Preemptive and Preventive Wars

George P. Fletcher
Jens David Ohlin

DOI: 10.1093/acprof:osobl/9780199757213.003.0007

Abstract and Keywords

This chapter tackles the issue of preventive and preemptive wars, and whether the doctrine of legitimate defense could justify such action. It highlights the phrase “armed attack occurs” in the UN Charter that draws the line between legitimate and illegitimate military force. It also considers the issue of determining imminence, as preventive war would normally be disallowed by the doctrine of legitimate defense if the attack was imminent.

Keywords: preemptive war, preventive war, international law, military force, illegitimate force, legitimate defense, United Nations Charter

When criminal lawyers talk about preemptive self-defense, they mean something negative, but when international lawyers use the same term, they mean no more than that the defender used force before it was faced with an “armed attack.” Although the doctrine of preemption gained renewed notoriety following the U.S. invasion of Iraq, the issue is one of the oldest in international law and has been debated ever since legal scholars started discussing the legality of warfare. The early debates focused on the balance of power between states
and whether a nation could prosecute a war merely to restore its regional superiority or prevent a neighboring nation from increasing its military strength. But in the modern framework of the UN Charter, it is the phrase “armed attack occurs” that draws the line between legitimate and illegitimate military force. A military response in the absence of an armed attack is illegal under international law unless authorized by the United Nations Security Council. But no one could reasonably propose a doctrine of self-defense that was limited to striking back only after being struck by a phalanx of bombers or guided nuclear missiles. Indeed, there would be an obvious contradiction in requiring states to wait until the missiles were under way or had struck their targets. Justifiable self-defense would then automatically qualify as a reprisal, inflicted after the attack was over. This would turn the entire notion of self-defense on its head.
1. Redefining Imminence
Preventive war would normally be disallowed by the doctrine of legitimate defense, because an attack must be *imminent* before the right to legitimate defense is triggered. This was discussed in chapter 4. Unfortunately, international law gives us little guidance on the question because there is no treaty explicitly defining imminence. And although it is clear that the imminence requirement is part of customary international law, we have no idea what the term means when it is used by state parties. Therefore, the battleground for this debate is the correct definition of imminence. Do the soldiers have to be crossing the border for the attack to be considered imminent? Surely this imposes too high a burden on the defender. Under these conditions, the defender would never have the opportunity to muster sufficient resources to successfully respond to the attack. On the other hand, if we define mere preparations for war as within the definition of an imminent attack, we grant the defender license to attack every strategic enemy.

Kant, surprisingly, argued in favor of preemptive war, suggesting that any preparation for war represented a shift in the balance of power that constituted an act of aggression. Kant argued that the international system is essentially a state of nature, with no overarching legal system that could vindicate a state’s rights. “States, like lawless savages, exist in a condition devoid of right,” he wrote. One state cannot sue another state for violating its interest, and so it falls on each state to use force when necessary to protect its interests, just as each individual can protect himself in the state of nature. Furthermore, mere preparations for war might constitute an act of aggression, according to Kant, against which another state might legitimately claim a “right of prevention” that it might vindicate with its own forces. Similarly, any attempt by one state to alter, to its advantage, the balance of power in its region would trigger the same right of prevention. Kant says that there is a “right to a balance of power among all states that are contiguous and could act on one another.”

For a philosopher concerned about “perpetual peace”—the end-game that we are all striving for—Kant’s view strikes most modern readers as a recipe for constant war. However, his views are instructive and demand greater attention. Kant thought that our ultimate goal should be to achieve a perpetual peace, though he did not think such a state of affairs
was possible in the international realm. The only way to achieve perpetual peace would be to create a world government through a social contract among the world’s nations. Though an enticing possibility, the (p.157) globe is too fractured with diverse and warring parties to be unified under a single government. The most that can be achieved, according to Kant, is something approaching world government through a weak confederation of states, committed to peaceful relations with each other and providing a legal framework for resolving disputes. These arrangements are entirely voluntary and can be dissolved at any moment, throwing states back into a state of war with each other.

Here is the interesting part of the argument. In the state of war, a nation has the right to vindicate its rights, “unlimited in quantity or degree,” against an unjust enemy, since there is no world government to do this for it. This is literally “the right to make war,” and it includes launching a preemptive strike against military preparations. How does one decide who is the unjust enemy? Kant’s answer is highly instructive. Borrowing on the structure of his great categorical imperative, Kant argues that an unjust enemy is one who expresses a maxim that “would make peace among nations impossible and would lead to a perpetual state of nature if it were made into a general rule.” This mirrors the same kind of universalization that he urges us to adopt when we decide if our own individual actions violate the categorical imperative. Ironically, this is the very problem of preemptive war. If every state prosecuted its strategic interests by launching preemptive attacks, the world would indeed collapse back into a state of nature. This is the very reason for the UN Charter’s general prohibition against the use of force.

Of course, much has changed since Kant’s time. There is now a functioning international legal system, including the United Nations, which did not exist when Kant was writing. It can no longer be said that states are in a state of nature with each other. Indeed, states can sue each other, not just at the International Court of Justice, but also at other regional and international organizations devoted to particular subject matter, such as the World Trade Organization. True, it is important not to exaggerate the scope of the international legal system. Much of international law must be enforced by states themselves, and there is no international police force to execute judgments. But this is a facile point. Questions of
international law are capable of adjudication, at the United Nations and elsewhere, and states have access to numerous legal fora to resolve these disputes.

The real issue here is imminence. A state is not required to wait for adjudication of its disputes when it is looking down the barrel of a gun. Whatever vindication that might be had would come much too late. But this is also true in the domestic law of self-defense. Indeed, this is the (p.158) whole point of self-defense. Imminence requires that you stand in the position of the government and use the force that they would if they were on the scene. But you cannot wait for a court to recognize your rights when the danger is imminent. No court can give you your life back once it is taken from you. It is therefore essential that you act immediately. In a sense, then, you temporarily borrow back from the government the authority to exercise force that you ceded to the government through the social contract. The same is true of the state, which is prohibited from using force under the UN system, but may do so when faced with an imminent attack.

The question is how to determine when an armed attack has begun. Any coherent doctrine of self-defense would permit a response as soon as the attack becomes imminent. Sensible interpretations of the Charter read the word “occur” to mean “be actually present,” and “present” means that the attack is imminent or about to occur. Thus, in his authoritative study of self-defense under international law, Yoram Dinstein comes to the conclusion that the Charter permits defensive force against an imminent attack.8

Whether you call a military response preemptive or not depends on your definition of a military “attack.” There is nothing preemptive about responding to a military attack in progress, but how we should define an attack in progress is totally unclear. So in terms of justifying real-world military responses, the concepts of attack and preemptive war are inversely proportional. If you have a sufficiently broad definition of attack, then you may not even need to resort to a theory of preemptive war, because you can simply claim that the military response is designed to stop the attack, not prevent it. If, on the other hand, you have a narrow definition of what constitutes an attack, then a good theory of preemptive war is essential, because you will need to find a justification for launching a military response before the
attack began. Many commentators are confused on this point. You do not need a broad notion of what constitutes an attack and a theory of preemptive war; one or the other will do.

At first glance it might seem easy to come up with a workable definition of what constitutes an attack. It goes without saying that when the troops are crossing the border and the planes are in the air, we have an armed attack. But what if the military forces are mobilizing but have not reached the border? What if the military forces are just training for the attack? What if spy planes are gathering intelligence that will be necessary to launch a successful attack? The question is where to draw the line. Once you admit that a state need not wait until the troops are crossing (p.159) the border before engaging in legitimate defense, the question of line drawing becomes very difficult.

Perhaps the most famous example of preemptive engagement was the 1981 Israeli air strike against Iraq’s nuclear power plant at Osirak. The facility had a nuclear reactor that could have been converted in the future to produce weapons-grade nuclear material, though the International Atomic Energy Agency was monitoring the site to prevent weaponization. But it was no secret that Israel was a prime target for Saddam Hussein’s military ambitions. Israel was not willing to wait until Scud missiles that could deliver a nuclear payload were launched. Indeed, it was unwilling to wait until the bombs were even built; it decided to strike when Hussein’s nuclear program was still in its development stage. Israel launched its airplanes, crossed into Iraqi territory, and destroyed the reactor in a military action that triggered criticism around the world. Many legal scholars assumed that the attack was illegal because it was not in self-defense. But could one make the claim that Iraq was in the process of attacking Israel because it had promised to destroy Israel and was now building the bombs to make this happen? This argument is provocative, although it is a stretch to pull back our definition of the attack so far that it extends to the time when the bombs are first being manufactured in the munitions factory. This strains credulity. Our definition of an attack must be something broader than troops crossing the border, but something narrower than mere preparations for war such as strategic planning.
So the only way to defend the Osirak strike would be to label it “preemptive” and carve out an extension of the doctrine of legitimate defense that permits preemptive action, even in the face of Article 51’s language that an armed attack must occur. Why should we call responses to imminent attack preemptive? As we have noted, the term carries negative associations in the minds of criminal lawyers, and in many international conflicts the popular use of the word echoes its use in domestic criminal law. During the cold war, for example, there was considerable debate about a preemptive strike against the Soviet Union. Both sides stood prepared to launch humanity-threatening nuclear missiles against the other, yet neither side moved to strike first. If one side had feared that the other was preparing for war and decided to save itself by trying to eliminate the missiles of the enemy, it would have considered its action a preemptive strike. It would have thought its use of force was politically necessary, but it could hardly have claimed that its preemptive strikes met the criteria of international law in the United Nations Charter. A preemptive strike during the cold war would be paralleled in the domestic context by Bernard Goetz’s intuition that all the blacks in the subway were dangerous and prepared to attack him. Striking first against the Soviet Union would have been equivalent to Goetz’s pulling his Smith & Wesson .38 prior to any threatening action and thereby preempting the use of force. There is little doubt in the criminal law of any country that a preemptive strike based merely on fear is illegal.

Indeed, the term “preemptive strike” should carry a connotation of illegality. It falls below the threshold of defensive action against an imminent attack. The U.S. attack on Iraq in March 2003 was clearly preemptive: there was no proof of an imminent threat against the United States or any other country. Even if the White House’s evidence of Hussein’s weapons arsenal had been accurate (and now we know that it was not), the most the Bush administration could claim was that Hussein was preparing a nuclear force, either to aggress against other countries in the region or to intimidate them to conform to his policies.

It is dismaying, then, that in his first debate against President Bush in the 2004 campaign, Democratic presidential nominee Senator John Kerry said that he subscribed to the doctrine of
These are his startling words: “The president always has the right and always has had the right for preemptive strike. That was a great doctrine throughout the cold war.”

This is flawed and, frankly, irresponsible rhetoric. Kerry had an opportunity to distance himself from the conception of presidential power that led to the war in Iraq and he failed to do so. His answer to the moderator’s inquiry did not mention international law; instead, he introduced the misleading phrase “global test”:

You’ve got to do [the preemptive use of force] in a way that passes the ... global test where your countrymen, your people understand fully why you’re doing what you’re doing. And you can prove to the world that you did it for legitimate reasons.

This was essentially right, but formulated in a discouragingly confused way, and Kerry then had to defend himself repeatedly against Bush’s charge that he wanted to give foreign nations a veto over our use of defensive force. Obviously he did not mean to vest veto power over American defense in the Security Council or any other organization. But he might have avoided this implication altogether by simply citing the Charter, which explicitly recognizes that no nation need surrender its inherent right of self-defense.

However artlessly worded, Kerry said something very important in his use of the phrase “global test.” What he meant (and should have said) was that the use of defensive force should be based on public evidence—evidence that the entire world can see. The administration’s claim that Hussein’s possession of a few aluminum tubes proved his dangerous potential hardly satisfied the global test of persuasive proof. Nor was Secretary of State Colin Powell’s presentation to the United Nations more satisfactory. Powell projected a photograph of a trailer and said, essentially, “This is where Saddam is manufacturing chemical weapons.”

The best example of public proof was the exemplary presentation made by U.S. Ambassador Adlai Stevenson to the UN General Assembly during the Cuban missile crisis in October 1962. The photographs proved that Castro was installing Soviet-supplied potentially aggressive land-to-land ballistic missiles capable of delivering nuclear bombs to
American soil. These photos met the global test. The world community was convinced that Castro was dangerously changing the strategic relationship between the Communist bloc and the United States. Stevenson could confidently dare Soviet Ambassador Andrei Gromyko to provide contrary evidence. He was ready to wait “until Hell freezes over” for the Soviet reply.

As a result of this public demonstration of the danger, President Kennedy’s moderate act of self-defense—the blockade of shipping lanes to Cuba—arguably met the criteria of necessary action against an imminent threat.\textsuperscript{10} Admittedly, there was no proof that Cuba intended to attack the United States, but it did intend to alter the balance of power between the superpowers. Kennedy’s response, coupled with a secret agreement with the Soviets to remove American missiles from Greece and Turkey, contributed to the stabilization of power during the cold war. The Soviets dismantled their missiles in Cuba and the world was made safer for both sides.\textsuperscript{11}

Perhaps the terminology of international law should conform more closely to the language of domestic criminal law, which treats the use of force against apparent imminent aggression as a standard case of justifiable self-defense. Also, the word preemptive unnecessarily demotes the status of self-defense against imminent attacks—when, in fact, that is the only kind of self-defense there is. Actual self-defense is based on a response to an imminent threat of harm. Indeed, this scenario is the only case of legitimate and properly defined self-defense.

The danger of our current usage—and this became evident in the 2004 presidential debates—is that we tend to confuse three different kinds of military action: actual self-defense, preemptive war, and preventive war.\textsuperscript{12} In the history of warfare, states have frequently engaged in preventive war when they thought the alliances arrayed against them were becoming too powerful. A classic example is the war of Spanish succession, which broke out in 1700 when it appeared that France might lay claim, by legal means, to the Spanish throne. Any strengthening of the alliance between the major powers of France and Spain threatened both the military and trade interests of countries like England and Holland. When one state threatened to become too powerful too quickly,
maintaining the balance of power in Europe meant going to war.

Preventive war is a splendid example of what Clausewitz meant when he described war as “politics by other means.” Despite efforts by the United Nations to prohibit the political use of force, the notion of preventive war remains viable—and worthy of discussion—in the post-9/11 period. President Bush’s doctrine of preventive war, outlined in a speech at West Point in June 2002, states that the United States “must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.” He then added, “In the world we have entered, the only path to safety is the path of action. And this nation will act.” This is an extreme application of the principle that the best defense is a good offense. In other words, in the Bush doctrine, the best form of self-defense is preventive aggression.

It would be interesting to apply these categories—actual self-defense, preemptive strikes, and preventive force—to domestic criminal law. We all seem to accept the basic principles of self-defense, and we might also be tempted to use a preemptive strike when we think that someone we fear is preparing an aggressive attack. The first would be certainly legitimate (except in the eyes of some pacifists), and the second might appear

<table>
<thead>
<tr>
<th>Table 7.1. Describing the Use of Force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action</td>
</tr>
<tr>
<td>1. Response to a shooting in progress</td>
</tr>
<tr>
<td>2. Using force against someone who is pointing a gun and threatening to shoot</td>
</tr>
<tr>
<td>3. Using force against someone stockpiling weapons</td>
</tr>
</tbody>
</table>
(p.163) legitimate to some people, depending on their assumptions about who is the virtuous party and who is the rogue. But it is hard to imagine a legitimate claim of preventive individual self-defense. Applied to an interpersonal conflict, the Bush doctrine would generate constant criminal aggression, designed to keep “possible enemies” off guard.

The dissonance between the languages of domestic and of international criminal law is summarized in Table 7.1. It would obviously be in everyone’s interest to bring these two spheres of language into harmony.
2. Battered Wives and Battered Nations
The requirement of imminence admittedly has its opponents. At one extreme is the United Nations Charter, which, if interpreted literally, would either eliminate the right of self-defense or, as a practical matter, reduce the exercise of that right to the period between the moment enemy missiles are launched and the instant they strike. At the other extreme we find the Model Penal Code, which as early as 1962 sought to water down the required threshold for attacks that could be legitimately resisted. The MPC created a new standard: Force should be permissible whenever the defender reasonably believes that “such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” Many of the states that reformed their criminal codes in the 1970s and 1980s followed this standard of immediate necessity.

At the time the MPC was drafted, the argument was that certain hypothetical cases could not be properly solved under the standard of imminence. Typically, these were cases in which the threat was slow but inevitable. Suppose a terrorist threatens to implant an undetectable nuclear device that is set to explode in a year. He can be stopped now, but once the device is implanted, it will be too late. Cuba’s installation of missiles threatening the United States comes close to this hypothetical situation. In these cases, the attack is not imminent, but the threat is real and ineluctable, and recognizing a right of legitimate defense would seem sensible and appropriate.

The MPC’s innovation anticipated a debate that erupted a few decades later about battered women who kill their batterers in their sleep. To make the threat seem serious and inescapable, imagine that before falling asleep the batterer threatened to kill the woman when he woke up. Of course, the woman could run from the house. To counter this objection, the defenders of battered women argued that the female victims suffered from a psychological condition called “learned helplessness.” As a result of “battered woman syndrome,” they had lost the capacity to take certain precautionary measures. If this syndrome is accepted, then one might well argue that the defendant reasonably believed that killing was “immediately necessary on the present occasion.” The MPC standard proved more attractive to battered female defendants than the conventional and
traditional standard of imminence. Accordingly, the imminence standard encountered much opposition in the wave of feminist writing that swept the law reviews in the last decades of the twentieth century.

It is no wonder that advocates for battered women were eager to support the MPC standard of immediate necessity. This seemed to accord exactly with the situation faced by many victims of domestic abuse. Although the batterer had inflicted life-threatening physical abuse in the past, the women sometimes killed their abusers while they were sleeping, watching TV, or otherwise engaged in passive recreational activities—a point in time when there was no imminent danger. They chose these moments because they knew that there was more abuse to come and that this particular moment in time represented the only chance to defend themselves from attack. If they waited until their batterer woke up—and the beatings resumed—they would have no reasonable chance of defending themselves. But if they acted now they could save themselves. Their use of defensive force was immediately necessary under the circumstances, at least according to their lawyers.

The immediately necessary standard was also beneficial for another important reason. The earlier portrait of women suffering from battered woman syndrome suggested that they were so abused that they were totally confused and unable to determine when they were really in danger. Consequently, they misread the situation and lived in a constant state of fear. This legal argument emphasized the psychological effects of the syndrome and made the defense sound like an excuse. The women were so psychologically fragile that they should not be held responsible for their actions. But the new standard emphasized that the behavior of the women was rational and based on a calculation that they had one last good chance to protect themselves before their abuser woke up again.\(^{18}\) This sounds much more like a justification, which accords with the feminist intuition that the actions of the abused woman were justified and lawful, and not the result of psychological infirmity.\(^{19}\) Tellingly, most victims of the disorder felt justified in their actions and did not run from the scene or attempt to evade capture. They were willing to tell the police (p.165) what they did—explain their actions, as it were—for the simple
reason that they believed that what they had done was justified.

Of course, the success of this defense depends on whether, as a factual matter, the killing of an abusive person in his sleep is really immediately necessary under the circumstances. This depends on the facts of each particular case, the nature and extent of the abuse, and the beliefs of the woman. Regardless of whether these claims are successful, though, the important point is the shift in standard to one of immediate necessity. This innovation of the Model Penal Code represents a fundamental shift in our theory of legitimate defense and could, furthermore, provide a theoretical foundation for a preemptive attack. Just as the battered woman can launch a preemptive attack if it is immediately necessary under the circumstances, can a nation launch a preemptive war if that moment in time represents its last best chance to defend itself? Our view is that if preemptive war is ever justified as an exercise of legitimate defense, it would have to be justified using the Model Penal Code approach. This should be the conceptual framework for our analysis.

Some academics have tried to apply this approach to “battered nations,” although these arguments have not yet filtered down to the level of international lawyers. If they did, the UN might be more sympathetic to the various Israeli actions that reflect the constant urgency of counteracting Palestinian terrorists. In international affairs, the historical trend toward weakening the criterion of imminence derived largely from the fear of nuclear proliferation. No one thought of invading France when de Gaulle acquired his force de frappe, but when certain rogue states threatened to join the nuclear club, the situation looked different. When Iraq started to build a nuclear reactor in 1981, allegedly for peaceful purposes, Israel feared that Iraq would use the Osirak reactor to make a bomb and launch an attack against it; Israel sent in its war planes. At the time the United Nations condemned the use of force as unlawful, there was no threat of imminent attack. Israel’s official defense was that it was still in a state of war with Iraq, which had never signed an armistice agreement after the Israeli War of Independence—which was fought against Iraqi troops, among others. This might have been true, but there
was a de facto armistice, which Israel had unilaterally violated by sending in its planes.

Israel’s best argument was that it would be too dangerous to tolerate nuclear weapons in the hands of a sworn enemy. This argument applies the battered woman syndrome defense to international relations, though the accent is on the rogue batterer rather than the battered victim. Israel’s allegedly defensive action gave birth to an argument that came home to roost—coincidentally—in the U.S. invasion of Iraq in March 2003, when the Bush administration argued that it had to intervene to prevent Hussein from deploying weapons of mass destruction. Though we now know that this suspicion was false, we must assume for purposes of analysis that the administration had reasonable grounds for its fears.\textsuperscript{22} Does not the possibility of WMD pose a serious challenge to the requirement of imminence as the threshold of a legitimate defensive response?

One might argue that, under the MPC standard, the United States thought it was immediately necessary to invade Iraq, but one would be hard put to apply the proviso “on the present occasion” to the prolonged ten-year period in which the United Nations imposed sanctions on Iraq and conducted inspections to control its supply of weapons. Nothing in particular had happened to support the decision to invade on March 20, 2003—or indeed, in 2003 rather than 2004.

In Israel’s case, timing was obviously more relevant. Israel knew Hussein was building a reactor. Once the reactor was in place, the Israelis would not know whether plans were under way to exploit the resulting enriched uranium to build a bomb. They might have plausibly argued that, though the threat was not imminent, the use of force was, in the language of the Model Penal Code, “immediately necessary on the present occasion.”

The problem with this argument is that it leads us to base our determination of necessity on efficiency. Actions appear to be necessary if they are based on a reasonable judgment of the costs incurred, relative to the benefit of undertaking the action and counteracting the threat. In cases of individual self-defense, the calculations are simpler. It is reasonable to protect your life when faced with a potentially deadly attack, even if the cost is that the attacker will die, because the value
of your life is high. No one doubts this. If you apply the cost/benefit approach to international disputes, however, the calculations become somewhat more complicated. The United States would have to claim that the danger posed by a rogue state acquiring WMD is so great that violence is justified to counter the risk. The number of deaths now would be smaller than the future deaths caused by the rogue state. (Indeed, the U.S. argument would have evaporated if it were forced to admit that invading Iraq caused more civilian deaths than would have been the case if Hussein had retained his weapons and used them against his enemies.) Unfortunately, this creates a standard that anyone can apply in any case in a self-interested manner. A coalition of Islamic states fearful of American intervention might justify bombing the United States based on the same perception of risks and benefits.

(p.167) The facts of life in the nuclear age have forced us to concede that the standard of imminence is contestable, but it is hard to know what should replace it. Cost/benefit analysis supports intervention when the perceived danger is great enough. In the view of the Bush administration’s policies, there was little doubt that the danger justified the invasion of a rogue state. However, if we believe that in the future the international community should avoid the sort of mistakes we have witnessed in Iraq, perhaps we should reconsider whether the imminence standard should be defended against those who would ease the threshold of legitimate defense.

The Israeli attack against the Osirak reactor and the U.S. invasion of Iraq highlight two major problems that have received virtually no attention in the literature of international law: whether it is possible to maintain the rule of law without adhering to the principle of reciprocity, and whether the legitimate use of force must meet a “global test,” in the sense that it must be based on publicly observable facts. Each of these elementary requirements of the rule of law requires comment.

First, on the issue of reciprocity. To put it colloquially, what’s good for the goose must be good for the gander. There is no way that Israel can claim a right to strike the Osirak reactor without recognizing the reciprocal right of Iraq to attack Israel’s reactors in Dimona. If one is a threat to peace, then so is the other. The same is true of the U.S. threat to invade Iraq, which became apparent—and indeed, imminent—as soon as
Congress passed its joint resolution in October 2002 authorizing the president to use military force against Hussein’s regime. As many observers have noted since March 2003, the rogue states of the world—most notably Iran and North Korea—now have greater incentives than ever to acquire and deploy nuclear weapons as the only way to deter aggressive action by the United States.

It is tempting to slip into the pattern of distinguishing between the supposedly peace-loving democracies and rogue states, and this temptation accounts for our failure to think more critically about the issue of reciprocity in self-defense.\textsuperscript{24} Kant thought that we could distinguish ourselves from “unjust enemies.”\textsuperscript{25} We take for granted that the United States, the United Kingdom, and Israel can rightly protect themselves by military means because they are peace-loving democracies and that rogue states must not acquire nuclear reactors or nuclear weapons because they are presumed to have aggressive intentions.

It might not be obvious to many policymakers that classifying states in this way runs afoul of a basic value of the rule of law. The idiom of \textit{(p.168) reciprocity does not come easily to the lips of international lawyers, yet equivalent concepts play a decisive role in domestic reflections about the rule of law.} Indeed, it is hard to find serious jurisprudential reflection on the latter topic without emphasis on general, universally applied rules.\textsuperscript{26} If such principles govern the rule of law in domestic law, they should also apply in the international arena as an aspiration of the law of nations. The rules of any domestic or international legal system must treat everyone equally and be applied generally. There is no way to build in a distinction between “good guys” and “bad guys,” and making these distinctions in international law recalls the scheme advanced by Carl Schmitt to distinguish between friends and enemies.\textsuperscript{27} Though many states now unfortunately have one criminal law for citizens (friends) and another for recidivists and terrorists (enemies), you cannot replicate this practice at the level of international law.\textsuperscript{28} States may have the power to enact repressive internal laws and thereby institutionalize discriminatory practices designed for enemies, but the international community must live or die on the basis of principles that are applicable to \textit{all} states—precisely as the UN
Charter prescribes. International law is based on the premise that states are free and equal persons under the law.\textsuperscript{29} The community of democratic states does not have the power to designate some nations insiders and others outsiders.

Of course, it might be possible to water down the standard of imminence and to apply the resulting weaker standard across the board, but this poses additional problems. Suppose that Israel were justified in attacking the Osirak reactor; would Iraq also be justified in defending its territory against attack? One would think so. Israel would certainly defend Dimona against incoming Iraqi warplanes. Thus both sides might lay claim to their inherent right of self-defense. If applied at the domestic level, this easy recognition of defensive rights would strike criminal lawyers as a contradiction: it cannot be the case that an abused woman is justified in attacking her sleeping batterer, but if he wakes up under a falling knife, he cannot justifiably act to avoid the assault. This creates exactly the kind of incoherence that bothered Kant. If we universalized this maxim of preemptive intervention at the international level, the result would be a world of total violence, devoid of stability and full of aggression. It is precisely for this reason that we cannot logically, upon pain of contradiction, advocate for a doctrine of preemptive war and simultaneously demand that our enemies refrain from it.

If we assume that in any particular conflict both sides are of equal moral standing and only one side may claim self-defense against the other, then we need a rigorous standard for recognizing legitimate defense—more rigorous than the MPC criterion of immediate necessity or the Bush administration’s implicit appeal to cost/benefit analysis. It must be a standard that applies equally to both sides. Each side must be classified as lawful or unlawful, defender or aggressor, on the basis of what it does. The appeal of imminence is precisely that it provides a nearly foolproof standard for distinguishing between the aggressor and the defender. The defender can justifiably use force, whereas the aggressor, if he kills, is guilty of homicide, or at least unlawful aggression. This is the appeal of requiring the defending party to wait until the point of imminent attack. Waiting ensures a stronger case that only the defender is acting in legitimate defense.
The standard of imminence works properly when the threatened aggression is manifested in publicly observable facts. When the facts are laid bare—when the threatened attack is manifested in troop movements, missile deployments, and the like—the world will know which side to support in the struggle. Outside powers are permitted only to support the defender against aggression, and therefore there must be some public test of aggression. When there is persistent disagreement about the evidence, as there was in the case of Iraq, the invading powers might believe their action is justified, but a large number of states, particularly those who identify with the victim state, will treat the invaders as aggressors and criminals.

The principle of publicity is critical in a self-administering system of law. There is no court to determine the facts underlying international legal conflicts; there is no authority but the eyes of the world to assess whether the United States had sufficient evidence to warrant its claim of dangerous and deployable WMD in Iraq.

These two fundamental principles—reciprocity and publicity—have gotten lost in the debate over whether Saddam Hussein really was the worst villain in the world. Regime change is not a justification for aggression. There might be some who think that the aim of spreading freedom and democracy justifies deposing foreign dictators and staging free elections. But it is hard to avoid the conclusion that these righteous goals are but the modern secular analogue of the just wars of the Christian tradition. Just causes and a righteous purpose hardly suffice to establish a fair, reciprocal rule that all states can live by. However, if the relevant criterion is not just but lawful war, a good case remains for retaining the criterion of imminent attack. This conventional standard of domestic law best realizes the principles of both reciprocity and publicity. Reciprocity ensures that both sides are treated equally and fairly under the law, and publicity guarantees a standard that can be fairly administered by the states themselves, without the urgent intervention of a court to determine who is right and who is wrong.

Reciprocity is so misunderstood in our current environment that it leads to a totally asymmetrical view of warfare. For example, the Bush administration maintains the right to torture suspected terrorists, either directly at CIA detention
facilities overseas or indirectly by extraordinary renditions to friendly states that practice torture. However, the key to the Bush doctrine is that torture is justified against terrorists and that our right to torture suspected terrorists for information does not entail a reciprocal right for them to torture us. Furthermore, the Bush doctrine could even appeal to legitimate defense as a justification for torture: to defend others from terrorist attacks, government officials must occasionally use physical violence against detainees. But all of these arguments for torture, regardless of how they are framed, suffer from the same defect. We deny terrorists the right to be free from torture, but we are not willing to forgo this right for ourselves; if American soldiers were captured abroad and tortured, we would surely complain. This lack of reciprocity flies in the face of a coherent account of preemption. If we can use torture to prevent armed attacks, then our enemies can use torture against us as well.

It should be noted that terrorists, too, as a group, are guilty of ignoring reciprocity. Terrorists seek political objectives by killing innocent civilians. However, terrorists do not concede that it would be right for us to kill their families or the innocent civilians on whose behalf the terrorists are fighting. Indeed, they assume that our status as imperialists or infidels or some other moral failing justifies a lower level of protection in warfare. Because of who or what we are, we do not deserve to live. But this conclusion is asymmetrical. Similar acts of desperation on our part would draw their criticism—indeed, it would be taken as more evidence of our moral failings—just as the United States would criticize any foreign group that dared use torture against our troops. Although none of this entails that the torturer and the terrorist are the same (or are equally guilty), it does suggest that both depart from the normal conduct of warfare through the same conceptual deficiency: lack of reciprocity.
3. Mistaken but Reasonable Beliefs: Weapons of Mass Destruction in IRAQ

The invasion of Iraq also highlights the problem of mistaken beliefs, which is an issue distinct from imminence. Colin Powell gave a long (p.171) presentation to the United Nations explaining the evidence that Hussein was still actively pursuing weapons of mass destruction. Powell showed evidence of chemical weapons manufacturing and suggested that Hussein was actively pursuing a nuclear device through the black market. As it turns out, of course, this presentation was completely false. Hussein had no facilities for manufacturing or researching chemical weapons and had apparently abandoned his effort to produce major amounts of them. We do not know why. Perhaps the pressure from the UN weapons inspections made the program unworkable, or maybe it was too expensive, or maybe he just preferred to let the international community believe that he had the weapons, when in reality he did not. In any event, the evidence presented by Powell was false. After the invasion, a special military unit was specifically tasked with scouring the Iraqi countryside looking for WMD and they never found them. After an embarrassingly long time, they just gave up the search altogether.

The first issue is whether Powell and Bush were sincere in their beliefs. Many have asserted that the evidence was skewed by the intelligence community after intense political pressure from White House officials, who were accused of interfering with the supposedly objective process of intelligence gathering and risk assessment. If this is indeed the case, then the invasion was clearly unjustified because then Bush’s whole argument for preventive war collapses. How can the international community determine if a mistaken belief was sincere or was used as a pretext to justify military invasion? The Bush administration could say that Hussein had WMD, not really believe it, launch the attack, and then issue a mea culpa afterward for their “reasonable” mistake. This would turn the doctrine of preventive war into a farce. The only solution is to require that the evidence be, in some manner, publicly available to the international community (say, through the General Assembly or the Security Council) and not relegated to the president’s hip pocket.
But let us assume, for the sake of argument, that the beliefs were sincere and analyze whether the justification still holds if the sincere belief turns out to be mistaken. If the presence of WMD was the justification for this preventive war, what happens now that we know that we were wrong about the threat? There is always a problem of mistaken beliefs in a theory of legitimate defense, and the issue has been long debated in the domestic theory of criminal law. The whole issue in the Goetz case was how we should evaluate Goetz’s mistaken belief that he was about to be attacked on the subway, and whether or not his belief was reasonable and under what standard. But the problem is even more acute in the case of preventive war, because preparations for war are often conducted in secret, away from the international public, unlike an armed attack that is available for all to see. There were witnesses to the Goetz shooting, so we know exactly what was said and how it went down. But Hussein’s weapons programs were conducted in secret and, at times, hidden even from the eyes of UN weapons inspectors. Preparations such as these are often discovered by the intelligence community, but intelligence can be misinterpreted, faulty, or manipulated.

So the first question is whether a mistaken but reasonable belief bars the right to go to preventive war. The Bush administration mistakenly believed that Saddam Hussein had WMD capabilities. In criminal law, as long as the mistaken belief was objectively reasonable at the time, then the doctrine of legitimate defense would apply, and at first glance there is no reason to think there should be any difference in international law. The real question is whether we should view this defense as a justification or as an excuse. One might be confused as to why this distinction is important, especially in international law. Why does it matter whether we view the Bush administration’s mistaken views about Hussein’s WMD as a justification or an excuse? The answer, of course, lies in Iraq’s right of resistance to the invasion. If a preventive invasion is justified, then the conduct is lawful and not a case of aggression. Iraq therefore has no right to resist, and its use of defensive force is illegal. This follows the model of domestic self-defense. If you are justified in using legitimate defense against your attacker, your attacker cannot legally use force to fend off your counterattack. He is the original aggressor, not you. If, on the other hand, the preventive invasion is based on
a mistake, and the target country was not harboring weapons of mass destruction or preparing for aggressive war, then it is clear that the target country has the right to fend off the invasion, consistent with its own rights of legitimate defense. Why should it be forced to give up its right to self-defense just because the invaders had a mistaken belief? Again, this way of analyzing the situation follows the model of domestic self-defense. If a neighbor mistakenly thinks you have a gun and must be stopped, you have every right to defend yourself against him, even though he might have an excuse and not go to jail because of his reasonable mistake.

International lawyers are less than sensitive to this distinction, although a few scholars with a background in criminal law have mentioned the issue. But no one has fully recognized the degree to which excuses may be important in international law. The international community is uncertain about how to characterize the U.S. invasion of Iraq in terms familiar with international law. The answer they are looking for is to be found in the language of criminal law. The U.S. invasion was not legally justified, and the Iraqis were justified in resisting the attack, although the United States may have an excuse based on its mistaken beliefs about chemical and biological weapons.

What does it mean for the United States to have an excuse in this situation? We discussed this problem in chapter 5. It seems strange to talk about excusing a nation, and this term is completely foreign to the modern language of international law. It seems odd to attribute to a nation the kind of mental states that go along with an excuse, but this problem is a general one having to do with our treatment of states as persons capable of being held responsible by the international community. If we can hold states responsible for their actions, there seems to be no reason why we cannot attribute both excuses and justifications to their actions. As noted in chapter 3, international law in previous centuries was once more comfortable with the language of excuses, and resurrecting this language presents an intriguing possibility. The current situation in Iraq demands clarification. Presenting this excuse could be relevant at a case brought against an aggressor at the ICJ (although the United States of course refuses to participate in ICJ proceedings). But the theoretical issue would
be important in other international conflicts where the international community decides that punitive action must be taken against another country.

The final issue is whether an *unreasonable* mistake about weapons of mass destruction could be offered as a defense—either an excuse or a justification—for a preventive war. Some might argue that the United States was negligent in its collection and interpretation of intelligence in the run-up to the war. Administration officials allegedly analyzed the information with a particular conclusion in mind and refused to look for information that might disprove their hypothesis. This kind of selective intelligence gathering, if true, might be regarded as a form of negligence. If the United States was indeed negligent in gathering its information, one might well want to conclude that its mistaken beliefs about WMD were sincere but *unreasonable*.

As a policy matter, unreasonable beliefs are disfavored in criminal law. If Goetz’s mistake was unreasonable, the New York State Court of Appeals would not excuse or justify his use of force. Of course, the issue of unreasonableness hinges on whether we use a subjective or objective standard of reasonableness. The court of appeals answered in *Goetz* that the appropriate standard was objective and based on community standards. *(p.174)* The same should hold true in international law, for the simple reason that states should be excused from their mistakes only if those mistakes were reasonable, not just in their eyes, but also by reference to an objective standard. The question is not just whether the United States believed that Hussein had weapons of mass destruction; the issue is whether it was objectively reasonable for any country to believe, with the information available, that he posed a danger with these weapons.

This underscores the importance of the publicity constraint discussed earlier. Evidence for a preventive war must be publicly available to the world community before the invasion occurs. We have to be careful about former Secretary of Defense Donald Rumsfeld’s argument that “the absence of evidence is not evidence of absence.”

If the evidence for an invasion can be gathered only after the invasion itself, the publicity constraint is not met. But if the evidence is available and the international community can see that it is objectively reasonable, then the exercise of legitimate defense in the form
of a preventive war can proceed. Again, the Cuban missile crisis is the paradigmatic example: we had the satellite images and published them for the whole world to see. The publicity constraint will therefore limit the number of mistakes that might happen and limit the need to even resort to mistaken beliefs as an excuse.
4. Disturbing the Balance of Power
A final issue remains. The other rationale for launching a preventive war is to redress a change in the balance of power in a region. Is a mere shift in the balance of power sufficient to justify an attack under our standards of imminence, reciprocity, and publicity? Kant felt it was sufficient on the theory that an alteration of the balance of power between states was a significant form of aggression. A state need not watch as its regional influence is diminished to the point of being so weakened that it can no longer defend itself. Two case studies will be considered.

During the Cuban missile crisis, Kennedy initiated a blockade against Cuba because Khrushchev’s missiles in Cuba altered the balance of power in the Americas. For the first time there was Soviet influence within striking distance of North America and directly off the coast of Florida. The nuclear missiles were capable of striking the eastern seaboard. This frightened the American public, although certainly the U.S. government encouraged these fears to justify the blockade and gain both domestic and international support for it. At the time, many international legal scholars did not consider the shift in the balance of power in the region (p.175) to be sufficient to justify military action, and the blockade was criticized. However, it would seem likely that the shift in power was so sufficient— and threatening—that Kant’s argument holds some sway. The passage of time has been kind to Kennedy’s decision, and the move is credited with preventing a nuclear war. The Soviet move was clearly provocative and increased Soviet strategic interests in the region at the expense of American security.

But contrast the blockade with another, more infamous preemptive attack: Pearl Harbor. The argument for preventive war to redress a shift in the balance of power looks suspicious when we consider it from the point of view of our enemies. The Japanese attacked Pearl Harbor because a buildup of U.S. naval forces in the Pacific was changing the balance of power in the region. The United States was attempting to use its naval forces to project its influence in the Pacific to counter Japanese expansionism and aggression, in effect challenging Japan’s status as the preeminent imperial power in the Pacific region. Of course, the U.S. ships were not engaging in military assaults, but they were undeniably in the region. From the point of view of the United States, its naval capabilities in the
Pacific did not seem threatening, provocative, or aggressive. But to the Japanese, the increase in naval capabilities put the U.S. military within striking distance of Japan and challenged its status as the region’s superpower that it had acquired after incursions into Manchuria in 1931 and a larger invasion of China in 1937. In response to what the Japanese viewed as an inevitable naval confrontation, Japan struck first. The Pearl Harbor attack—on a military installation, no less—was regarded internationally as illegal and an unprovoked act of war. In the United States it was a day that would “live in infamy.”

But if the balance of power argument is accepted, do we need to reevaluate the legal status of Pearl Harbor? This provokes an uncomfortable tension in our intuition. If we accept the argument that a change in the balance of power may justify a preventive war, then we would be forced to admit that this argument is equally valid for our enemies, not just our friends. This would be especially problematic for a country such as the United States that is continually altering the balance of power in its favor by further projecting its military influence around the globe. If our enemies have the right to launch preventive wars against us each time we change the balance of power in our favor, the United States will be on the receiving end of a constant barrage of attacks. Because the United States is always changing the balance of power in its favor in all regions of the globe, dozens of our enemies have the right to attack us to return the \((p.176)\) balance of power to their favor. This is a recipe for world war, and Kant’s theory no longer looks tenable.

The problem with balance of power arguments is that they violate the reciprocal criterion that we discussed earlier. The Bush administration likes to argue that a shift in the balance of power justifies our use of preemption, but we do not extend the same privilege to rogue states. Rogue states are on the receiving end of this argument, just as they are on the receiving end of our bombs. But once again this opens up a nonreciprocal treatment of states within the international system, which is intolerable. Just as your use of legitimate defense on the street does not depend on your station in life, so, too, a nation’s use of legitimate defense in the international sphere should not depend on its status within the international
community. All that matters, in both cases, is how the two opponents stand in relation to each other. The doctrine of legitimate defense must be the same for all.

Notes:


(3.) *Id.* § 56, at 167.

(4.) See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *Kant: Political Writings*, at 98.

(5.) *Kant, Metaphysics of Morals*, § 60, at 170.

(6.) *Id.*

(7.) Kant argues that we should always act in conformance with a maxim that could logically become a law for all mankind. This is the famous categorical imperative. See generally his *Grounding for the Metaphysics of Morals*, translated by James W. Ellington (Indianapolis: Hackett, 1981).


blockade was illegal because, inter alia, it violated Charter obligation to resolve disputes through peaceful means).


(13.) See George W. Bush, Commencement Address at the United States Military Academy at West Point (June 1, 2002).

(14.) MPC § 3.04. Note that this section does not in itself impose a requirement of reasonable belief. The requirement becomes clear, however, by reading § 3.04 alongside the exceptions provided in § 3.09.


(17.) See Fletcher, With Justice for Some, at 133–37.

(18.) For examples, see generally Alafair S. Burke, Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes out of the Battered Woman, 81 N.C. L. Rev. 211 (2002); Anne M. Coughlin, Excusing Women, 82 Cal. L. Rev. 1 (1994).

(19.) But see Cathryn Jo Rosen, The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill, 36 Am. Univ. L. Rev. 11 (1986) (arguing that battered woman syndrome should be classified as an excuse because as a category excuses are less narrowly applied than justifications).
Preemptive and Preventive Wars


(21.) See Security Council Resolution 487 (June 19, 1981) (strongly condemning the attack and calling it a violation of the UN Charter).

(22.) However, Paul Wolfowitz stately publicly that the Bush administration settled on the WMD justification out of “bureaucratic convenience” because it was the one argument that everyone could agree on. See Robert Jensen and Rahul Majahan, *End the Deception*, USA Today, June 4, 2003, at A10.

(23.) See Ferzan, *Defending Imminence: From Battered Women to Iraq*, at 228.

(24.) For a critical argument against the concept of rogue states, see Jacques Derrida, *Rogues: Two Essays on Reason*, translated by Pascal-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005). Mixed in with Derrida’s animated and radical critique of U.S. foreign policy is an illuminating deconstruction of our use of the term “rogue.” Although he makes the strong claim that the United States is, in fact, the real rogue state par excellence, this political claim can be divorced from the conceptual claim that the idea of the rogue state is an outlaw designation used by the strongest to vindicate their military actions.

(25.) See Kant, *The Metaphysics of Morals*, § 60, at 118–19. Kant defines an unjust enemy as a nation whose actions do not follow the categorical imperative. Specifically, unjust nations act in accordance with maxims that, when universalized, make
peace impossible and throw the community of nations back into a perpetual state of nature.


(28.) This distinction is explored most thoroughly in the work of the German scholar Günter Jakobs. See his *Strafrecht allgemeiner Teil: die Grundlagen und die Zurechnungslehre* (Berlin: De Gruyter, 1983).


(30.) See, e.g., D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*. 


(31.) In a 2002 memo to White House Counsel Alberto Gonzales, Deputy Assistant Attorney General John Yoo argued that federal law prohibited only torture that was “primarily” intended to inflict severe physical or mental pain or suffering, implying that torture primarily for the purposes of interrogation against Al Qaeda or Taliban detainees (having the incidental effect of causing pain and suffering) would not violate federal law. See John Yoo, Memo to White House Counsel (August 1, 2002). Furthermore, Yoo argued that the administration’s war on terror would not be constrained by the international Torture Convention because the United States attached to its ratification an “understanding” that imported this definition of torture from federal law. In a similar Justice Department memorandum, Assistant Attorney General Jay Bybee argued that federal law limited torture to cases of intense pain similar to that experienced during “serious physical injury, such as organ failure, impairment of bodily function, or even death.” Mental suffering would constitute torture under federal law only if it produced “significant psychological harm of significant duration, e.g., lasting for months or even years.” Regardless of this interpretation, though, Bybee argued that the executive branch was completely unrestrained by the federal law because it “impermissibly encroached on the President’s constitutional power to conduct a military campaign.” Bybee even cited Article 51 of the UN Charter and its inherent right of self-defense as another possible justification for the practice. See Jay Bybee, Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (August 1, 2002), n.26, at 45–46. For a discussion of these memos, see Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681 (2005).

(32.) There is a lengthy literature on the morality and legality of so-called ticking bomb scenarios, where an imminent attack can be averted only by torturing the suspect for information. For a dubious defense of torture that fails to adequately respect the principle of reciprocity, see John Yoo, War by Other Means: An Insider’s Account of the War on Terror (New York: Atlantic Monthly Press, 2006). For a more sophisticated discussion of torture, see Florian Jessberger, Bad Torture—Good Torture? 3 J. Int’l Crim. Just. 1059 (2005) (discussing a German case of police officers torturing a suspect to find
kidnapping victim); see also Public Committee Against Torture in Israel v. Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471 (Sept. 6, 1999).


(34.) See, e.g., Ferzan, Defending Imminence: From Battered Women to Iraq, at 220.