CHAPTER 1

Introduction

Deen K. Chatterjee

The increasingly common "preventive" use of military force raises difficult moral and legal issues that seriously challenge prevailing international law. Despite the justifying rhetoric alleging that these anticipatory wars aim to increase or ensure peace and security, such wars pose both moral and political dilemmas. Even when a war is declared in self-defense in response to an actual or imminent show of aggression, it is possible to take a principled pacifist or utilitarian stance instead of resorting to violence. While the long-standing just-war doctrine sanctions military self-defense, and international law endorses it, preventive wars in the name of self-defense when the danger is not actual or imminent raise moral conundrums and lead to problematic outcomes. Also, moral and military hazards of "rescue" wars are compounded when they are preventive wars against anticipated evils. The recent trend of justifying preventive war by blurring the distinction between preemption and prevention with epithets like "gathering threats" does little to clarify the important issues that arise.

The conundrum of whether nations should adhere to existing international law or carry out illegal but morally justified intervention is not new in the context of egregious violation of negative human rights by certain regimes. For instance, illegal intervention in the name of an urgent humanitarian cause occurred in the NATO bombing of Yugoslavia in 1999. But nations hide behind international law in their reluctance to undertake military intervention to enforce basic rights of subsistence. Certainly it is true that raising high barriers to intervention and respecting sovereignty minimizes self-serving military interventions couched in moral rhetoric. If interventions were permitted in inept or failed states in response to their ineptitude, then there would be no limit to military operations, posing a grave threat to the stability of world order. Consequently, "non-interventionism" is the standard thrust of international law, with "reluctant interventionism" being the practice only in exceptional cases.

With the changing nature of warfare in the twenty-first century, the permissibility of preventive war with a broader mandate of intervention has become a major focus of controversy. The bar against preventive use of force is much higher than that for preemption due to the greater odds of mistakes in assessing the severity and likelihood of danger, the extent of harm to non-combatants, and the probability of high incidence of preventive wars resulting from baseless fear or false pretense. Nonetheless, the blurring of the distinction between preemption and prevention in matters of peace and security due to the likely scenario of certain unstable regimes and hostile non-state actors acquiring weapons of mass destruction (WMD) has contributed to a more open attitude toward preventive war. Scholars also point out that a permissive interpretation of preventive measures can be found in the later just-war tradition of Grotius/Hobbes as part of reasonable self-defense, and also in Chapter 7 of the United Nations Charter pertaining to the Security Council in matters of international peace and security. Sovereignty and non-intervention might be the accepted norms, but stipulated measures suggestive of preventive intervention are permissible with Security Council authorization, thus making preventive war legal under current international law.

Nonetheless, matters of legality and morality related to preventive war are far from settled, as the chapters in this volume amply attest. In particular, the self-proclaimed authority of the United States to use unilateral preventive military measures for self-defense under the broad rubric of global security has generated intense controversy. Critics cite the US war on terror as an example of what could go wrong with a permissive policy of preventive war. Since the Bush doctrine of 2002, largely in response to the terrorist attacks on the United States on September 11, 2001, along with the recent wars in Iraq and Afghanistan (with an Iran conflict looming on the horizon), preventive war with a global mandate has apparently become part of official United States policy or doctrine. The thrust of this new direction is framed in terms of national defense and security, though humanitarian preventive intervention remains a policy option, as evident in the recent intervention in Libya (though it is debatable whether the Libya operation was really a case of preventive intervention and whether it could be called a humanitarian mission, given the fact that the Libyan conflict at that time had the appearance of a civil war). The potential for the global mandate of a nation's military, along with all other trends of globalization, has profound implications for international law, international relations, and overall peace and security. The permissibility of preventive war is a central issue in this debate.

The primary focus of this volume is on the moral, legal, and practical viability of preventive war for self-defense and security, though some chapters discuss the moral implications of anticipatory "rescue" wars, mainly for contrast and comparison. Most contributors examine preventive war via analysis of just-war thinking and through the lens of the important public and political issues of war and peace in the twenty-first century.

In Part I, Jean Bethke Elshtain, Chris Brown, and George Lucas examine the conceptual, normative, and methodological terrains of preventive war, both in the context of the just-war tradition and in view of the challenges of the twenty-first-century military conflicts and terrorist threats. Elshtain begins her discussion by exploring whether preventive war is an entirely new and unacceptable idea, as many critics of the Bush administration have charged, and whether preventive war cuts against the grain of American history, which is another common complaint. She asserts that the United States has taken actions in the past that can reasonably be called preemptive if not preventive, and that the Iraq war, if construed as a security decision by the United States (a move that Elshtain finds not unreasonable) can have prima facie justification in view of the failure of the United Nations as a credible organization for collective security. She also contends that due to the ambiguity in many aspects of the just-war theory, it is an open question whether preventive war is justifiable within the just-war tradition. Though the barrier to preventive war is higher than that to preemptive use of force, Elshtain notes that given the changing nature of modern warfare, with the rise of non-state actors and certain regimes posing grave threats to national and collective security, the idea of imminence in estimating the severity of threat should be understood in an expanded sense, making the preventive use of force a viable option in cases of dire emergency.

In his chapter, Chris Brown points out the need for a serious discussion of preemption and prevention in view of the novel and unconventional security threats posed by terrorism and rogue states today. For him, such a discussion is needed on its own merit, regardless of the ill-planned invasion of Iraq and the broad resistance to the Bush administration's National Security Strategy of 2002 – the so-called Bush doctrine. In fact, Brown notes that the importance of examining the ethical and legal implications of preemption is underscored by the fact that the Bush doctrine, though widely critiqued, is still largely in effect as part of current United States policy. In supporting the Bush doctrine of preemption, Brown points out that the doctrine's expanded notion of preemption, which blurs the

distinction between preemption and prevention, is justified in today's world, though he admits that perhaps the reason the doctrine aroused so much skepticism is because it conveyed the impression that it could effectively provide absolute security or be successful in promoting freedom and democracy. In speculating what could replace the conventional distinction between preemption and prevention, Brown proposes a somewhat Aristotelian approach, drawing insights from classical realism and noting that a rule-based justification for preemption is not likely to be feasible in today's uncertain world.

George Lucas offers yet another angle on the normative and methodological debate surrounding preventive war. Declaring that the "case against preventive war is far from clear," he investigates the "methodological chaos" in the debate on the morality of preventive war, concluding that several competing paradigms of prevention and preemption have unduly clouded the case for a limited justification for preventive war. For instance, contemporary international law prohibits unilateral preventive war even in self-defense, but the classical just-war theorists were less clear on this issue. Lucas points out that the classical paradigm not only differs in its methodological stance from the mode of today's legal discourse on the justification of preventive war, it contained ambiguities and indeterminacy in the formulation and interpretation of some of the key provisions of the just-war doctrine, such as just cause, proportionality, legitimate authority, and right intention. In addition, these conditions were not put forth in a consistent and uniform manner, thereby leaving them open to varying interpretations regarding their relative importance or priorities. Thus the crucial notion of self-defense as a just cause, or whether other considerations besides self-defense could count as just cause, were left open-ended in the just-war tradition; yet so much of the debate on preemption and prevention depends on a clear and consistent articulation and application of these terms. All this prompts Lucas to consider the classical just-war doctrine less a coherent theory and more a form of ideal speech – a normative discourse "on the moral constraints on the resort to deadly force." For him, this explains the contrast (and the apparent confusion) between the morality of war and its presumed legality in today's debate. Not unlike Brown's approach in the previous chapter toward addressing the moral dilemmas arising from the conundrum of preemption and prevention, Lucas claims that the classical tradition is better suited to respond to such conundrums in today's complex world than is a rule-bound legalist paradigm that is getting progressively inept in framing the vexing moral issues of war and peace in our post-Westphalian global order.

In his chapter, Lucas writes: "How can law-abiding peoples and nations avoid recourse to the destruction of war, while yet responsibly acting to protect themselves against legitimate threats to their security, welfare, and even to the rule of law itself? This question deserves careful scrutiny on its own terms (as the remaining contributors to this volume attest)." Indeed they do! The conceptual, normative, and policy issues raised in the first part of the volume require a closer scrutiny of the legal and moral dilemmas of preventive use of force and an assessment of these dimensions in a world order that is juridically horizontal (interactions of sovereign states) and geopolitically vertical (shaped by doctrines of exception and unilateralism). With that objective, in Part II, Michael Blake, Richard Falk, and Larry May discuss the moral dilemmas of preventive war by focusing on international legal norms and institutions, while later chapters take up the task of critical moral assessment of prevention.

Michael Blake begins his chapter by noting that there is both a right and wrong way of explaining our intuitive disapprobation of preventive war. The wrong way begins with the negative consequences of the acceptance of a doctrine of preventive war, and proceeds to condemn the doctrine itself. This equation is incorrect, Blake suggests, because it confuses the validity of the doctrine with the empirical consequences of widespread endorsement of the doctrine. A better way of explaining our hostility toward preventive war, he argues, accepts that preventive war can be morally justifiable where serious threats to national self-interest may be found, but that a legal principle condemning the unilateral pursuit of such wars might nonetheless be defensible. Such legal principles might be grounded not directly in the moral status of the war itself, but indirectly in the beneficial consequences of demanding that individual states articulate their cases to an impartial international community. This conclusion requires us to rearticulate the moral status of international law. We should not, Blake concludes, think of international law as itself providing authority for a war, but rather giving a legitimate demand for provision of evidence that the moral authority for warfare already exists.

In an interesting twist to the logic of preventive use of force, Richard Falk discusses the challenges of preventive use of threat, or what he calls "threat diplomacy" in world politics, specifically against the backdrop of ongoing confrontation with Iran. He finds it revealing that while the global discourse has been focused on the perceived Iranian threat, almost no attention has been paid to the legality or propriety of the dire threat directed against Iran. Article 2(4) of the United Nations Charter prohibits threat or use of force in a most unconditional language – it does not

distinguish between threat and international uses of force in its "war prevention goal" after the Second World War. Thus a threat to use force against the territorial integrity and security interests of any state is against international law and morality as mandated by the United Nations Charter. Accordingly, Falk finds it surprising that the Security Council has rarely been criticized for failing to come forward on behalf of the weaker states in the face of ongoing and illegal threats directed at them, for instance in the years leading up to 2003 against Iraq and the current confrontation against Iran. For Falk, this asymmetry in global perception is indicative of the geopolitical hegemony by powerful states over the legitimate rights of weaker states.

In the course of discussing whether it is realistic or legitimate to prohibit all threat to use force, and whether threat diplomacy can be effectively used to bring the parties to negotiation, Falk looks squarely at evolving concerns surrounding threat diplomacy. He spells out five dimensions where the issues merit careful scrutiny: international law, deterrence, the long war after the 9/11 attacks on the United States, countering nuclear proliferation, and nuclear terrorism. Falk shows that in each case the reliance on threats has the potential to make matters worse, while not using threats can improve a situation. In sum, reliance on coercive diplomacy paves the way toward unilateralism and non-accountability of the hegemonic powers, which is not good for world peace and is also counterproductive and imprudent for the countries themselves relying on such measures.

In probing the nature of aggression and international criminal responsibility, Larry May's primary concern in his contributed chapter is whether those who undertake preventive war where there are serious human rights violations should be prosecuted in an international tribunal for such wars. Is the fact that the war was preventive a defense against the charge of aggression or at least a mitigating factor concerning punishment in such cases? For May, this is an especially pressing issue in international criminal law, as the International Criminal Court debates whether to begin prosecuting cases of the crime of aggression along with the other three crimes under the Court's jurisdiction, namely crimes against humanity, genocide, and war crimes.

May proceeds first to distinguish preventive wars from preemptive and anticipatory wars. For that, he turns for guidance to the just-war tradition of Gentili and Grotius. While for Gentili first strike as anticipatory defense is justifiable even if there is little evidence that a danger is imminent, Grotius is more cautious in arguing that an offensive war is hard to justify in anticipation of an attack that may not materialize, and the premise can

be used as a pretext for a self-serving and unjust war. May points out that this idea still forms the norm in current international law. Accordingly, for May, the Bush doctrine's provision for not precluding uncertainty and lack of evidence in engaging in warfare is closer to Gentili's view. It goes beyond "interceptive" or even anticipatory use of force and departs from the accepted international norm.

In deciding which international institution should determine what is aggressive war and which state has engaged in it, the issues of fairness and proper authority come to the fore. In the absence of any binding institutional jurisdiction in world affairs, the most obvious institutions that would have a legitimate claim of authority to decide which state is an aggressor are the ones that were set up by large multilateral treaties. According to May, the United Nations or one of the international courts are the most obvious institutions having such authority. In matters of determining aggression, the United Nations has the advantage since it was established to put an end to aggressive war, though May notes that there is dispute about which part of the United Nations should have the proper authority to decide on aggression: the Security Council, the General Assembly, or the Secretary General, each having serious drawbacks. May claims that the International Criminal Court, on the whole, should be the most likely body to decide on state aggression, though he notes that the ICC too has its problems.

In initiating trials of aggression after a preventive war, there are competing considerations ranging from deterrence and retribution to reconciliation and fairness. International trials for aggressive wars, including preventive wars, are held for discouraging military and political leaders from engaging in this type of war, as well as holding them accountable if they do. On the other hand, considerations of reconciliation for the sake of peaceful resolution of war may take precedence over deterrence and retribution in the aftermath of preventive war. But, most importantly, fairness considerations may prevail against prosecuting leaders of preventive war because such wars are often not clear-cut cases of aggression. Most military and political leaders engage in preventive wars because of their good-faith commitment to the safety and security of their own people. Thus, for May, while states may be condemned and even sanctioned for waging aggressive wars of prevention, in general it may not be fair to bring state leaders to trial for pursuing such wars. He argues that we should be more cautious in cases of individuals than in the case of states. He finds the bifurcation between Grotius and Gentili instructive here: Grotius' criteria for aggression should be construed as standards for state aggression, for

which states should be held liable, and Gentili's expanded standards should be used for determining when state aggression may have constituted crimes of aggression, for which individuals should be liable for prosecution.

Part III contains three critiques of preventive war: Jeff McMahan's specter of moral conundrum, Stephen Nathanson's observation that both just-war theory and rule consequentialism lead to a rejection of preventive war, and Alex Newton's demonstration, though not a critique of preventive use of force *per se*, of how a policy of anticipatory prevention can go gravely wrong. McMahan notes that one moral objection to preventive war is not extensively discussed: the fact that preventive war generally requires attacking military personnel who may not have done anything, individually or collectively, to make themselves morally liable to attack. Preventive war, in other words, may involve large-scale intentional killing of innocent people. One response to this objection is that people who voluntarily join the military thereby make themselves strictly liable to attack, and even to preventive attack, if their government engages in planning and preparation for an unjust war. Consenting to join the military in the knowledge that this involves a risk of being used as an instrument of wrongdoing is sufficient to make a person liable to attack if he or she later has the misfortune to serve a government that begins to prepare for aggressive war. For McMahan, however, there are at least two concerns about this response. First, to prevent this claim from collapsing into a doctrine of pure collective liability, whereby soldiers are held liable to attack merely by virtue of group membership, it is necessary to distinguish between voluntary and non-voluntary membership. Yet this is a difficult normative rather than straightforwardly factual issue, since there is usually some element of choice in being or remaining in the military. But, second, if we concede that membership as a result of extreme coercive pressure counts as non-voluntary, it might follow that countries with universal conscription and draconian penalties for refusal to serve could not be morally liable to preventive attack while countries with volunteer armies could – an unsettling conclusion.

Stephen Nathanson's chapter begins with Michael Walzer's well-known case against preventive war. He argues that Walzer's approach is weakened because of his acceptance of a highly truncated version of just-war theory, a version that deprives him of important grounds for rejecting preventive war. Given Walzer's claim that just cause is sufficient for a just war and his dismissive remarks about proportionality and last resort, he has little basis for critiquing a preventive war that is motivated by the goal of defending a nation from a (perhaps distant) future attack. In contrast, Nathanson aims

to defend the view that preventive wars are not justified and finds support in the multiple criteria of traditional just-war theory's *jus ad bellum* framework. For him, the one criterion that is especially impossible for preventive wars to satisfy is last resort – a criterion that he claims is "extremely plausible." In addition, even if any one criterion can be construed as a justification for going to war in anticipatory self-defense, the theory's multiple criteria collectively impose constraints on such a move. In essence, the *jus ad bellum* criteria provide us with a nuanced, balanced, rational, and impartial framework for evaluating a broad range of complex issues that mitigates partial, rash, and narrow perspectives. Nathanson finds this approach consistent with the cost/benefit evaluative framework used by the consequentialists for promoting overall human well-being. He argues that rule consequentialists might in fact adopt a version of the traditional *jus ad bellum* criteria in objecting to preventive war. However, Nathanson suggests that often in actual cases, a simple, rough-and-ready best case/worst case analysis can be psychologically compelling in spite of its evident defects. This is why he finds preventive war so dangerous as an option.

Alex Newton's chapter on the confrontation between Iran and the United States is a case study of the current situation from the perspectives of international law, international relations, and the morality of warfare. Through careful examination of the international trends and practices, the evolving uncertainties and ambiguities of the situation in Iran on the nuclear front, and especially the past and current policies and guidelines of the United Nations, along with the pronouncements of leading authors on international relations and ethics, Newton concludes that any preventive military strike by the United States on the Iranian nuclear facilities would be gravely mistaken and patently illegitimate, both legally and morally. Her chapter is not a critique of preventive war *per se* but addresses the moral and practical hazards of a preventive strike against Iran at a time when such a course of action is openly contemplated in influential political circles. She makes her case vivid through analogies with the mistakes of the 2003 invasion of Iraq. However, relying heavily on Michael Doyle's "jurisprudence of prevention" that draws on the just-war criteria and supports unilateral prevention in rare cases, Newton seems to leave open the possibility of a justified preventive use of force against Iran if and when Iran is deemed by credible evidence to be a sufficient and unacceptable threat.

In the fourth and final part, Tony Coady and Deen Chatterjee look beyond the option of preventive war to seek durable peace and security.

Contrary to the viewpoints presented in earlier sections, where some authors elucidate the need for a suitable policy of preventive use of force in response to the conditions of the twenty-first century, Coady sees no legitimate application of such a policy in today's world and finds the just-war prohibition of preventive war entirely valid. Chatterjee substantiates the traditional just-war resistance to preventive war by articulating the notion of "just peace." Both he and Coady favor diplomacy and proactive measures such as institutional reforms for a durable global civil society in order to eliminate the need for preventive use of force in the name of peace and security.

Coady notes that the arguments for preventive war are basically those encapsulated in the slogan "prevention is better than cure," the idea being that preventing something bad from happening is less costly and more effective than dealing with it after it has happened. For Coady, the slogan's benefits depend heavily upon the sort of prevention in question and the likely incidence of the harm being forestalled. Information campaigns about the advantages of exercise and a healthy diet in the cause of preventing heart disease, strokes, and diabetes are one thing; bringing massive, lethal violence to bear upon foreign populations in the hope of preventing their doing something horrific is quite another matter. Coady's chapter addresses the problems of preventive war and argues that the slogan has no legitimate application to warfare in the world as it presently is or is likely to be in the foreseeable future. He examines certain arguments that seek to show the need to abandon traditional just-war objections to preventive war, especially those that use analogies from domestic law enforcement, such as laws against conspiracy and attempted criminal activity. These arguments seek to bring anticipated crimes within the ambit of just cause, but Coady argues that they are unsuccessful. He specifically directs his objections to those preventive wars that are targeted against potential terrorism and anticipated persecution of citizens by their own governments, arguing that these cases of preventive military measures face overwhelming difficulties. Coady then points out effective non-military alternatives, for instance, in the case of terrorism: policing, surveillance, diplomacy, education, international cooperation, recognizing and meeting genuine grievances; in the case of government persecution of its citizens: diplomatic pressure, non-violent coercive measures including carefully developed sanctions aimed at the rulers rather than the ruled, economic and financial measures aimed at dictators, and legal sanctions against powerful persecutors. Coady notes that these methods, though likely to be effective, are not guaranteed to fully succeed and are not easy