Also important, the cases show it is up to states to interpret international law. While academics can claim a state’s action violates international law, ultimately it is up to the international community to decide whether to allow flexibility in the laws.

The war in Afghanistan

On September 11, 2001, Al Qaeda terrorists attacked the World Trade Center in New York and the Pentagon in Washington D.C. using hijacked airliners. Subsequent investigations lead to the conclusion that Osama bin Laden was the mastermind behind the attacks. Furthermore, it was no secret bin Laden was hiding in Afghanistan under the protection of the ruling Taliban regime. The Taliban openly admitted to harboring Al Qaeda terrorists and refused to extradite bin Laden to the United States. Invoking the right of self-defense, on October 7, 2001, the U.S. invaded Afghanistan. Shortly after the war started, removal of the Taliban regime was completed, and a new government was in power. While the war in Afghanistan was not a preemptive war, it shows the willingness of the international community to expand the *jus ad bellum* of war, in regards to self-defense, to allow an American invasion.

What makes the war unique is the U.S. attacked Afghanistan in response to the September 11th attacks, which the Taliban did not directly order. Responsibility was attributed to a state for attacks carried out by non-state actors residing within its borders. However, the Bush administration made it clear there was no distinction between the state and non-state actors in this case. Only six days after the September 11th attacks, in a speech to the nation, President Bush said; “We will make no distinction between the terrorists who committed these acts and those who harbor them” (Ratner 2002, 906). On the day of the invasion, the U.S. sent a letter to the U.N. Security Council declaring a right of self-defense “because of the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation” (Ratner 2002, 907). Clearly the U.S. believed that following a terrorist attack, a state had the right to respond in self-defense against the state that harbored the terrorists.

To understand better the significance of the U.S. action, and the subsequent reaction of the international community, it is necessary to examine international law regarding *jus ad bellum* in similar cases (state responsibility for non-state actors) prior to the war in Afghanistan. The International Court of Justice in *Nicaragua v. United States* “rejected the notion that mere assistance to rebels was an armed attack triggering the

right of self-defense.” The International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic* stated that the Serbian government was responsible for the actions of the Serbian army because it maintained control over it. Finally, the International Law Commission regarded states responsible for non-state actors,

If the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct; if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities; and if and to the extent that the State acknowledges and adopts the conduct in question as its own (Ratner 2002, 907-908).

Based on criteria set forth by these international institutions, without direct evidence linking the Taliban to the September 11th attacks, the U.S. invasion of Afghanistan was a violation of international law.

Nevertheless, rather than condemning the actions of the United States, the international community supported the invasion.⁴ Shortly after September 11th, the U.N. Security Council issued resolutions stating that it “recognized the inherent right of individual or collective self-defense in accordance with the Charter.” Additionally, after a classified briefing on October 2, Lord Robertson, the secretary general of NATO, declared that “the evidence linking Al Qaeda to September 11 provided the factual basis for invoking Article 5 of the Washington Treaty.”⁵ Finally, the Organization of American States (OAS) adopted a resolution on October 16 stating “the [U.S.] measures...in the exercise of [its] inherent right of individual and collective self-defense have the full support of the states parties to the Rio Treaty” (Ratner 2002, 909).

⁴ A few countries did protest the invasion. Iraq, North Korea, and Sudan all made strong protests. Cuba, Malaysia, and Iran made mild protests.

⁵ Article 5 of the Washington Treaty states that an attack on one ally on all, and invoked the commitment to collective self-defense.

It is possible to argue the international community acquiesced to U.S. action due to its hegemony rather than acknowledging an expansion to the *jus ad bellum* of war. However, it is important to note the condemnation of the international community in regards to American treatment towards prisoners of war from the Afghanistan conflict. There were strong rejections regarding U.S. claims that the detainees were not prisoners of war and therefore not afforded the protection of the Geneva Conventions. Both Britain and France “were so opposed to the U.S. decision...they threatened not to hand over detainees to the United States” (Ratner 2002, 912). International pressures eventually lead to a change in U.S. policy. Because of this condemnation and eventual change in policy, it is difficult to claim U.S. hegemony could force a change in *jus ad bellum* norms, yet not be able to change *jus in bello* norms. Therefore, the reaction of the international community shows it is possible to expand *jus ad bellum* in regards to self-defense. However, the second Iraqi war shows *jus ad bellum* can only expand so much.

The Second Iraqi War

Shortly after the one-year anniversary of the September 11th terrorist attacks, the Bush administration released the 2002 National Security Strategy (NSS) of the United States of America. Contained within the NSS was the doctrine of anticipatory self-defense. The NSS states, “the greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts...the United States will, if necessary, act preemptively” (National Security Strategy 2002, 15; hereafter NSS). On March 20, 2003, U.S. armed forces invaded Iraq, implementing the anticipatory self-defense doctrine less than a year after its publication. While the Bush administration has downplayed the preemptive nature of the war in post-war discussions, pre-war statements and speeches clearly show the war began with preemptive justifications. More significant is the reaction of the international community and its refusal to expand further *jus ad bellum* principles regarding self-defense. This reaction demonstrates that *jus ad*

bellum principles are not infinitely elastic and according to international law, preemptive wars will remain restricted.

In numerous statements prior to the invasion of Iraq, the Bush administration justified its use of anticipatory self-defense. Central to the administration's argument is the changing nature of threats and the inability of past policies to deal with them. Secretary of Defense Rumsfeld, in a statement to reporters in October 2001 stated, "the problem with terrorism is that there is no way to defend against the terrorists at every place and every time against every conceivable technique. Therefore, the only way to deal with the terrorist network is to take the battle to them...that is in effect self-defense of a preemptive nature" (Rumsfeld 2001). In a graduation speech at West Point in June 2002, President Bush furthered the point by saying, "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 terrorists' allies" (Bush 2002). For the Bush administration, the past practice of waiting for an attack to occur and then responding accordingly, is no longer a viable policy. In an address to the nation three days before the invasion of Iraq, President Bush said, "terrorists and terror states do not reveal these threats with fair notice, in formal declarations – and responding to such enemies only after they have struck is not self-defense, it is suicide" (Bush 2003).

While the previous statements all served to justify the anticipatory self-defense doctrine, President Bush still had to show an imminent threat existed within Iraq. In the same speech as above prior to the invasion, Bush outlined the case against Iraq.

Intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised...And it has aided, trained and harbored terrorists, including operatives of al Qaeda. The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfill their stated ambition and kill thousands or hundreds of thousands of

innocent people in our country, or any other...Before the day of horror can come, before it is too late to act, this danger will be removed (Bush 2003).

It is clear the case outlined fails to satisfy either the imminent attack of the Caroline Doctrine or the sufficient threat set forth by Waltzer. By circumventing the U.N. Security Council, the U.S. failed to give weapon inspectors time needed to carry out their duties properly. Not only were the weapon inspectors deprived, the U.S. also avoided possible diplomatic resolutions to the crisis. In addition, while Iraq might have actively sought weapons of mass destruction, evidence proving plans for strikes against the U.S. or any of her oversea interests did not exist. However, the U.S. was not operating within the definitions of the Caroline Doctrine or Waltzer's sufficient threat. According to the NSS, "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries" (NSS 2002, 15). The Bush administration's concept of imminent threat calls for action before threats can mature and more closely resembles self-defense of a preventive nature.

As with the war in Afghanistan, clearly the U.S. was looking to expand further *jus ad bellum* principles regarding self-defense. This expansion was to go beyond even Waltzer's sufficient threat. However, a large portion of the international community, including major NATO allies France and Germany, did not support the U.S. position. The obvious connection between the Taliban and al Qaeda made it clear the Taliban regime threatened not only U.S. national security, but also world security. In this context the international community was willing to allow flexibility regarding *jus ad bellum* and not consider the U.S. invasion of Afghanistan as a violation of international law. In the case of Iraq, the evidence supporting the United States and the United Kingdom's claim of a connection between Iraq, weapons of mass destruction, and al Qaeda was ambiguous and in some cases unintentionally false. Without proper evidence, it is inappropriate to ignore restrictions regarding preemptive self-defense, even for the world's only superpower.

The National Security Strategy and Just War Theory

As previously stated, the NSS publicly made preemptive force a viable option for the United States. With the second Iraqi War being the sole example of the NSS operational in a real-world situation, it is simple to declare the NSS unjust. However, it is unreasonable to judge the NSS solely on its application in the Iraqi War. In order to understand its relation to Just War Theory an analysis of the NSS beyond the context of the Iraqi War will be undertaken. Determining whether the NSS is in accordance with international law can occur only after examining it in its entirety.

The NSS is a political doctrine with enormously lofty goals. It states, “The aim of this strategy is to help make the world not just safer but better. Our goals on the path to progress are clear: political and economic freedom, peaceful relations with other states, and respect for human dignity” (NSS 2002, 1). In order to achieve these goals the U.S. possesses numerous options ranging from preemptive action to multilateral diplomatic actions.

Many critics of the NSS point solely to its preventive aspect. However, this is not the lone policy option recommended by the NSS. In fact, found within the NSS are numerous references specifically calling for cooperation with the international community rather than unilateral action. One of the strategies for dealing with the proliferation of weapons of mass destruction (WMD) is international cooperation. This strategy calls for the U.S. to “enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD...We will continue to build coalitions to support these efforts” (NSS 2002, 14). Later the NSS states, “With our long-standing allies in Europe and Asia, and with leaders in Russia, India, and China, we must develop active agendas of cooperation lest these relationships become routine and unproductive” (NSS 2002, 28).

Furthermore, found within the NSS are additional statements calling for international cooperation. Part III of the NSS states, “We will continue to encourage our regional partners to take up a coordinated effort that isolates the terrorists,” and the U.S. “will continue to work with our allies to disrupt the financing of terrorism” (NSS 2002, 6). In the introductory statement to the NSS, President Bush writes; “We are also guided by the conviction that no nation can build a safer, better world

alone. Alliances and multilateral institutions can multiply the strength of freedom-loving nations” (NSS 2002, 3).

Clearly the NSS is much more than a war doctrine. The current situation with North Korea supports this claim. Rather than acting unilaterally against North Korea with military force, the Bush administration is working with all the regional powers, including China, to bring about a peaceful solution to the problem.

However, despite the inclusion of non-military actions within the NSS, there is a strong call for military action for when diplomacy cannot or has failed to resolve a crisis. According to the NSS, when military action is necessary, it will take place before an attack occurs. In some cases, action will be essential even before a threat has fully formed. This military action is self-defense of an anticipatory nature.

There is no dispute that anticipatory self-defense operates in a fashion similar to preventive self-defense. The NSS gives an accurate reading of international law as it stands regarding preemptive self defense.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack (NSS 2002, 15).

It goes on further to say, “we must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries” (NSS 2002, 15). The NSS also states that the U.S. must take action, “even if uncertainty remains as to the time and place of the enemy’s attack.” From these statements it is clear the Bush administration realizes it is operating outside of current international law. However, the NSS presents a clear argument as to why *jus ad bellum* principles must change to meet the threats of the twenty-first century.

As discussed earlier, the Bush administration is justifying its use of anticipatory self-defense by arguing international law must change as the

nature of threats change. The main arguments being that the old deterrence strategies of the Cold War are no longer applicable to the threats represented by terrorists and rogue states. According to the NSS, “traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents” (NSS 2002, 15). Furthermore the NSS states that, “deterrence based upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations” (NSS 2002, 15)

For the Bush administration, anticipatory self-defense is an acceptable option for dealing with the new threats of the twenty-first Century. However, the question remains, should international law, and just war theory, change to allow the use of anticipatory self-defense? Before answering this question, a brief examination of how international law can change needs to be undertaken.

Changing International Law

According to Hans Morgenthau, at the foundation of any legal system “lies a body of principles which incorporate the guiding ideas of justice and order to be expounded by the rules of law” (1958, 218). However, as previously stated, the problem is that no universal set of principles exists. A state cannot superimpose the principles guiding its domestic legal system onto an international legal system. Therefore, what is to be the guiding principle for international law?

A positivist approach to international law believes that the interaction of states is determined through their respective national interests. These actions endeavor towards a system of reciprocity in which states agree to mutually beneficial interests. Therefore, international law “owes its existence to identical or complementary interests of nations, backed by power as a last resort or, where such identical interests do not exist, to a balance of power which prevents a nation from breaking these rules of international law” (Morgenthau 1958, 224-225).

While positivists believe that it is possible to codify the interactions of states within treaties and other institutions, ultimate acceptance of international law comes from the individual states. International law gains

validity when states feel that it is advancing their national interest. More importantly, true validity is obtained when two or more states agree that international law enhances national interest. Thus, when there is “a recognized identical or complementary interest in a certain action on the part of two or more nations, together with the willingness to enforce this action, there exists the likelihood that the same sanctions for the sake of the same interests will also be performed in the future” (Morgenthau 1958, 227). States ultimately seek predictability from an international system and international law offers this predictability.

A key point in Morgenthau’s discussion on the validity of international law is the dependency of the system upon a balance of power. This raises an important question; in the absence of a balance of power, is it possible for a hegemonic state to create its own international law? One could argue that the nineteenth century hegemony of the British Empire allowed for the abolition of slavery. However, the reasoning of this argument becomes less compelling after a closer examination of the subject is undertaken.

In 1833, the British Parliament banned the institution of slavery throughout its extensive empire. Throughout the nineteenth century and into the twentieth, the British became a global police force in suppressing slavery. In the 1840s, “the Royal Navy devoted between a sixth and a quarter of its warships to suppressing the slave traffic” (Nadelmann 1990, 492). Additionally, the British negotiated numerous bilateral agreements with African leaders and European states prohibiting the slave trade. The agreements also authorized the Royal Navy to seize and search suspected slave trading vessels (Nadelmann 1990). In instances where states refused to enforce their agreements, British naval power was quick to intervene. In the case of Brazil, “which had resisted enforcing its agreements with Britain throughout much of the first half of the nineteenth century, British naval vessels seized and destroyed slave ships in Brazilian harbors and threatened to blockade Brazilian ports” (Nadelmann 1990, 492). The naval actions elicited the desired Brazilian response.

From the previous information, one might conclude that British hegemony was the driving force behind the creation of international law that outlawed the slave trade. However, it is important to note that there

were limits to how far British influence could extend. The Ottoman Empire, France, and the United States, “were less susceptible to British coercion than were the Brazilian and black African rulers, either because they possessed significant military power in their own right or because Britain’s other interests restrained it from undertaking coercive actions” (Nadelmann 1990, 494). Additionally, the governments that did comply with British requests did so for numerous reasons. These reasons include, “monetary and territorial compensation, trade advantages, [or] a desire for some political advantage” (Nadelmann 1990, 494). Therefore, one must conclude, while British power was a major factor in enforcing new international law, ultimately it was the states maximizing their own interests that gave the new laws true validity.

States acknowledge that interests change over time and international law is capable of adapting to these changes. However, one should not assume that changing international law is an expedited process. Morgenthau believes when a state “tries to impose rules supported neither by common interests nor by a balance of power, these rules never become valid law or gain only ephemeral existence and scant efficacy” (1958, 225). Even for hegemonic powers, international law will only change once a majority of the states realizes that it is within their interests. Therefore, a state cannot form international law to pursue its own agenda at the expense of the international community.

Conclusion

The 2002 National Security Strategy of the United States is by no means a war doctrine. It does not advocate a policy of shoot first and ask questions later. Critics of the NSS fail to see the numerous references calling for international cooperation. In most cases military action is to be undertaken only after diplomacy has failed. This is in accord with just war theory. However, what critics rightly point out is the unjust nature of anticipatory self-defense.

The second Iraqi War is the only case in which anticipatory self-defense was put into use. Because of this, the war is also the only case available for analysis to determine the just or unjustness of anticipatory self-defense. As discussed earlier, the Bush administration’s justification for

going to war with Iraq went beyond the scope of preemptive and into the realm of preventive. Intelligence failed to find either the imminent threat required by the Caroline Doctrine, or a sufficient threat as defined by Waltzer. President Bush's own words illustrate the preventive nature of the war. He stated, "in 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over... We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities" (2003).

The current position of both international law and just war theory regarding preventive self-defense is clear: It is unjust. Therefore, the Bush administration's concept of anticipatory self-defense, judging by its use in Iraq, is also unjust. Since anticipatory self-defense plays a prominent role in the NSS, one has no choice but to declare it unjust as well. However, it is important to remember that the Bush administration realized it was operating outside of international law and laid out an argument calling for changes within the law. This leads to the final issue. Can and should just war theory and international law change to accommodate anticipatory self-defense?

The first question is a simple one to answer. Yes, just war theory and international law can change. International law is not a set of rules etched into a stone tablet. It is forever evolving and adjusting as the conditions of the world change. Even the portions codified within the U.N. Charter can adjust. The U.S. invasion of Afghanistan proves this. As for just war theory, it would not even be an issue in the twenty-first century if it were unable to adapt to an international system that has been constantly changing over the years. Its ability to embed itself within international law ensures that it will remain an important theory for years to come. However, while these two institutions can change, it does not mean they always should change.

President Bush calling for an expansion of *jus ad bellum* principles regarding self-defense is a situation where both international law and just war theory cannot be flexible. The risk of allowing such a change is simply too great.

Preventive war needs only vague-suppositions and fear as justification for launching an attack. Imminence and necessity play a vital

role in determining whether preemptive action is justified. They are vital because without them, the legitimacy of military power becomes doubtful and the possibility for abuse is real. Additionally, imminence and necessity places a high burden of proof on the intelligence community to prove a threat credible. The post-Iraqi War discussions prove that intelligence is sometimes flawed. Those advocating preventive wars ignore the concepts of imminence and necessity. It is because of this that preventive wars remain unjust.

Additionally, the members of the international community clearly feel that altering international law to include anticipatory self-defense is against both their individual and collective interests. The current laws regarding *jus ad bellum* offer predictability to an anarchic international system. To circumvent international law through unilateral action only serves to undermine the centuries of laborious work of past statesmen. International law must apply equally to all states, even a superpower such as the United States.

Finally, preventive wars are unjust for a practical reason: It is unrealistic to believe that anyone can judge what actions a state *might* undertake in one or five years into the future. As Bismarck said, “I cannot look in Providence’s cards in such a manner that I would know things beforehand.” I doubt anyone in the Bush administration has this power either.

President Bush argues the world is changing and the nature of threats is changing. It is difficult to find anyone to argue against this in the post-September 11th world. However, to allow anticipatory self-defense as a just military option would result in an international system closely resembling the system of the eighteenth and nineteenth centuries. States could go to war whenever they felt it necessary and do it under the guise of promoting peace. Destroying a nation that might be a threat in the future for the sake of preserving another nation is no way to secure peace. It is merely a way of allowing history to repeat itself.

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