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PREEMPTIVE OR PREVENTIVE WAR: A DISCUSSION OF LEGAL AND MORAL STANDARDS

Steven J. Barela[*]

Common in today's discourse about U.S. foreign policy are the terms *preemptive* and *preventive war*. An enormous problem with the use of these terms is that there has been little attempt to clarify their specific meanings, much less initiate a discussion over their ethical and legal implications. This problem has resulted in an environment of ambiguity for determining and discussing a standard for when the United States is to engage in war. The objective of this essay is to raise the level of understanding of the important distinctions between these two terms by examining their legal, moral, and current uses. Through this investigation, I hope to achieve a clearer understanding of the war-making policies of our nation and all others.

First, it is necessary to discuss the significant intersection between the concepts of ethics and international law. At this point in history, one might describe international law as a system of largely unenforceable norms that nations share to better predict and evaluate behavior between states. What comprises these customs tends to emerge out of a concerted effort to search through historical precedent to find—and, when possible, to codify—normative interaction. There is no official body entrusted with this task, and it therefore might be explained as an accepted inter-subjectivity. One might even say that, often times, these norms or laws arise from each state's choice to refrain from a particular behavior since it would not like to see this specific action visited upon itself. I suggest that this is the same process that allows one to arrive at similar ethical determinations. Inter-subjectivity, or understanding of a shared reality, seems to be the critical building block for establishing a code of ethics or norms for a law of nations.

This is not to be confused with the concept of *legal moralism*, which contends that it is possible and necessary to codify a prohibition of behavior based on the shared morality of the majority in a society, even when the behavior does not endanger others physically or psychologically.[1] International law might instead be generally understood as seeking to protect members of international society without imposing cultural or religious biases or morals.

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1. 4 JOEL FIENBERG, THE MORAL LIMITS OF THE CRIMINAL LAW : HARMLESS WRONGDOING (1990), http://www.oxfordscholarship.com/oso/public/content/philosophy/0195064704/toc.html.

There is an essential distinction between personal moral behavior and the moral behavior of states. Individuals who negotiate for state governments might often be purely self-interested and oblivious to the common good of their people and, thus, sign unethical treaties that are advantageous only for the elite. Therefore, it is erroneous to assume that, unless a state truly represents the interests of its people, it is the single unitary actor in international affairs and is fully capable of acting morally. This circumstance is certainly problematic, but in the current global structure of nation-states there does not appear to be an obvious solution other than advocating for ethical arguments in the legal forum and criticizing those treaties that might undermine the common good. Hence, I intend to approach the topic of preemptive and preventive war with an ethical analysis aimed at optimistically creating the conditions for an inter-subjective legal consensus based on the stark difference between these two terms, in both their meaning and moral implications.

U.S. Department of Defense Dictionary

To begin, we will turn to the dictionary created by the U.S. Department of Defense (DOD) to reach for clarity on the distinction between the two terms in question. It would perhaps be overreaching to take these definitions as definitive, since they are but one linguistic clarification, and would thus fail the litmus test of a global inter-subjectivity. However, considering that the U.S. government produced this dictionary, the same government that brought the issue of preemptive and preventive war to the forefront of world politics, it does provide a substantive starting point. "Preemptive attack: An attack initiated on the basis of *incontrovertible* evidence that an enemy attack is *imminent.*"[2] "Preventive war: A war initiated in the *belief* that military conflict, while not imminent, is inevitable, and that to delay would involve greater *risk.*"[3] The first feature in these definitions worth noting is that the DOD actually recognizes that there are, in fact, two different levels of anticipatory self-defense. In addition, there is a marked difference in tone between the two definitions. Leaving no room for doubt about the burden of proof for the cases in which it is applied, the language used to define preemption is particularly commanding. On the other hand, prevention is based on certain subjectivity that allows for interpretation in each case in which it is applied. Additionally, there is a stark contrast in linguistic strength, and hence, moral tone, between the words *incontrovertible* and *imminent* when compared with the terms *belief* and *risk.* This author suggests that many would not argue with the notion that, by these descriptions, preemption would appear to be a moral act of self-

2. UNITED STATES JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY TERMS (1988), http://www.dtic.mil/doctrine/jel/doddict/data/p/04142.html (Nov. 30, 2004) (emphasis added).

3. UNITED STATES JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY TERMS (1988), http://www.dtic.mil/doctrine/jel/doddict/data/p/04178.html (Nov. 30, 2004) (emphasis added)..

defense, while preventive war would regularly raise doubts because of its inherent subjectivity. With these two apt and functioning definitions established by the DOD, it is necessary to see whether the same distinctions and clarity will hold up when investigated historically.

Historical Treatment of Anticipatory Self-Defense

No matter how we define and distinguish the terms *preemptive* and *preventive war*, they will no doubt fall into the same category of a perceived defensive maneuver before an attack has occurred and, hence, be considered some type of anticipatory self-defense. Therefore, it is necessary to first establish that the concept of anticipatory self-defense actually exists in customary international law. I first turn to the often accepted father of codified international law, Hugo Grotius, and his work, *On The Law of War and Peace*.[4] First published in 1625, this voluminous work of three books treats the subject of anticipatory self-defense in Book II, Chapter I:

> The danger must be immediate, which is one necessary point. Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. For in the moral as well as the natural system of things, there is no point without some breadth. But they are themselves much mistaken, and mislead others, who maintain that any degree of fear ought, to be a ground for killing another, to prevent his SUPPOSED intention.[5]

Here, Grotius indeed recognizes a right to anticipatory self-defense if the threat reaches a level of certainty and proximity in time. However, this right is clearly not proclaimed to exist without any constraint. Although there are moments in which one can act before injury occurs, there is evidently a line that, if crossed, changes a self-defensive action's moral character and legality.

In a subsequent section of the same Book II, Grotius addresses the notion that a state might claim the right to use force to disarm another state if the other state is acquiring weapons and power that will come to imperil itself and others:[6]

> Some writers have advanced a doctrine which can never be admitted, maintaining that the law of nations authorises one power to commence hostilities against another, whose increasing greatness awakens her alarms. As a matter of expediency such a measure may be adopted, but the principles of justice can never be advanced in its favour. The causes which entitle a war to the denomination of just are somewhat different from those of expediency alone. But to maintain that the bare probability of some remote, or future annoyance from a neighbouring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity. Such however is the condition of

4. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Francis W. Kelsey trans., Legal Classics Library 1984) (1625), http://www.geocities.com/Athens/Thebes/8098/ (last visited Feb. 2, 2005).

5. *Id.* at 173.

6. *Id.*.at 184.

> human life, that no full security can be enjoyed. The only protection against uncertain fears must be sought, not from violence, but from the divine providence, and defensive precaution.[7]

Once again, Grotius is explicit and direct in his assessment. I suggest that Grotius depicts what might be construed as a definition of preemption with caveats. The latter quote could also fit the description of preventive war. In fact, with the inclusion of some strong moral judgments, Grotius' quotes fit nicely with the DOD presentations.

A century after the publication of Grotius' work, the Swiss author of *Law of Nations*, Emmerich de Vattel, also wrote of anticipatory self-defense, again with a caution against imprudence:

> It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.[8]

Both de Vattel and Grotius recognize the fact that it is not necessary to await the first blow of an attack before a nation can justly use force. It is also noteworthy that a strong cautionary note is traditionally sounded to guide this anticipatory principle. Finally, the solemn warning by de Vattel seems explicit in how one can, in turn, commit the crime of aggression if indiscriminate action is taken.

In the nineteenth century, echoing Grotius, the U.S. Secretary of State, Daniel Webster set forth a precise definition for the term *preemption*.[9] In what is now commonly known as the Caroline incident, Webster asserted that the necessity for preemptive self-defense must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[10] This strict and precise definition, fitting the widely accepted meaning of *imminent*, was reaffirmed in the Nuremberg Trials which, for the first time, held government officials responsible for state actions.[11]

United Nations Charter

Today, one customarily turns to the U.N. Charter to settle questions of legality under international law.[12] Unfortunately, the Charter appears to be unable to bring clarity to either the legality or morality of preemptive or preventive war.

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7. *Id.* at 184.

8. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, Book II, Chapter IV (1758), http://www.lonang.com/exlibris/vattel/vatt-204.htm (last visited Feb. 2, 2005).

9. Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, AM. SOC'Y INT'L L INSIGHT (June 2002), *at* http://www.asil.org/insights/insigh88.htm.

10. *Id.*

11. *Id.*

12. Legal Information Institute, International Law: An Overview, *at* http://www.law.cornell.edu/topics/international.html (last visited Feb. 2, 2005).

However, considering that the first words of the Charter preamble begin, "[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," it is evident that the intention was to limit the use of force in the international arena.[13] Additionally, Article 2(4) of the Charter explicitly requires that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] The only other place in the Charter in which the possibility of unilateral force is considered is in Article 51, in which the "inherent right of individual or collective self-defence if an armed attack occurs" is enshrined.[15] However, it is also explicitly stated in the same article that final authority lies with the Security Council, even in extreme circumstances when force is deemed necessary and legal:[16]

> Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter . . . .[17]

Although there are no descriptive definitions of *preemption* and *preventive war*, the Charter contains explicit restrictions on states' use of force even in cases of self-defense. It is difficult to say whether a literal reading of these statutes, in which all anticipatory self-defense would be ruled out, would be acceptable to the entire international community. Undoubtedly, however, the overall intention of the Charter was to limit unilateral military action. Therefore, when looking to see whether either of these terms meets the spirit and letter of the Charter, it seems necessary to look for guiding principles that are restrictive rather than expansive.

In the evidence presented above, we see that the assertion of the National Security Strategy released by the White House in October 2002 is in fact correct when it asserts that "[f]or 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."[18] However, along with this right, come clear requirements of prudence, lest the state initiating the use of force commit crimes against the peace, as was charged against Germany and its officials in the Nuremberg Trials following World War II.[19]

More importantly, though, we have also found a salient distinction for characterizing the different types of anticipatory self-defense. As described above, *Preemption* is a lawful and moral use of force, as long as tremendous discretion

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13. U.N. CHARTER pmbl., http://www.un.org/aboutun/charter/ (last visited Feb. 2, 2005).

14. U.N. CHARTER art. 2, para. 4, http://www.un.org/aboutun/charter/ (last visited Feb. 2, 2005).

15. U.N. CHARTER art. 51, http://www.un.org/aboutun/charter/ (last visited Feb. 2, 2005).

16. *Id.*

17. *Id.*

18. The National Security Strategy of the United States of America, http://www.whitehouse.gov/nsc/print/nssall.html (last visited Nov. 10, 2004).

19. Kirgis, *supra* note 9.

accompanies preemptive action to ensure that the threat is both certain and imminent. Yet after, looking at the previous documents, *preventive war* does not seem to merit the same endorsement. I suggest that the primary reason for this apprehension is that preventive war, by its nature, is based on speculation of intent and capabilities. It is quite problematic to assert that any type of conjecture on future events could be construed as an act of self-defense. Once we have removed the certitude that accompanies the concept of preemption, one begins to deal with worst case scenarios and decisions driven by Hobbesian diffidence.[20] Few would assert that fear brings clarity and prudence in decision-making. Therefore, I suggest that the real distinction between preemptive and preventive war is based on an essential moral divergence. Ethical behavior is often simplified into the "golden rule" found in all of the world's major religions: do unto others as you would have them do unto you.[21] It is unlikely that any nation would characterize a preventive war against itself as defensible, since preventive war is, by definition, based on unsubstantiated and unverifiable claims. Yet a nation about to attack another would not like to meet preemptive resistance; it seems highly unlikely that the nation initiating the attack would accuse the defender of acting unjustly. The question remains whether the policy advocated by the George W. Bush administration is in fact preemption or preventive war.

The Bush Doctrine: Preemption or Preventive War?

The opening salvo in the current debate was launched on June 1, 2002, in a graduation speech at the U.S. Military Academy at West Point by President George W. Bush.[22] The United States had recently won an initial military victory in Afghanistan, and President Bush had alluded in his State of the Union speech to the existence of an "Axis of Evil" that included Iraq, Iran, and North Korea.[23] The tension from the terrorist attacks of September 11, 2001 still gripped the nation and President Bush appeared intent on setting the tone for a response beyond Afghanistan. It is in this speech that President Bush first referred to preemption.[24] However, if we look at the language used in this speech, as well as other references, we will in fact see that the President seems to be describing preventive war, not preemption.[25]

> When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups *could* attain a catastrophic power to strike great nations . . . But new threats also require new thinking . . . In the world we have entered, the only path

20. The History Guide: Lectures on Modern European Intellectual History, Thomas Hobbes: 1588 – 1679, *at* http://www.historyguide.org/intellect/hobbes.html (last visited Feb. 2, 2005).

21. Karen Armstrong, *Fresh Air with WHYY* (National Public Radio broadcast, Mar. 8, 2004), http://www.npr.org/templates/story/story.php?storyId=1751746.

22. President George W. Bush, Address at the Graduation Exercise of the United States Military Academy (June 1, 2002), http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

23. President George W. Bush, The State of the Union Address (Jan. 29, 2002), http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

24. President George W. Bush, *supra* note 22.

25. *Id.*

> to safety is the path of action. And this nation will act . . . And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.[26]

At the beginning of this quote, President Bush recognizes that the proposal is novel, and is therefore a departure from previous doctrines or approaches in foreign policy. Perhaps the Bush administration believed it was actually staying within traditional domestic and international norms of preemption, yet decided to present its tactics as innovative to garner domestic support in a time of crisis and uncertainty. However, looking further into what later became referred to as the "Bush Doctrine," it appears that this proposed policy was in fact novel for the United States, and was a departure from previous standards for a preemptive military attack.

Additionally, the assertion that the "only path to safety is the path of action," seems to be based on the notion that there are only two options available: military action or insecurity. Grotius cited the Roman historian Titus Livy on this subject: "In the effort to guard against fear, men cause themselves to be feared, and we inflict upon others the injury which has been warded off from ourselves, as if it were necessary either to do or to suffer wrong."[27] It appears problematic to suggest that, at any given time, there are no more than two alternatives. It is peculiar to frame the circumstances to indicate that only one decision can lead to security. More importantly, however, the notion that the unknown should move us to military action is no longer premised on incontrovertible evidence of an impending attack.[28] This notion is based on the "belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk," or *preventive war* as defined by the DOD.[29]

Next, Bush asserted:

> We cannot defend America and our friends by *hoping for the best.* We cannot put *our faith* in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. *If we wait for threats to fully materialize*, we will have waited too long . . . Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats *before they emerge.*[30]

Looking closely at this excerpt, we see that the selected language does not advocate a method of arriving at irrefutable evidence of danger to justify action. Instead, the argument here rests on the severity of the threat and the imprudence of hesitation. The line of reasoning is that the potential for mass casualties is so great because of the threat of weapons of mass destruction that "hoping for the best" or

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26. *Id.* (emphasis added).
27. GROTIUS, *supra* note 4, at Book II, Chapter V.
28. President George W. Bush, *supra* note 22.
29. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.
30. President George W. Bush, *supra* note 22 (emphasis added).

putting "our faith in the word of tyrants" no longer makes sense.[31] This terminology seems to point to the need for a foreign policy based on worst case scenarios, since such scenarios cannot be ruled out. As discussed earlier, assuming the worst and then acting upon this postulation does not fit into the definitions of preemption that have been discussed in the first part of this paper.

Arguing against waiting "for threats to fully materialize" and confronting them before they become apparent also seems to indicate an approach that is not based on full knowledge, but one that proactively engages potential enemies before attacks reach our homeland. Lastly, President Bush asserted that the struggle against terrorism "will not be won on the defensive," raising serious doubts about whether the actions encouraged here could still be defined as self-*defense*.[32]

To further investigate the exact type of policy advocated by the Bush administration, we turn to the October 2002 National Security Strategy penned by the White House.[33] This was the first document of its kind released after the terrorist attacks of September 11, 2001. President Bush decided to outline his overall strategy in combating terrorism in this document, which has given rise to the term "Bush Doctrine."[34] It is here that we find the first formal document detailing the framework of President Bush's vision of what he refers to as *preemption*:

> 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.
>
> We must *adapt the concept of imminent threat* to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, *potentially*, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.
>
> The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principle norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses *would be* exponentially more severe *if* terrorists acquired and used weapons of mass destruction.
>
> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, *the greater the risk of inaction*—and the more compelling the case for taking

31. *Id.*

32. *Id.*

33. The National Security Strategy of the United States of America, *supra* note 18

34. Frontline, Chronology: The Evolution of the Bush Doctrine http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html (last visited Feb. 2, 2005).

> 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 by our adversaries, the United States will, if necessary, act preemptively.[35]

Notably, the threat being presented here is one of conjecture. Even a cursory analysis will reveal that the attacks of September 11th did not entail terrorists obtaining any type of weapons of mass destruction. This does not mean that the threat described above does not exist or is irrelevant. However, in the context of preemption, I believe that this danger must be categorized as hypothetical and, therefore, a *risk* of severe destruction, not an imminent threat. To deal with this menace militarily would thus be a preventive war, not preemption.

There is certainly recognition of the fact that the White House's proposal is a departure from the traditional view of preemptive self-defense, which is evident in the phrase, "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[36] It seems that this is a common theme in the argument for preemption by the Bush administration. The line of reasoning is that the destructive power of today's weapons warrants an immediate response, lest we suffer a terrible fate at the hands of weapons the world has not previously known. However, it should be remembered that every preceding generation has not known the destructive power of today's weaponry. Due to humanity's proclivity for creating ever more devastating armaments, throughout the course of history each generation has introduced death and destruction on a level that has never before been seen. We are always at the apex of our potential for destruction. Therefore, to assert that we are living in a new world describes the circumstances with which every generation has had to struggle. This is not to minimize the prospective devastation that might come from potential terrorists if they obtain weapons of mass destruction and are able to elude our homeland defenses. The question remains, however, to what point are we willing to extend our speculation once we have dropped the standard of incontrovertible evidence of an imminent attack?

At this point, it is important to note that the means for evaluating threats to the United States are under close scrutiny after the failure to find weapons of mass destruction in Iraq, the discovery of an elaborate black-market nuclear weapons proliferation program in Pakistan, the discovery that the nuclear weapons programs of Iran and Libya were much more advanced than originally supposed, and the inability to foresee or forestall the attacks of September 11th. It seems that these revelations raise serious doubts about our capacity for reliable and accurate conjecture. The concepts of both preemption and preventive war presuppose a capability to produce correct assessments of imminent and looming dangers. The ethical ramifications of advocating actions based upon less than perfect intelligence seem quite problematic.

The question that follows these disclosures is whether the Bush administration continues to advocate the same type of anticipatory self-defense policy that it

35. The National Security Strategy of the United States of America, *supra* note 18 (emphasis added)

36. *Id.*

presented in October 2002. The answer appears to be yes. In an interview with Tim Russert of Meet the Press on February 8, 2004, President Bush discussed this issue.[37] In light of the absence of weapons stockpiles that were alleged to exist in Iraq, Russert asked about the concept of "preemption war," and whether a preemptive war can be launched without ironclad evidence.[38] In this discussion, President Bush responded:

> The fundamental question is: Do you deal with the threat once you see it? What—in the war on terror, how do you deal with threats? I dealt with a threat by taking the case to the world and said, "Let's deal with this. We must deal with it now."
>
> I repeat to you what I strongly *believe*, that inaction in Iraq would have emboldened Saddam Hussein. He *could have* developed a nuclear weapon over time—I'm not saying immediately, but over time—which would have then put us in what position? We would have been in a position of blackmail.
>
> In other words, you can't rely upon a madman, and he was a madman. You can't rely upon him making rational decisions when it comes to war and peace, and it's too late, *in my judgment*, when a madman who has got terrorist connections is able to act.[39]

By the definitions articulated in the beginning of this paper,[40] it appears that the President was speaking of preventive war, since the justification for acting, before the dangerous weapons were produced and for waging war on another country, is the risk of not acting. President Bush asserted that the danger comes from hesitation, not from existing circumstances and capabilities.[41]

In a February 23, 2004 article, "The Right War for the Right Reasons," printed in *The Weekly Standard*, Robert Kagan and William Kristol, self described neo-conservatives and members of the Project for the New American Century, argue the same point:[42]

> Did the administration claim the Iraqi threat was imminent, in the sense that Iraq possessed weapons that were about to be used against the United States? That is the big charge leveled by the Bush administration's critics these days. It is rather surprising, given the certainty with which this charge is thrown around, how little the critics have in the way of quotations from administration officials to back it up. Saying that action is urgent is not the same thing as saying the threat is imminent. In fact, the president said the threat was not imminent, and that we

37. *Meet the Press* (NBC television broadcast, Feb. 8, 2004).

38. *Id.*

39. *Id.*

40. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 2; UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.

41. President George W. Bush, *supra* note 22.

42. Robert Kagan and William Kristol, *The Right War for the Right Reasons*, 9 THE WKLY STANDARD 23 (Feb. 23, 2004), http://www.weeklystandard.com/Content/Public/Articles/000/000/003/735tahyk.asp.

had to act (urgently) before the threat became imminent.[43]

What we see here is an even more explicit argument against the standard of preemption with the rejection of an imminent attack as the proper standard. It seems too restrictive to wait for a threat to become immediate, and hence, preventive war would be necessary and just. In fact, the argument here seems to imply that anything less would be imprudent and irresponsible.

Implications and Conclusions

If we have in fact established that, due to its vague and speculative criteria, preventive war is a more tenuous prospect than that of preemptive action, then there would certainly be legal and ethical implications. As mentioned earlier, this author believes that moral behavior and international law are often based on the notion that the norms we choose are largely crafted by the actions we would not like to see visited upon us. Consequently, the question must be raised as to whether preventive war is the type of normative behavior one would like to see operating freely in the international sphere, or, more specifically, waged against one's own nation. It certainly seems to be the case that law loses its meaning if all are not bound by it. That which is deemed legal for one nation should be applied to all. Given the unrivaled and unprecedented military power of the United States, the criteria of possessing the capability for mounting an attack will always be met, leaving open only the question of intent. Since the interpretation of U.S. intentions by a potential adversary is a purely subjective exercise, one might be wary of such a low standard for waging war.

It should be noted that this type of subjective and speculative standard for war seems to contradict every intention of the U.N. Charter. One reason for this omission might be that it would be nearly impossible to write a statute that legalizes certain types of unverifiable military action while outlawing others. Hence, all preventive war in which the "belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk," would need to be deemed legal.[44] As we have seen, it is quite possible, and perhaps sometimes reasonable, to make the case in certain circumstances that a particular nation represents a real threat to another nation's security. However, ethical and legal codes are more appropriately constructed under a "veil of ignorance" in which we are oblivious to our own capabilities and circumstances so that we can achieve true equity.[45] If such determinations of law and ethics are made while primarily considering our own self-interest, they no longer can be deemed ethical, nor can they achieve the equity that just law promises.

In addition, it should be noted that although it is usually the activity of international jurists and political scientists to discuss the justness of a particular war, I believe that these determinations have real repercussions and are in fact more importantly decided on the ground in today's world. Even if there were a

43. *Id.*

44. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.

45. This model and phrase comes from JOHN RAWLS, A THEORY OF JUSTICE (1971), in which he describes the "original position" that allows us to understand his theory of "justice as fairness."

broad consensus of the legality of a particular military action, and a U.N. Security Council resolution were passed to codify this conclusion, it would ultimately still be up to the people of the invaded nation to decide upon the legitimacy of that invasion. It also seems that the development of non-violent action and guerilla warfare throughout the twentieth century have given rise to tactics that people have learned and implemented to resist perceived injustice even in the face of the most powerful militaries of the world. For this reason, it is imperative that we understand that the standards discussed here are for our own benefit and not simply constraints on one's action. The norm suggested here is also a guideline for how others will interpret military actions that are not based on incontrovertible evidence of imminent attack, even if they are justified at home.

The intent of this paper is to clarify the distinction of the terms *preemption* and *preventive war,* and hopefully, the examination of legal and historical citations has brought some clarity to the current discourse. I also hoped to highlight the important difference between the two terms and to further elucidate each of their implications in international law and moral theory. As stated earlier, both ethics and international law are based on an inter-subjectivity that this author alone cannot accomplish. Therefore, it falls upon the reader to determine whether the legal distinctions drawn and the claims of morality presented have been persuasive. If in fact this lofty goal is accomplished, then it is hoped and encouraged that these terms will be used in their proper context in the future so that the ambiguity that has clouded the national debate can be lifted and an open and honest discourse may ensue. This would perhaps pave the way for reasonable people to agree or disagree on the philosophical tenets of these terms and not to be distracted or confused by their ambiguity.

To conclude, I return to Grotius, whose nearly four-hundred-year-old words continue to embody meaning and salience:

> Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way, or that he is making ready a false accusation and a false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot otherwise be avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences; as the proverb runs, 'There's many a slip 'twixt cup and lip.' There are, it is true, theologians and jurists who would extend their indulgence somewhat further; but the opinion stated, which is better and safer, does not lack the support of authorities.[46]

46. GROTIUS, *supra* note 4, at 184.